

TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY
TRIBUNALS



VOLUME XI

"THE HIGH COMMAND CASE"

"THE HOSTAGE CASE"

Germany (territory under Allied occu
" 1945- U.S. Zone)

TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY TRIBUNALS
UNDER
CONTROL COUNCIL LAW No. 10
NUERNBERG
OCTOBER 1946-APRIL 1949



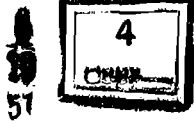
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CONTENTS

"The High Command Case"

(Introductory material and basic directives under which the trials were conducted together with Chapters I through VII-B of High Command Case are printed in Volume X.)

	Page
VII. War Crimes and Crimes Against Humanity—Selections from the Evidence (cont'd) -----	1
C. Measures Against Prisoners of War and Enemy Belligerents....	1
1. Introduction -----	1
2. Treatment of Prisoners of War in German Prisoner-of-War Camps -----	2
3. Killing of "Dispersed" Soldiers -----	63
4. The Commando Order -----	73
5. The Terror Flyer Order -----	166
D. The "Night and Fog" Decree and the Terror and Sabotage Decrees -----	195
1. Introduction -----	195
2. The "Night and Fog" Decree -----	196
3. The Terror and Sabotage Decrees -----	235
E. Deportation and Enslavement of Civilians -----	254
1. Introduction -----	254
2. Contemporaneous Documents -----	255
3. Extracts from the Testimony of Defense Witnesses Westerkamp and Heidkaemper -----	285
F. Plunder of Public and Private Property, Destruction, and Devastation Not Justified by Military Necessity -----	305
1. Introduction -----	305
2. Contemporaneous Documents -----	306
3. Defense Evidence -----	317
VIII. Photographic Reproductions of Documentary Evidence -----	323
IX. Final Argumentation -----	331
A. Introduction -----	331
B. Extracts from the Closing Statement of the Prosecution -----	331
C. Extracts from the Closing Statement for Defendant Reinhardt -----	374
D. Extracts from the Closing Statement for Defendant Warlimont -----	377
E. Closing Statement for the Defendant Lehmann -----	379
F. Extracts from Closing Briefs of the Defense -----	398
1. Defendant von Kuechler -----	398
2. Defendant Hoth -----	406
3. Defendant Reinhardt -----	408
4. Defendant Hollidt -----	414
5. Defendant von Roques -----	416
6. Defendant Lehmann -----	433
G. Extracts from Final Briefs Concerning the Responsibility of a Chief of Staff -----	446
1. Introduction -----	446
2. Extract from the Closing Brief for the Defendant Woehler -----	446
3. Extract from the Closing Brief of the Prosecution Against the Defendant Woehler -----	450
X. Final Statement of Defendant von Leeb to the Tribunal on Behalf of All Defendants -----	458

	Page
XI. Judgment	462
The Indictment	463
Count One	463
Count Two	463
Count Three	465
Count Four	465
Conspiracy Count	482
Controlling Principles in Trial	483
Count One of the Indictment—Aggressive War	485
War Crimes and Crimes Against Humanity	491
Crimes Against Civilians	495
German Military System	501
Superior Orders	507
Orders	509
Commissar Order	515
Barbarossa Jurisdiction Order	521
Commando Order	525
Night and Fog Decree	527
Hostages and Reprisals	528
Partisan Warfare	529
The Hague and Geneva Conventions	532
Responsibility of Commanders of Occupied Territories	542
Hitler and the Wehrmacht	549
Wilhelm von Leeb	553
Hugo Sperrle	564
Georg Karl Friedrich-Wilhelm von Kuechler	565
Hermann Hoth	580
Hans Reinhardt	596
The Commissar Order	597
The Commando Order	599
Hans von Salmuth	614
Karl Hollidt	625
Otto Schniewind	629
Karl von Roques	630
Hermann Reinecke	648
Walter Warlimont	661
Otto Woehler	683
Rudolf Lehmann	690
Sentences	695
XII. Confirmation of Sentences by the Military Governor of the U.S. Zone of Occupation	698
XIII. Order of the United States Supreme Court Denying Writs of Habeas Corpus	701
Appendix	701
Glossary of Abbreviations and Terms	701
Table of Comparative Ranks	703
List of Witnesses in Case 12	704
Index of Documents and Testimony in Case 12	707

"The Hostage Case"

	Page
Introduction	759
Order Constituting Tribunal V.....	761
Members of the Tribunal.....	762
Prosecution Counsel	763
Defense Counsel	763
I. Indictment	764
II. Arraignment	782
III. Opening Statements	785
A. Extracts from Opening Statement of the Prosecution.....	785
B. Opening Statement for Defendant List.....	855
C. Opening Statement for Defendant Foertsch.....	897
IV. The Theater of War in Southeastern Europe.....	904
A. Introduction	904
B. Organization of the German Army.....	905
C. Relations of the German Army with Satellite Governments and Satellite Armed Forces.....	912
D. Cooperation of the German Army with the SS and the Einsatzgruppen	924
E. Extract from Testimony of Defendant Rendulic.....	934
V. Hostages, Reprisals, and Collective Measures in the Balkans. Measures Against Partisans and Partisan Areas.....	937
A. Introduction	937
B. Contemporaneous Documents	938
C. Testimony of Defendants and Defense Witnesses.....	1036
VI. Treatment of Captured Members of the Italian Army.....	1078
A. Introduction	1078
B. Contemporaneous Documents	1078
C. Extracts from Testimony of Defendant Lanz.....	1088
VII. Destruction in and Evacuation of Finmark, Norway.....	1113
A. Introduction	1113
B. Contemporaneous Documents	1113
C. Extract from Testimony of Defendant Rendulic.....	1123
VIII. Photographic Reproductions of Documentary Evidence.....	1137
IX. Closing Statements	1141
A. Extracts from Closing Statement of the Prosecution.....	1141
B. Extracts from Closing Statement for Defendant List.....	1172
X. Final Statement of Defendant List to the Tribunal on Behalf of All Defendants.....	1228
XI. Judgment	1230
A. Opinion and Judgment of Military Tribunal V.....	1230
B. Sentences	1318
XII. Confirmation of Sentences by Military Governor of the United States Zone of Occupation.....	1320
XIII. Extract of Order of Supreme Court of the United States Deny- ing Leave to file for Habeas Corpus.....	1322
Appendix	1323
Table of Comparative Ranks.....	1323
List of Witnesses in Case 7.....	1324
Index of Documents and Testimonies in Case 7.....	1326

VII. WAR CRIMES AND CRIMES AGAINST HUMANITY —SELECTIONS FROM THE EVIDENCE—Continued

C. Measures Against Prisoners of War and Enemy Belligerents

I. INTRODUCTION

The principal charges of criminal conduct against enemy belligerents and prisoners of war are contained in paragraph 45-58 of the indictment (count two). These charges can briefly be summarized as murder and ill-treatment, denial of rights and status, and employment under inhumane conditions and prohibited circumstances.

In connection with the evidence reproduced below on the treatment of prisoners of war and "dispersed" soldiers (sections 2 and 3), reference is made to evidence reproduced in the earlier sections on the Commissar Order and the Barbarossa Jurisdiction Order (section VII A and B 1, Vol. X). The prosecution contended that the uniformed commissars were members of the Soviet Army and, as such, entitled to treatment as prisoners of war after capture. The "dispersed" soldiers were uniformed soldiers of the Soviet Army who, after having been separated from their units, continued fighting in the rear of the front line, either as individuals or in small groups, and in defiance of the German order to surrender before a set date. The prosecution claimed that such soldiers, upon capture, were entitled to prisoner of war status and privileges, whereas the defense contended that they were to be regarded as *francs-tireurs* and persons who have lost prisoner of war status.

The documentary evidence on the Commando Order (some of which is reproduced in section 4) was particularly voluminous. Space limitations have prevented the reproduction here of the correspondence between the OKW and the German Foreign Office concerning an answer to the British Government's protest concerning the treatment of captured commandos, the correspondence about the treatment of commandos who had been captured in Norway before the issuance of the Commando Order, and other matters. The evidence included herein deals quite thoroughly with the conduct of the defendants Warlimont and Lehmann during the period when the text of the order was under consideration. The materials included also involve the defendant Warlimont's connection with the practical interpretation and execution of the order itself.

The High Command of the Army (OKH) distributed the Commando Order to all the army groups and armies in Russia, as

shown by the distribution list to Document NOKW-1737, Prosecution Exhibit 126. The enclosure to this document, the Commando Order itself, is omitted from that exhibit, but it is printed in full in Document 498-PS, Prosecution Exhibit 124.

The only defendant shown by the evidence to have been engaged in preliminary discussions of the Terror Flyer Order (section 5) was defendant Warlimont. This order is set forth in Document NOKW-3060, Prosecution Exhibit 1462.

Prisoners of war were likewise among the thousands of persons killed by the Einsatzgruppen in the Occupied Eastern Areas. See the materials in Section VII B 5, Vol. X, and in the "Einsatzgruppen Case" (United States vs. Otto Ohlendorf, et al., Case No. 9, Vol. IV).

2. TREATMENT OF PRISONERS OF WAR IN GERMAN PRISONER OF WAR CAMPS

PARTIAL TRANSLATION OF DOCUMENT EC-338¹ PROSECUTION EXHIBIT 253

COMMENTS BY CANARIS (CHIEF OF INTELLIGENCE, OKW), 15 SEPTEMBER 1941, CONCERNING OKW DIRECTIVE, 8 SEPTEMBER 1941, ON THE TREATMENT OF SOVIET RUSSIAN PW'S²

Office Foreign Counterintelligence
No. 9731/41 Secret Chief Foreign
F XIV, E 1.

Berlin, 15 September 1941

Secret

* * * * *

To be submitted to the Chief, OKW

Memorandum

Subject: Directive for the treatment of Soviet prisoners of war

Reference: 2 f 24.11 General Armed Forces Office/PW's (I)
No. 3058/41 Secret of 8 September 1941

To be submitted to the Chief of General Armed Forces Office
[of OKW]

¹ See *Nazi Conspiracy and Aggression*, vol. VII; pp. 411-416, U.S. Government Printing Office, Washington, 1946, for more complete translation of document.

² Document NO-3417, Pros. Ex. 363 reproduced below in this section, also refers to the same subject.

1. The legal position is as follows:

The Geneva Convention for the treatment of prisoners of war is not valid between Germany and the U.S.S.R., so only the principles of general international law concerning the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people; this is also in the interest of all belligerents in order to prevent mistreatment of their own soldiers in case of capture.

2. The regulations for the treatment of Soviet prisoners of war (enclosure 1) are based on a fundamentally different viewpoint, as is shown in the opening sentences. According to this view, military service for the Soviets is not considered military duty but, because of the murders committed by the Russians, is characterized in its totality as a crime. Hence the validity of international legal standards in wartime is denied in the war against bolshevism. Furthermore, much is set aside which, according to previous experience has proved itself not only militarily useful but was also considered absolutely essential for the maintenance of discipline and efficiency of our own troops.

3. The regulations are very general. But if one considers their basic principles, the expressly approved measures will result in arbitrary mistreatments and killings, even if arbitrary actions are formally prohibited.

a. This can be seen in the first place from the instructions about the use of arms in cases of insubordination. The guards and their superior officers who are entirely unacquainted with the languages of the prisoners of war will frequently not be able to determine whether noncompliance with orders is caused by misunderstanding or disobedience. The principle—"Use of arms against Soviet prisoners of war is as a rule legal" exempts the guards from any obligation for deliberation.

b. The treatment of the prisoners of war is removed to a large extent from the supervision of the armed forces; to outward appearances, however, the responsibility will remain with the armed forces.

(1) The segregation of the civilians and politically undesirable prisoners of war, as well as the decision over their fate is effected by the Einsatzkommandos of the Security Police and the Security

Service according to directives which are unknown to the armed forces authorities and the compliance with which they cannot check.

[Handwritten] very efficient!

[Handwritten] not at all.

(2) The establishment of a camp police equipped with sticks, whips, and similar tools is contrary to military conceptions even though the policing is done by camp inmates; furthermore, the armed forces authorities are thus handing over a means of punishment of unknown persons without being able really to check on its use.

c. The final phrase of the regulation suggests that the commanders of the prisoner of war camps act even more severely than the regulations provide, in order to be sure of not being held responsible themselves.

4. According to general experience, unfair treatment provokes the spirit of insubordination, so that the guarding of these prisoners of war in all probability will always remain difficult. The regulations already provide for the employment of one guard for each 10 prisoners during work, so that with the present figure of approximately 1.5 millions of employable prisoners a minimum of 150,000 men is required for guard duty.

5. Enclosure 2 is a translation of the Russian decree concerning prisoners of war, which complies with the principles of general international law, and to a very large extent also with the Geneva Convention for the treatment of prisoners of war. This decree is no doubt disregarded by the Russian troops at the front, but both the Russian decree as well as the German regulations are mostly for the home territory. Although it can hardly be assumed that the Russian decree will be adhered to in the Russian territory of the Soviet Union, there is the danger that the German regulations will be seized upon by the enemy propaganda and will be compared with the Russian decree.

6. The reconstruction of the occupied territories, so essential for the German war economy, will be handicapped. It will be made politically impossible for those prisoners of war who, because of their anti-Bolshevist attitude, or because of some special training, or for other reasons could be used for the administration of these territories, to work for us after their release, even if they still want to do so after their experiences in the prisoner of war camps. Instead of taking advantage of the tensions among the population of the occupied territories to the advantage of the German administration, the mobilization of all the internal forces of opposition in Russia for unified hostility will be facilitated.

7. Under the special conditions prevailing in the Russian theater of war, the will to resist of the enemy troops must be vastly strengthened by the enemy intelligence service and the very rapidly effective whispering campaign.

8. Possible sources of information will be blocked; prisoners of war, as internal political opponents of the Bolshevik regime, especially those belonging to minorities, who could be used for counterintelligence purposes, will lose any willingness they may have to be recruited. This applies especially to the nationalities of the territory of the Caucasus, which is so decisive for the war economy.

9. It will be impossible to protest against the bad treatment of German soldiers in Soviet Russian captivity.

[Handwritten] I consider it useless!

II

Office Foreign Counterintelligence has not been consulted before issuance of these regulations or the order for their execution. For fundamental reasons as well as for the detrimental results certainly to be expected with regard to political and military matters, the Office Foreign Counterintelligence has considerable misgivings about them.

[Signed] CANARIS

2 Enclosures

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NO-3414 PROSECUTION EXHIBIT 362

EXTRACT FROM OPERATIONAL ORDER NO. 8, BY HEYDRICH, CHIEF OF THE SECURITY POLICE AND SD, 17 JULY 1941, AND ENCLOSURES, ON SEGREGATION AND TREATMENT OF CERTAIN CATEGORIES IN PW CAMPS

Berlin, 17 July 1941

The Chief of the Security Police and the Security Service
21 B/41 top secret IV A I c

350 copies—276th copy

[Stamp] Top secret

Operational Order No. 8

Subject: Directives for the Kommandos of the Chief of the Security Police and the Security Service which are to be detailed to the permanent PW camps [Stalags] and transit camps [Dulags]

Appendices: 2 stapled enclosures, 1 and 2

1 loose enclosure*

I am enclosing directives for the purging [Saeuberung] of the prisoner camps which contain Soviet Russians. These directives have been formulated in agreement with the High Command of the Armed Forces—Prisoner of War Department (see encl. 1). The commanders of the prisoner of war and transit camps have been informed by the High Command of the Armed Forces.

I request that a Kommando consisting of one SS Leader and 4-6 men be detailed for the prisoner of war camps in that area. If additional forces are needed to carry out the required tasks, I am to be informed at once.

* * * * *

I draw attention, however, to the fact that the regional Gestapo headquarters in the Reich, which are not concerned, are so understaffed, that further forces cannot be taken from them.

In order to facilitate the execution of the purge, a liaison officer is to be sent to Brigadier General von Hindenburg, Commander in Chief of the Prisoner of War Camps in the Army Service Command Area, East Prussia, in Koenigsberg, Prussia, and to Major General Herrgott, Commander in Chief of the Prisoner of War Camps in the Government General in Kielce.

The following are to be detailed at once as liaison officers:

a. Kriminalrat Schiffer, Regional Gestapo headquarters Stettin, to Brigadier General von Hindenburg in Koenigsberg, Prussia and

b. Kriminalkommissar Raschwitz, with the commander of the Security Police and of the SD in Krakow, to Major General Herrgott in Kielce.

The duty of those liaison officers is to ensure from time to time, and especially in the initial stages of the action, that the operations of the Kommandos are carried out uniformly and in accordance with these directives, and to assure smooth working relationship with the offices of the Wehrmacht.

For the execution of the tasks assigned to the Kommandos in the prisoner of war camps, I attach—as enclosure 2—directives for the Kommandos of the Chief of the Security Police and the SD [Security Service] to be detailed to the permanent camps of which the Supreme Command of the Armed Forces and

* The "1 loose enclosure" is a "List of PW camps in the area of Military District [Wehrkreis] I and the Government General", dated 21 August, 1941, unsigned. It lists 8 and 6 camps, respectively, and contains the following comment: "The transit camps are, according to the communication by the High Command of the Armed Forces, in the area of operations and are from time to time moved nearer to the front as locally required. Their present location may be found by inquiry at the Generalquartiermeister, department prisoners of war—Telephone: Anna 757 (military wire)—Captain Sohn."

therefore also the regional commanders and camp commanders have been informed.

Before carrying out of executions [liquidations], the leaders of the Einsatzkommandos are to contact, in each case, the heads of the competent regional Gestapo headquarters or the commanders of the area competent for their camp, with regard to carrying them out. The executions must not be carried out in the camp itself or in its immediate neighborhood. They are not to be public and are to be carried out as inconspicuously as possible.

With regard to the screening of the transit camps in the newly occupied territories, separate instructions are being issued to the chiefs of the Einsatzgruppen of the Security Police and the Security Service. The transit camps which lie in the areas of the additional Einsatzkommandos detailed by the commanders of the Security Police and the Security Service and of the State Police offices, are to be screened by those.

* * * * *

[Signed] HEYDRICH

Copy

Enclosure 1

[Stamp] Top Secret

Directives for the segregation of civilians and suspicious prisoners of war from the Eastern Campaign in the prisoner of war camps in the occupied territory, in the operational zone, in the Government General, and in the camps in the Reich

I. *Intention*

The armed forces must instantly rid itself of all those elements among the prisoners of war who are to be regarded as carriers of bolshevism. The special conditions of the Eastern Campaign therefore require extraordinary measures which must be carried out free from bureaucratic and administrative influences, and with pride in the responsibility of the task.

While the previous regulations and orders concerning prisoner of war matters have been exclusively based upon military considerations, the political aim must now be achieved to protect the German people from Bolshevist agitators and to secure the occupied territory quickly.

II. *The road to the achievement of the ultimate goal*

A. The inmates of the Russian camps are therefore, first of all, to be separated inside the camps according to the following categories:

1. Civilians.
2. Soldiers (those too who are known to have donned civilian clothes).
3. Politically intolerable elements from 1 and 2.
4. Persons from 1 and 2, who appear to be especially reliable politically and therefore capable of being used for employment in the reconstruction of the occupied territories.
5. Racial groups within the categories of civilians and soldiers.

B. While the rough segregation according to A 1-5 will be carried out by the camp authorities themselves, the Reich Leader SS will commission the following units with the task of segregating the persons included in A 3 and 4: "Einsatzkommandos of the Security Police and Security Service".

These units are directly subordinate to the chief of the Security Police and the Security Service; they are specially trained for their special task and carry out their measures and investigations within the framework of the rules prevailing in the camp according to the directives they receive from the Chief of the Security Police and the Security Service. It is the duty of the camp commandants, in particular that of their counterintelligence officers, to collaborate closely with the Einsatzkommandos.

III. Further treatment of the segregated groups

A. Civilians

* * * * * * *

B. *Military personnel*—The Asiatics are to be separated from the soldiers of European appearance, in view of their possible use in the Reich. Officers will often be liable to segregation as "suspicious elements". On the other hand, in order to prevent the officers from influencing the enlisted men, the two are to be separated from each other forthwith. A special order will be issued regarding the final assignment of military personnel. It must be emphasized now that *no* Asiatics and persons speaking German are to be considered for employment in Germany.

C. The Einsatzkommando of the Security Police and Security Service will decide the fate of the "*suspicious elements*" (see II A 3) who are segregated.

Should any of the persons suspected turn out later to be *un-suspicious*, they are to be returned to the rest of the civilians or soldiers in the camp.

Requests from the Einsatzkommando for the handing over of further persons will be granted.

D. *Trustworthy persons* are to be used to segregate the suspicious ones (II A 3) and are also to be assigned to other work in the camp administration. (Special reference is made to "Volga Germans".)

* * * * *

[Stamp] Top Secret

Berlin, 17 July 1941

Enclosure 2

Office IV

Directives for the Kommandos of the Chief of the Security Police and the Security Service [SD] to be detailed to the Permanent PW Camps [Stalags]

The Kommandos are detailed in accordance with the agreement between the chief of the Security Police and the Security Service and the High Command of the Armed Forces, dated 16 July 1941 (see encl. 1).

Within the framework of the camp regulations the Kommandos operate independently by virtue of special authorization and in accordance with the general directives issued to them. It goes without saying that the Kommandos will keep the closest contact with the camp commander and the counterintelligence officer attached to him.

The task of the Kommandos is the political screening of all inmates of the camp and the segregation and further treatment of (a) elements intolerable for political, criminal, or other reasons, (b) those persons who can be used in the reconstruction of the occupied territories.

No aids can be made available for the Kommandos in the performance of their task. The "German [Police] Register of Wanted Persons", the list compiled by the office for the investigation of domiciles and the "Special Register of Wanted Persons, U.S.S.R." will be of very little use in most cases; the "Special Register of Wanted Persons, U.S.S.R." is not sufficient because only a small proportion of the Soviet Russians classified as dangerous are listed therein.

The Kommandos, therefore, will have to rely on their own specialized knowledge and ability, on their own clues and self-acquired experiences. For this reason they will not be able to start on their task until they have accumulated sufficient material.

For the time being and also later on, the Kommandos in performing their tasks will utilize to the fullest possible extent the experience which the camp commanders have acquired from observation of the prisoners and from interrogation of camp inmates.

Furthermore, the Kommandos must endeavor right at the start to single out those elements among the prisoners which appear to be reliable, regardless of whether or not they are Communists, so as to utilize them for their information service inside the camp and later on, if advisable, also in the occupied territories.

It must be possible through the employment of these confidential agents and by making use of any other means available to single out, as a first step, all those elements among the prisoners which are to be segregated. By short interrogation of the singled-out persons, and possibly by questioning other prisoners, the Kommandos will be in a position to make the final decision in each individual case.

The statement of *one* confidential agent is as such not sufficient proof to classify a camp inmate as suspicious. Somehow or other, a confirmation should be obtained, if possible.

Above all, it is necessary to find out all important officials of the state and the party, in particular—professional revolutionaries; the officials of the Comintern; all influential party officials of the Communist Party of the Soviet Union and its subdivisions in the central committees, the regional and district committees, all People's Commissars and their deputies, and all former political commissars in the Red Army; the leading personalities on the central and intermediate level of the state administration; the leading personalities of the economy; the Soviet Russian intellectuals; all Jews; and all persons found to be agitators or fanatical Communists.

As already mentioned, it is no less important to sort out those persons who may be used for the conquered Russian territories.

Finally, it will be necessary to sort out those persons who will be wanted later for the conclusion of further investigations, no matter whether of a political nature or otherwise, and for the clarification of questions of general interest. This category includes in particular all higher state and party officials who are able to furnish information regarding the measures and working methods of the Soviet Russian state, the Communist Party or the Comintern, owing to their position and their knowledge.

Before any final decision is taken, racial membership should be considered.

The leader of the Einsatzkommando will transmit a weekly brief report to the Reich Security Main Office by teletype or express letter.

* * * * *

On the strength of these operational reports, the Reich Security Main Office will communicate further measures to be taken at the earliest possible moment.

In order to carry out successively the measures indicated in these instructions, the Kommandos will request the camp authorities to surrender the prisoners in question.

Camp authorities have been instructed by the High Command of the Armed Forces to comply with such requests (see encl. 1).

Executions must not be carried out in or near the camp. If the camps are in the Government General, close to the frontier, prisoners are to be moved to former Soviet territory, if possible, for special treatment.

In the event of executions being necessary for reasons of camp discipline, the leader of the Einsatzkommando has to get in touch with the camp commander for this purpose.

The Kommandos are required to keep records of the completed special treatments.

* * * * *

Exemplary conduct on and off duty, smoothest possible cooperation with the camp commandants, careful scrutiny is enjoined on the leaders of the Einsatzkommandos and all members.

The members of the Einsatzkommandos have at all times to bear in mind the special importance of the tasks set them.

**PARTIAL TRANSLATION OF DOCUMENT NO-3417
PROSECUTION EXHIBIT 363**

LETTER OF 26 SEPTEMBER 1941, FROM HEYDRICH'S OFFICE, ENCLOSING LETTER OF TRANSMITTAL, SIGNED BY DEFENDANT REINECKE, AND DIRECTIVES FOR THE TREATMENT OF SOVIET PRISONERS OF WAR, 8 SEPTEMBER 1941

The Chief of the Security Police and the Security Service
Diary No. 539 B/41 secret IV A 1 c

Berlin, 26 September 1941

Subject: Directives for the Kommandos of the Chief of the Security Police and the Security Service to be assigned to permanent PW camps and transit PW camps

Reference: Decree of 17 July, 21 July, and 12 September 1941, Diary No. 21 B-41 Top Secret Operational Orders Nos. 8 and 9

Enclosure: 1 stapled enclosure

As a supplement to my afore-mentioned decrees I herewith enclose for your information the pertinent regulations issued by the High Command of the Armed Forces concerning the treatment of Soviet Russian PW's, dated 8 September 1941, file Nos. 2 f 24

November, General Armed Forces Office PW's, (I) No. 3058/41 secret. The extra copies attached are for the leaders of the Einsatzkommandos.

In case difficulties of any kind should occur during the purging of the camps accommodating Soviet Russian PW's as well as the labor detachments, I would advise you to refer the competent armed forces authorities to the directives laid down in conjunction with the OKW, as well as to the order of the OKW, dated 8 September 1941, which, according to the distribution list, was sent to all the military district commands.

* * * * *

As Deputy
Signed: MUELLER

High Command of the Armed Forces
File No. 2 f 24 November, General Armed Forces Office/PW's (I)
No. 3058/41 secret
2 enclosures

Berlin-Schoeneberg, 8 September 1941
Badenschestr. 51

Secret Registered

Subject: Regulations for the treatment of Soviet PW's.
Reference: 1.OKW/PW's 26/41 top secret, 16 June 1941 (only to the commanders of PW's in Military District I and Govt. Gen.).
2.OKW/PW's 2114/41 secret, of 26 June 1941.
3.OKW/PW's 2041/41 secret, of 17 July 1941.
4.OKW/PW's 15 No. 5015/41, of 2 August 1941.

Enclosed please find a summary and/or supplement to the directives hitherto issued with various orders concerning the treatment of Soviet PW's. Allowances have been made for the directives already issued for the operational area by the High Command of the Army/Generalquartiermeister with this order, the orders cited in reference, unless especially referred to in the enclosure, are cancelled.

* * * * *

FOR THE CHIEF OF THE OKW

BY ORDER
Signed: REINECKE

8 September 1941

Secret

Regulations for the treatment of Soviet PW's in all
prisoner of war camps

I. *Treatment of Soviet PW's in general*—*Bolshevism is the mortal enemy of National Socialist Germany.* For the first time, the German soldier faces an enemy who has not merely been trained as a soldier but who has also undergone Bolshevik political training calculated to destroy nations. The fight against national socialism has become part of his nature. He carries out this fight with all the means at his disposal—sabotage, seditious propaganda, arson, and murder. For this reason, the Russian soldier loses all claims to treatment as an honorable soldier and according to the Geneva Convention.

It is in accordance, therefore, with the authority and dignity of the German Armed Forces, for *every German soldier* to keep a strict distance as far as Russian PW's are concerned. The attitude to be maintained towards them must be correct, though frigid. Anyone found to be adopting an indulgent or even a friendly attitude is to be punished severely. The feeling of pride and superiority of the German soldier who has been detailed to guard Soviet PW's must be evident at all times even to the public. Ruthless and energetic action is, therefore, to be ordered at the least sign of insubordination, especially toward Bolshevik instigators. Insubordination, active or passive resistance, must be *immediately* stamped out by force of arms (bayonets, rifle butts, and firearms). The regulations concerning the use of arms by members of the armed forces are only partly applicable, since these were meant for cases where it was necessary to interfere *under generally peaceful conditions.* As far as the Soviet PW's are concerned, the strict use of arms is necessary alone for disciplinary reasons. Whoever does not use arms or does not use them energetically enough for the enforcement of an order, is liable to punishment. Escaping PW's are to be fired on *immediately, without previous warning.* Warning shots are not to be fired at all. The regulations hitherto in force, in particular Army Manual 38/11, page 13, etc., are cancelled to this extent. On the other hand, all arbitrary action is prohibited. Those PW's who are obedient and willing to work will be treated in a correct manner. However, at no time should one be off guard when dealing with a PW, or forget to adopt a suspicious attitude towards him. *As a rule, the use of arms against Soviet PW's is legal.* Any contact between the civilian population and the PW's is to be prevented. This applies in particular to the occupied territory. The segre-

gation of the PW officers and noncommissioned officers from the enlisted men already carried out by the army in the field, is also to be strictly adhered to in the areas of the armed forces commanders and in the Reich. Any communication between these two groups, even by signs, must be made impossible.

Those Soviet PW's suitable for the task are to be formed into a camp police force, both in the camps and in larger work details. They will be appointed by the [camp] commandant to maintain order and discipline. In order to carry out their tasks effectively, the camp police is permitted to carry sticks, whips, or similar weapons within the wire enclosure. German soldiers are expressly forbidden to use any of the afore-mentioned weapons. By the granting of better food, treatment, and billets, it is intended to create an executive organization in the camp which will greatly alleviate the tasks of the German guard personnel.

II. *Treatment to be accorded to members of different ethnic groups*

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III. *Segregation of civilians and PW's from the Eastern Campaign who are politically undesirable*

1. *Intention*—The armed forces must instantly rid itself of all those elements among the PW's who are to be regarded as carriers of bolshevism. The special conditions of the Eastern Campaign therefore require extraordinary measures which must be carried out free from bureaucratic and administrative influences and with pride in the responsibility of the task.

2. *The road to the achievement of the ultimate goal*

A. In addition to the segregation in the PW camps, according to nationalities, see paragraph II, the PW's (also members of ethnic groups) as well as the civilians in the camps are to be segregated as follows:

a. Politically undesirable persons

b. Politically harmless persons

c. Persons especially reliable politically (who can be used for the reconstruction of the occupied territories)

B. While segregation according to nationalities, officers, etc., will be carried out by the camp authorities themselves, the Reich Leader SS will commission the following units with the task of segregating the PW's in respect to their political ideology—*Einsatzkommandos of the Security Police and the Security Service.*

These units are directly subordinate to the Chief of the Security Police and the Security Service. They are specially trained for their special task and carry out their measures and investigations within the framework of the rules prevailing in the camp, accord-

ing to the directives they receive from him. It is the duty of the camp commandants, in particular that of their counterintelligence officers, to collaborate closely with the Einsatzkommandos.

3. *Further treatment of the groups segregated according to figure 2.*

A. *Military personnel*—The Einsatzkommando of the Security Police and Security Service will decide the fate of the “politically undesirable elements” who are segregated.

Should any of the persons suspected turn out later to be unsuspecting, they are to be returned to the rest of PW’s in the camp. Requests from the Einsatzkommando for the handing over of further persons will be granted. Officers will often be liable to segregation as “politically undesirable persons”. Those soldiers caught in civilian clothes will also be counted as military persons.

* * * * *

V. *Concluding remarks*—The commanders of PW’s are to be made personally responsible for the strict observance of the aforementioned regulations by their subordinate units. This task must under no circumstances be interrupted or impaired, even by a change of offices. Therefore, all new offices and units must on arrival and commitment be thoroughly instructed as to the context of these regulations.

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EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS
HANS FRUECHTE*

DIRECT EXAMINATION

MR. HOCHWALD: Witness, will you please state your name for the record?

WITNESS HANS FRUECHTE: My name is Hans Fruechte, Doctor of Medicine.

Q. Are you a German citizen, Witness?

A. Yes, sir. I am German.

Q. Did you serve in the German Army during the last war?

A. From 1939, until the end of the war I served in the German armed forces.

Q. Did you ever serve in the Eastern theater of war?

A. Since July 1941, we were committed in the Eastern theater of war.

Q. What was your rank at that time?

A. At that time I was an assistant physician.

* Complete testimony is recorded in mimeographed transcript, 3 August 1948, pp. 9097-9134.

Q. This is if I understand you correctly, a rank of a second lieutenant, is that correct?

A. Second lieutenant.

Q. In what capacity did you serve when you came to the East?

A. At that time I was an auxiliary medical officer in the Transient PW Camp 160.

Q. How long were you in this position?

A. From May 1940, until June 1942.

Q. To whom was this camp subordinate?

A. When we marched into Russia we were subordinate first of all to the Sixth Army, later on to the Rear Area of Army Group South.

Q. Can you tell the Tribunal when you became subordinate to the Rear Area of Army Group South?

A. I cannot give you the exact day, but I can give you the month at any rate. We were permanently stationed in Russia on 17 September 1941. At the very latest, therefore, during the month of September we were made subordinate to the Rear Area of Army Group South. I am referring to the year 1941.

Q. Do you know whether certain classes and races of prisoners of war were segregated in the Transient PW Camp 160 when you served there?

A. Yes. From the very beginning in Russia the Jews, and at first the Mongolian and other Asiatic races, were segregated. Altogether we had three camps in Russia. In the first camp the Jews and Mongolians were still segregated. Later on the Jews and Mongolians were segregated but were kept separately.

Q. Do you know whether, if at all, the camps were searched for Bolshevik commissars?

A. To the best of my knowledge there was a directive to the effect that prisoners of war were to be screened for the presence of commissars and Politruks. In actual practice it only happened very rarely—I only remember two cases—since in most cases, the commissars had been liquidated before the prisoners arrived in the camp. I only know of two cases, one in the Kirovograd camp where a man who was charged with being a Politruk was interrogated by a judicial officer and by the commandant. The second case which I recall occurred in the main camp Khorol where a sergeant of the [Secret] Field Police, when a column of prisoners arrived at the camp, immediately segregated one commissar and shot him on the spot. He wanted him shot right in the camp. I happened to be in the camp at that time, but I told him that nobody must be shot in the camp. Therefore, he took him away, had him undressed, and shot at the next corner.

* * * * *

Q. You have testified to these two cases, Witness. Can you tell the Tribunal to whom the Transient PW Camp 160 was at that time subordinate, at the time of these two cases?

A. I want to refer back to the other matter. I don't believe I was understood correctly. I didn't say then that only on two occasions were searches carried out. Of course, searches were carried out always, but only in two cases was something actually discovered. It was a matter of course for the German guards that every incoming transport of prisoners of war was screened for the presence of political functionaries; but only on two instances was something actually discovered, as I said, because in most cases these people had been liquidated prior to the transport reaching the camp. I wanted to add this statement to my last answer.

* * * * *

Q. Let's return now to the segregation. Can you tell the Tribunal what happened to the Jews who were segregated?

A. At first we didn't know at the time when we entered Russia what was to happen to these people. In my first camp I assumed that these people were segregated, that they were to be put into separate camps, as the Jews were put into ghettos in Poland. But even during the course of the first week we learned from the soldiers who had accompanied transports to Zhitomir, that in Zhitomir already at the beginning of August 1941, all incoming Jews who arrived together with the prisoner transport had been shot. The Jews whom we kept later separated in the camps, were, without exception, shot by the Security Service Kommandos that arrived later.

Q. Do you recall whether at any time Security Service Kommandos entered the Transient Camp 160?

A. Transient Camp 160 was entered by Security Service Kommandos approximately on 12 May 1942. The then commandant of the camp told us officers frankly that he was directed to give the Security Service every freedom of action within the camp. The Jews were not interrogated or examined in any way. There were a number of other persons, however, detained because they were suspect or were considered undesirable elements, and these suspected persons were very briefly interrogated by the Security Service. Then on 15 May 1942, all the Jews in the camp and all other undesirable persons were shot by the Security Service. They were taken away from the camp to a place where they were shot.

Q. Was that the only time when the Security Service entered the Transient Camp 160?

A. Yes. While I was there the Security Service was only in Transient Camp 160 on this one occasion.

Q. Was it known to you, Witness, what happened on the transports which left or came to the Transient Camp 160, what happened to the people who were unable to march?

* * * * *

A. I can only remember one instance—

PRESIDING JUDGE YOUNG: Well—

A. —in which I know positively that prisoners of war were shot on the march; this march was the one that took place in the middle of October. I cannot recall the exact date but it was directed from Khorol to Kremenchug. The Khorol camp was overcrowded and the order came to transfer about 20,000 prisoners of war on foot across country to Kremenchug. I, as a camp physician, was ordered by the camp management to make notes when the prisoners filed through the gates of the camp and to segregate the prisoners who looked weak and exhausted. I did this, and segregated a number of people whom I could see would not be able physically to withstand the strain of the march. Later on soldiers who either participated in the march or others who passed the stretch of road between Kremenchug and Khorol on vehicles said that all the people who were exhausted—

DR. TIPP (counsel for defendant von Roques): If Your Honor please, I object to any further testimony of this witness, and I move that the testimony so far rendered be stricken from the record. The witness just said that soldiers told him certain things. What he is going to state now is, therefore, clearly only hearsay. The witness can testify as to what he noticed himself, but he cannot relate here before this Court what any soldiers told him at any time. That is not proper evidence which is credible in this trial. Therefore, I move that the testimony so far rendered by this witness be stricken from the record.

MR. HOCHWALD: If the Tribunal please, this very remark of the witness shows clearly what type the evidence is. Therefore I do not think it is necessary to strike.

PRESIDING JUDGE YOUNG: It is not necessarily objectionable because it is hearsay. We will have the circumstances under which it is said. It goes to the weight of it. Objection overruled.

MR. HOCHWALD: Will you finish your answer, please?

WITNESS HANS FRUECHTE: I said that shortly after the march had taken place, we the personnel of the camp were informed by soldiers, some of whom had participated in the march as escorts, or by other soldiers who had passed the stretch of road where the march took place, that those people who couldn't march any further were shot. They also told us that the corpses were left at the roadside and that the whole stretch of road up to Khorol was marked by the corpses.

Q. Can you tell the Tribunal why you were ordered to segregate the weak people?

A. So that only those people participated in the march who would be able to stand the strain of the march.

Q. Who gave this order to you, please?

A. The camp commandant.

MR. HOCHWALD: I have no further questions to this witness.

PRESIDING JUDGE YOUNG: Cross-examination?

CROSS-EXAMINATION

* * * * *

DR. TIPP: Witness, you said you knew that in the prisoner of war camps a certain subdivision was carried out. You mentioned Russians, Jews, and Asiatics; I think.

WITNESS HANS FRUECHTE: Yes.

Q. Do you know or can you tell us what the purpose of this subdivision was?

A. I stated that in my earlier testimony. At first the prisoners of war were segregated into Russians and Ukrainians on the one hand, and Jews and Asiatics on the other hand. I, as well as the other officers of the camp, was of the opinion that this was merely done so that the Jews and Asiatics could be accommodated in separate camps where they would be subjected to a particularly severe treatment. However, only a week later, all of us knew that this was not the case, but that instead these people were segregated because the Jews were to be shot. I also stated—

Q. Excuse me for interrupting you, Witness, you just said, "all of us knew." May I now ask you to tell me where you derive your knowledge from?

A. I have already stated that in my earlier testimony. The soldiers who accompanied the transports as escorts to Zhitomir, where the first shootings took place, came back and told us that all the Jews had been shot there. They had seen it themselves.

Q. If I understand you correctly, Witness, you now relate reports or descriptions from third persons.

A. Yes. In this particular case; but I can mention a report from Khorol where I myself heard that Jews were actually shot five hundred meters away from my house.

Q. Perhaps we can discuss this later, Witness. At this point I want you to tell us whether you recall how long the transient camp was subordinate to the Sixth Army?

A. I cannot give you the exact date. Until we came to Khorol we were intermittently subordinated to various headquarters because we passed through various areas. I happen to know that in Kirovograd we were subordinate to the Sixth Army because I

happened to talk to the medical officer in charge there myself. I know that later from reports which I sent off from my headquarters in Khorol that I addressed numerous medical reports to the medical officer in charge with the Rear Area of Army Group South.

Q. But you cannot state when these individual shootings which you mentioned actually took place?

A. On the contrary, I can tell you almost exactly. The first shooting, which I did not witness myself, was one of the first shootings which came to my attention at all. It took place during the first days of August 1941. The second one took place in Khorol, and that occurred towards the end of October, or beginning of November 1941. And the third shooting of which I have exact knowledge and which I, so to speak experienced myself, occurred 500 meters away from my house, that took place on 15 May 1942. There I heard the shots, even if I was not an eye-witness of the shooting.

* * * * *

Q. Thank you. I am interested in one specific factor here. What was your rank at that time?

A. Assistant physician.

Q. You were an officer then?

A. Yes.

Q. You told us that a member of the field police wanted to shoot this man in front of your own eyes?

A. Yes. That is right.

Q. What was the rank of this man?

A. Sergeant.

Q. He held a lower rank than you?

A. Yes.

Q. You told us that a member of the [Secret] Field Police wanted to shoot this man in front of your own eyes?

A. Nothing.

Q. Why didn't you do anything?

A. Because it would have been ridiculous.

Q. You think it is ridiculous to prevent a man from being shot? Then I have no further questions on this point.

Now, Witness, one other question about the shooting of Jews. You said that you yourself were an eyewitness or rather you heard, if you did not see it, when Jews were shot in the camp; perhaps in order to make it clear you can tell us once again when that happened?

A. On 15 May 1942.

Q. Do you know whether on 15 May 1942, the Khorol camp was still in the area of the Army Group Rear Area?

A. Yes. I do know that.

Q. You know that for certain?

A. Yes. At any rate, I know it on the basis of the reports which I sent out, and which I am sure I addressed at that time to the Rear Area of Army Group South.

Q. Did you make a report concerning these shootings of Jews, Witness?

A. I?

Q. Yes, you.

A. No.

Q. Why not?

A. To whom should I have reported? To whom for instance?

Q. To whatever agency you usually reported.

A. To the second medical officer?

Q. Certainly, if he was the one.

A. How could I make a report on something that had been ordered? I couldn't report that the prisoners received their lunch yesterday, either.

Q. This matter is too serious to joke about.

A. I am not joking.

Q. It seemed to me as if you were joking.

A. Well, I can't report anything that is a matter of course.

Q. You think it is a matter of course that prisoners are shot practically before your eyes?

A. It was a matter of course in those days. For every officer and for every enlisted man of the German armed forces at that time, it was an absolute matter of course that every Jew was shot.

Q. Witness, did you ever see an order which ordered the shooting of Jews?

A. No.

Q. Did you personally ever learn that any one of your superior officers ordered Jews to be shot?

A. No.

Q. From where do you derive the conclusion then that for every officer and for every enlisted man it was a matter of course that Jews were shot?

A. Because every officer and every enlisted man knew it.

Q. I beg your pardon, Witness. You can testify to your own personal knowledge; it is your own business what you know and what you don't know, but how do you know what millions of German soldiers knew on the eastern front, that is a mystery to me.

MR. HOCHWALD: If Your Honor please. I object to this way of questioning. This is merely argumentation with the witness. This is a speech.

PRESIDING JUDGE YOUNG: You don't need to make him a speech, if you want to ask him any more questions.

MR. HOCHWALD: I think it is absolutely improper.

PRESIDING JUDGE YOUNG: Ask him questions.

DR. TIPP: Witness, how many officers and men of the German armed forces were committed on the eastern front?

WITNESS HANS FRUECHTE: I don't know.

Q. Approximately?

A. I have no idea.

Q. Perhaps you know something else then. According to percentage, with how many officers or enlisted men did you yourself talk personally?

A. With 200 officers and thousands of enlisted men.

Q. You talked to 200 officers and thousands of enlisted men?

A. Yes.

Q. And how long were you on the eastern front?

A. Throughout the whole Eastern Campaign.

Q. And all these officers confirmed to you that they knew it?

A. Yes.

Q. All of them?

A. Yes.

Q. Witness, you are under oath here, you know that?

A. Yes.

Q. And you said that you asked all these 200 officers and all these thousands of enlisted men, "What do you know about shootings of Jews", is that what you contend? Yes or no, Witness.

A. This subject cropped up in almost every conversation which lasted longer than 3 minutes. And I did not meet a single person who said: "That is completely new to me. I don't know anything about it. What are you telling me?" It was an accomplished fact for everybody.

* * * * *

Q. Now, Witness, we will revert to the proper topic of our examination; that is, the topic for which you have been called here by the prosecution, to wit, the shootings of prisoners of war unfit to march. Did you from your own knowledge obtain cognizance that prisoners unable to march were shot?

A. I was never an eyewitness, as I stated.

Q. You stated, I believe, that you had received the order from the camp commandant to pick out the people unable to march from the marching columns which were about to leave.

A. Yes.

Q. Could you infer from this order, Witness, that the armed forces, if I may put it this way, intended to shoot people unfit for marching while they were en route?

A. Yes. I assumed so,—

Q. I believe we misunderstood each other, Witness, you stated that your camp commandant issued an order to you to segregate the people unfit for marching. What happened to those people unfit for marching whom you segregated?

A. They remained in the camp.

Q. Were they then shot in the camp?

A. No.

* * * * *

Q. Thus, if I understand you correctly, the shootings about which you heard occurred allegedly with that marching column which you had previously examined in order to segregate the people unfit for marching?

A. Yes.

Q. Now, did you carry out the examination thoroughly in accordance with your medical duties?

A. As thoroughly as was possible. As a camp physician, even if I have 50 Russian assistant physicians, I can't examine 10,000 Russians in half an hour. I received the order at six o'clock in the morning to go to the camp to watch as the prisoners were driven through the camp gate and to sort out those who were feeble. I went out and did so, and then they marched off.

Q. Were the 50 assistant Russian physicians you mentioned also consulted during this examination?

A. No.

Q. Why not?

A. Because a column cannot pass 50 persons, where everybody sorts out people at his own discretion.

Q. Witness, did you have the feeling or the view as the marching column filed past that you had sorted out the people unfit for marching?

A. It is hard to say because I didn't know what the requirements were regarding these people. I didn't know anything about them. I knew they were going to Kremenchug. That was 90 kilometers away. I didn't know how many days their march would take or if their food or their billeting would be taken care of on the march. I sorted out those people who seemed to be the weakest and who seemed to be debilitated. This I did not do alone but with the help of two, three, or five Russian doctors and German medical orderlies.

Q. Didn't you, as a physician, bring it to the attention of the camp commandant that this examination of people unfit for marching couldn't be carried out by you in such a short time?

A. I can't recall. It is possible that I told the commandant but I can't swear to it.

Q. Thus, you don't know how the camp commandant reacted, do you?

A. No.

Q. May I then ask you, Witness, regarding the shootings,—did you ever talk about it with the camp commandant?

A. Yes. Yes, I did.

Q. What did he tell you?

A. He personally was against the shootings, but he tolerated them as an unalterable fact. I attempted to save a few Jewish doctors from the shooting and said, "There are a few doctors whom I need desperately." Then I told him, "There are some half-Jews there; they needn't be shot." But he refused and said verbatim, "We won't start on this business. They will soon be shot, sooner or later, whatever happens. It is better we shoot them now. Let's have them shot now." That was his literal statement, and if you attach importance to this statement, another doctor asked the camp commandant at the same time to save a few Jewish doctors, and he was refused in the same conversation; this doctor is now in Munich.

Q. You don't know from whom this camp commandant received the order to grant the Security Service access to the camp, do you?

A. No.

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EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS
PAUL OHLER*

DIRECT EXAMINATION

MR. DOBBS: Witness, your name is Paul Ohler, is that correct?

WITNESS PAUL OHLER: Yes. That is correct.

Q. Are you a German citizen?

A. Yes.

Q. Were you an SS lieutenant colonel and criminal inspector of the Nuernberg Gestapo during the year 1941?

A. No. I was an SS first lieutenant and inspector of the Gestapo in 1941.

Q. Was the Gestapo regional headquarters at Nuernberg subordinate to the Reich Security Main Office in Berlin?

A. Yes, officially.

* Complete testimony is recorded in mimeographed transcript, 18 February 1948, pp. 588-592.

Q. Who was the head of the Reich Security Main Office in Berlin in 1941?

A. That was SS Lieutenant General Heydrich.

Q. Who was the Gestapo chief in Berlin during that period of time in 1941?

A. That was Heydrich.

Q. Mr. Ohler, in the course of your official duties as criminal inspector of the Nuernberg Gestapo, did you ever hear or learn that Gestapo men were to carry out assignments at prisoner of war camps?

A. Yes. On assignment from the Chief of the Security Police and the Security Service, we had to set up a Kommando for the prisoner of war camp in Hammelburg.

Q. Mr. Ohler, can you tell whether orders were given from Berlin, activating such Kommandos?

A. The order came from the Reich Security Main Office, under the name of the Chief of the Security Police and Security Service.

Q. Can you describe for us the nature of the assignment for which this Kommando was activated?

A. Yes. It was the sorting out of Russian prisoners of war, commissars and Politruks.

Q. Witness, did you yourself receive an order in connection with such an assignment?

A. At the beginning of November 1941, my superior gave me the order to take over the Kommando which was already existing in Hammelburg. I had to relieve my predecessor.

Q. How many men worked within your particular Kommando?

A. Four officials.

Q. Did your group have any special name?

A. It was designated as, "Einsatzkommando attached to the officers' PW camp, Hammelburg."

Q. Did your Einsatzkommando screen prisoners of war at Hammelburg?

A. Yes. They were screened.

Q. Can you tell me whether other Einsatzkommandos, to your knowledge, were activated for the purpose of screening other prisoner of war camps?

A. Yes. There was a second Kommando for the main PW camps—main PW camp Nuernberg and main PW camp Hammelburg.

Q. Was the camp at which your Kommando worked, a main PW camp?

A. No. That was an officers' camp.

Q. That was an officers' camp. Can you tell me how many prisoners of war were screened by your particular Kommando?

A. Well. I do not know that. I do not know how many prisoners of war were in the officers' camp because people kept coming in.

Q. Well, can you give me a rough approximation of the number of prisoners screened by your Kommando? Was it ten, five hundred, a thousand?

A. Well, there were several thousands. I should think probably—well, of course I cannot be bound to this figure at all—but I should think it was probably about 15,000 men.

Q. But did your Kommando screen that many officers?

A. Yes. They were all officers in the officers' camp.

* * * * *

Q. Mr. Ohler, will you please describe for us the procedure?

A. Yes. As far as I knew, the people contacted the camp commandant. They reported there and then they mentioned the tasks they had to fulfill and then, in agreement with the camp commandant or with officers of the armed forces, they selected confidential agents in the camp, who could be called in to carry out the tasks.

Q. Who were the confidential agents?

A. Well, they were people chosen from the prisoners of war of the officers' camp itself.

Q. And what was the work that these confidential agents did?

A. The confidential agents then informed the officials who, among the prisoners of war, were commissars, or Politruks, etc.

Q. When you say they "informed the officials" do you mean officials attached to your Einsatzkommando, or were there other people that they informed as well at that time?

A. No. There weren't any other officials there. May I continue?

Q. Yes, yes.

A. The prisoners of war who were then mentioned by name were taken out and interrogated and witnesses were also interrogated. If the man concerned had denied or disputed that he was a commissar, then at least two witnesses had to be heard to confirm it. If this was not the case—I mean if there were no two witnesses to confirm this, then the prisoner of war concerned still remained unmolested.

Q. Did you have any special technique for identifying any political commissar or a Politruk?

A. No. It was only possible to do all this through the confidential agents or else prisoners of war themselves came and reported such people on their own initiative.

Q. Can you tell me whether any one of the camp personnel assisted you in any way in connection with the screening of these prisoners of war?

A. No. The camp personnel did not participate.

Q. Whom did you contact when you went to a camp and told them that you were there to carry out an assignment?

A. I have already stated that was all done before I arrived in Hammelburg.

Q. You mean at a time when some other man had been in charge of this particular Einsatzkommando?

A. Yes. That is what I mean.

Q. Did you at any time have any business connection with reference to the Einsatzkommando activity with the intelligence officer of the camp?

A. No, never.

Q. What procedure was necessary to release a selected prisoner from the prisoner of war camp jurisdiction?

A. Well, the prisoners of war who were sorted out were then segregated from the others—that means they were placed in a separate room. They continued to be fed by the armed forces in exactly the same way as the other prisoners of war. When the required number of people were sorted out to be formed into a transport, the men were reported to the Chief of the Security Police and the Security Service, and from there came the instruction for the people to be transferred to Dachau concentration camp. A list of the people was sent, in writing, to the camp commandant, and the camp commandant was requested to release the people as prisoners of war and to transfer them to the Gestapo.

Q. Witness, at any time when you were at camp Hammelburg, did you see an OKW order in connection with the screening of these prisoners of war?

A. No.

Q. When these prisoners of war were transferred over to you—I withdraw that question.

Mr. Ohler, you say that you replaced a man who formerly was in charge of this Kommando. When you replaced him, did you just go up to the camp—just walk in, or did you introduce yourself to anyone at the camp?

A. I reported to the camp commandant, at that time, that I had the order from my superior agency to take over the Kommando.

Q. Did the camp commander object to your going to the camp?

A. No. We did not go into the actual prisoner of war camp itself.

Q. Where did you go?

A. I beg your pardon?

Q. Where did you go?

A. I went into the commander's office, that is on the troop training ground. The prisoner of war camp was separate and was surrounded by barbed wire, etc.

Q. Well, how did you screen these prisoners of war if you did not go into the prisoner of war camp?

A. The confidential agents, etc., made their reports in writing, and the reports were translated and then given to us.

Q. Who actually handed you these reports—the informing people? Or were they handed to you by someone else?

A. Well, they were people from the armed forces.

Q. When these prisoners of war were screened by you and released by the prisoner of war camp to you, what then happened?

A. Then the people were taken to the Hammelburg railroad station and there they were taken over by the Gestapo.

Q. Who escorted the prisoners of war from the Hammelburg camp to the Hammelburg railroad station?

A. That was matter for the armed forces.

Q. What happened at the railroad station at Hammelburg?

A. In the Hammelburg railroad station the people were taken over from us; then they were taken into railroad cars; two men were always chained together with a fine chain, in order to prevent escape. The carriages were then closed and locked, and they were sent to Dachau as quickly as possible.

Q. What sort of cars were these?

A. They were freight trains.

Q. You mean freight cars?

A. Yes. They were large freight cars—closed cars.

Q. Can you tell me how many prisoners of war would be allotted to each one of these cars?

A. About 60 to 80 men.

Q. And then I assume these trains were sent down to Dachau; is that correct?

A. I beg your pardon?

Q. And then I assume these trains were sent down to Dachau; is that right?

A. Yes. They went to Dachau.

Q. Witness, there is one question to which I want to go back a bit. Can you tell me what sort of clothes these prisoners wore when they left the camp Hammelburg?

A. Well they had their PW clothing, that is, their usual uniforms. I think these were very few. They had poor uniforms, and some of them had substitute clothing on.

Q. Were you present at the Dachau station when such a transport would arrive?

A. Yes. I was there a few times. I don't know if it was once, or two or three times. I don't know exactly any more.

Q. What happened at that time?

A. When they arrived in Dachau the people were handed over

to a Kommando leader of the SS. They were fetched by cars at the station and then they were taken from there to the shooting range and there they were shot on orders from the Chief of the Security Police.

Q. Were you ever present at such shootings?

A. Yes. I had to be present a few times.

Q. Can you describe what took place at this shooting procedure?

A. Well, the people had to undress, and then five men at a time were taken to the shooting range, and then they were shot by an SS Kommando.

Q. Witness, will you repeat again for me the number of transports that were sent down to Dachau by your particular Einsatzkommando?

A. The number of the transports? I cannot possibly say.

Q. Can you give me an approximation?

A. I should think that about 500 men were sent from the officers' camp to Dachau.

* * * * *

CROSS-EXAMINATION

DR. SURHOLT (counsel for the defendant Reinecke): Witness, on whose orders did you act? From whom did they originate?

WITNESS PAUL OHLER: The orders came from the Chief of the Security Police and the SD; that is, I received the orders from my superior, that is, orally.

Q. Also, the orders for transfer from the PW camp to the concentration camp?

A. Yes. Everything came from the Chief of the Security Police and the SD and was carried out in accordance with directions.

Q. When these measures were carried out, did you receive orders from the camp commandant?

A. No.

DR. SURHOLT: Thank you. I have no further questions.

PRESIDING JUDGE YOUNG: Any further cross-examination? Any redirect?

MR. DOBBS: Just one question, Your Honor.

REDIRECT EXAMINATION

MR. DOBBS: Mr. Ohler, was the prisoner of war camp Hammelburg under the jurisdiction of the army or of the SS?

A. That was under the jurisdiction of the Wehrmacht.

MR. DOBBS: I have no further questions.

PRESIDING JUDGE YOUNG: Witness may be excused.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-1615
PROSECUTION EXHIBIT 257*

TELETYPE FROM 24th DIVISION TO COMMANDER REAR AREA ARMY
GROUP SOUTH, 15 OCTOBER 1941, INITIALED BY VON ROQUES,
CONCERNING EVACUATION OF PW'S

Signal Office	Number	Sent
To be	CinC Rear Area 273 Army Group South	To Day Time By Register
Filled	1st Radio Squad 1st Co., 221st	[Initials] vR [von Roques] FR. [Handwritten] Ia Pki
Out By	Signal Bn.	* * *
Signal Office	<i>Remarks:</i> Certificate of delivery	
	Received for or Received: By Day Time By 16 October 0215 hrs.	
Transmitted:	To: CinC Rear Area Army Group South, Ia	Sender 24th Division
Day: 15 October		Telephone
Time: 2125		Extension:
Priority:		

Message

Devoting every effort to the task, the evacuation of prisoners proceeds according to order. *Insubordinations, attempts to escape,* and exhaustion of prisoners make the march very difficult. Already there are *over 1,000 dead* as a result of executions by shooting, and exhaustion. In Aleksandriya, *no preparations* have been made by PW transit camp 182 for the permanent accommodation of 20,000. In Novo Ukrainka, allegedly only for 10,000.

* Photographic reproduction of this document appears on page 326.

PARTIAL TRANSLATION OF DOCUMENT NOKW-1605
PROSECUTION EXHIBIT 272

EXCERPT FROM "TEN-DAY REPORT", FROM REAR AREA ARMY GROUP SOUTH (COMMANDED BY THE DEFENDANT VON ROQUES) TO THE HIGH COMMAND OF THE ARMY, 20 DECEMBER 1941, CONCERNING PW DEATHS IN TRANSIT CAMPS, AND REMARKS OF PW DISTRICT COMMANDER, 21 DECEMBER 1941, ON THE PLAN CONCERNING THE RELEASE OF UKRAINIAN PRISONERS OF WAR

Commander Rear Area Army Group South
Section Ia 3172/41 Secret

Headquarters, 20 December 1941

[Stamp] Secret

To High Command of the Army

General Staff of the Army/Generalquartiermeister

Department War Administration

Subject: Ten-day report

Reference: OKH General Staff of the Army/Generalquartiermeister Department War Administration (Quartiermeister 4 B) II 865/41 Top Secret, dated 19 June 1941

* * * * *

4. *Prisoners of war*—The mass dying of undernourished prisoners of war in the transit camps increasingly attracts unwelcome attention among the civilian population. The bulk of the prisoners of war is unable to work owing to exhaustion.

Only a speedy release of the Ukrainians and transfer of collective transports to the Reich Commissariats can maintain at least one part of the manpower for the coming spring and prevent a serious change of attitude among the Ukrainian population.

* * * * *

For information:

Army Group South Ib (only enclosure I)

FOR THE COMMANDER REAR AREA ARMY GROUP SOUTH

The Chief of the General Staff

Signed in draft: v. KROSIGK

Certified:

[Illegible signature]

2d Lieutenant

[Handwritten] War Diary
Commander Rear Area Army Group South
Command Post, 21 December 1941
Department Quartiermeister/PW District Commander N
[Illegible initial] 30/12

*Remarks on the plan concerning the release of
Ukrainian prisoners of war in Rear Area of Army
Group South*

1. On 20 December 1941, the total number of prisoners of war in the four prisoner of war camps located in the army group rear area was (Transit PW Camps 160, 182, 205, Permanent PW Camp 346) *52,518 prisoners of war.*

2. *Mortality rate of prisoners of war in the camps, to 1 [above].*

a. Transit PW Camp 160: from 12,959 prisoners of war, an average of 10 deaths per day, *28.02 percent per year.*

b. Transit PW Camp 182: from 7,507 prisoners of war, an average of 18 deaths per day, *87.05 percent per year.*

c. Transit PW Camp 205: from 9,271 prisoners of war, an average of 21 deaths per day, *82.06 percent per year.*

d. Permanent PW Camp 346: from 22,776 prisoners of war, an average of 50 deaths per day, *80.1 percent per year.*

3. *Sick from hunger in Permanent PW Camp 346.*

I. There are 476 prisoners of war in the hospital among them—

250 Ukrainians

170 Russians

56 Asiatics

476

II. In the medical ward and in the camp 1,500 prisoners of war, among them—1,150 Ukrainians

350 Russians

1,500

476 [prisoners of war in hospital.]

1,500

Total 1,976 prisoners of war

4. *Food situation of the camps, to 1 [above].—With the present number of prisoners of war, the following camps are supplied:*

a. Transit PW Camp 160 for 6 weeks.

b. Transit PW Camp 182 for 5–6 days.

c. Transit PW Camp 205 for 8 days.

d. Permanent PW Camp 346 for 25–30 days.

5. Total number of Ukrainian prisoners of war in the camps to 1 [above].

a. Transit PW Camp 160.....	7,830 prisoners of war
b. Transit PW Camp 182.....	4,018 prisoners of war
c. Transit PW Camp 205.....	3,820 prisoners of war
d. Permanent PW Camp 346.....	7,178 prisoners of war

Total 21,846 prisoners of war
 [Signed] GAUL
 Colonel and Commandant

PARTIAL TRANSLATION OF DOCUMENT REINHARDT 367
REINHARDT DEFENSE EXHIBIT 92

EXTRACT FROM ENEMY INTELLIGENCE GAZETTE NO. 3 OF 3d PANZER
ARMY, 2 MARCH 1942, CONCERNING TREATMENT OF GERMAN
PRISONERS OF WAR

Panzer Army 3
Section I c/Counterintelligence Officer
No. 325/42 Secret

[Handwritten] Army Headquarters, 2 March 1942
Panzer Army Command 3
Ia No. 762/42 secret 2/3
Enclosure to II. 12
[Stamp] Secret

Enemy Intelligence Gazette No. 3
(concluded 1 March, 2400 hours)

A. *Enemy situation as a whole and its development
during the second half of February*

* * * * * * *

6. *Subject: Treatment of prisoners of war*
Southwest of Demidov, 24 murdered German soldiers were found, whose legs and hands were chopped off by the Russians on 8 and 9 February, and part of whose bodies were burned.

On 23 January, 107 German soldiers were taken prisoner by the Russians while attacking Russian supply columns near Durakovo (approximately 30 kilometers to the northeast of Toropets). After having been taken prisoner, they were immediately upon capture "summarily shot" in a forest.

PARTIAL TRANSLATION OF DOCUMENT NOKW-3531
PROSECUTION REBUTTAL EXHIBIT 33

EXTRACT FROM ORDER BY COMMANDING GENERAL OF REAR AREA
ARMY GROUP NORTH, 22 JUNE 1942, CONCERNING SUBORDINA-
TION OF COMMANDERS OF PRISONERS OF WAR, AND "SERVICE
REGULATIONS FOR THE COMMANDERS OF PW'S IN THE OPERA-
TIONAL AREA".*

Commanding General of the Security Troops and
Commander in Rear Area Army Group North
Section Ia/Qu. Diary No. 1441/42 secret

Headquarters, 22 June 1942
APO 11 122

Secret

Subject: Prisoners of war units

Reference: 1. High Command of the Army/Gen. Staff of the
Army/Org. Sect./Generalquartiermeister Dept. War
Administration (Quartiermeister, 5 PW's) No.
II/3910/42 secret, dated 9 June 1942.
2. Army Group Command North/Oberquartiermeister/
Quartiermeister 2 No. 4067/42 secret, dated
16 June 1942.

Enclosure 1

1. According to reference 1 above, a commander of prisoners of war will be subordinated to each army group command. His duties are laid down in the attached service regulation.

2. The units prisoner of war—district commandant, transit PW camp and army prisoner collecting point are Army [GHQ] troops (Guard Units [Ordnungsdienste]).

3. They will be subordinated to the army groups or armies (Panzer armies) by the High Command of the Army/General Staff of the Army/Generalquartiermeister. Their subordination is a "subordination in every respect" i.e., in respect to military duties, personnel, disciplinary, and judicial matters. They will receive departmental directives from the commander of prisoners of war of their superior command authority.

4. The army groups may subordinate the units under their command to the commander of the army group rear area, armies and Panzer armies. The provisions of paragraph 3 for the sub-

* This document was introduced as part of the prosecution's rebuttal evidence to the claim made by several defendants that the prisoner of war organization was not under their jurisdiction.

ordination will apply, with the stipulation, however, that the subordination may also be a "tactical subordination" if it is for a temporary duration only. In this case with respect to military duties, personnel, disciplinary, and judicial matters the units remain subordinated to the army groups.

5. If the prisoner of war units are subordinated to armies (Panzer armies) etc., by the army group, they are still bound to the directives in respect to departmental matters to the commander of prisoners of war with the army group command.

* * * * *

FOR THE COMMANDING GENERAL

Chief of General Staff

[Illegible signature]

Colonel, GSC

Copy

Service Regulations for the "Commander of Prisoners of War in the Operational Area"

1. The commander of prisoners of war is subordinated to the command of the army group.

2. The commander of prisoners of war is adviser to the command of the army group (Ib) in all questions concerning prisoner of war matters. He suggests the assignment and subordination of the prisoner of war district commanders, of the transit PW camps, the forward permanent PW camps and the army prisoner collecting points. When assigning prisoner of war units subordinated to armies (Panzer armies) and/or commander of army group rear area, he is to be consulted.

3. The commander of prisoners of war is superior officer for the troops of the prisoner of war agencies and units immediately subordinated to the army group. He has the disciplinary authority of a division commander.

4. The commander of the prisoners of war supervises on behalf of the CinC of the army group, the activity and the condition of the prisoner of war agencies and units with regard to personnel and material. He is authorized to issue to them directly departmental directives on behalf of the CinC, also if they are subordinated to the armies (Panzer armies) and/or commander of army group rear area. Prior to issuing directives, the competent command authorities are, if possible, to be consulted or to be informed immediately afterwards.

5. The care of the prisoners of war (shelter, food, clothing, medical care, etc.) their guarding, and their labor allocation is in

principle the responsibility of the command authorities to which the prisoner of war agencies and units are tactically subordinated. Deficiencies which the commander finds on his inspection must be reported by him immediately to the command authorities with the request for remedy, if necessary he will report to the CinC of the army group.

6. When preparations for strategic operations are being made, the army group has to inform the commander of prisoners of war in advance. He will in agreement with the armies (Panzer armies) and commander of army group rear area, as well as the commanders of prisoners of war in the areas of the armed forces commanders, submit in advance proposals for the care and removal of the prisoners of war, and establish such measures as are necessary for the smooth execution of the directives laid down by the High Command of the Army with respect to treatment, care, and removal of the PW's in general and in individual cases.

7. The commander of prisoners of war will always keep in personal contact with all military and economic agencies which are concerned with PW matters (labor offices, economic inspectorates, etc.). He will supervise the labor allocation of the prisoners of war and will see to it that the instructions of the High Command of the Army concerning the treatment of PW's are observed by those to whom they are allocated for labor.

8. In matters pertaining to personnel of the prisoner of war agencies and units, the commander of prisoners of war is to be consulted. He may be called upon by the competent command authorities to draft qualification evaluations about prisoner of war district commanders, commanders of transit PW camps, forward permanent PW camps, and army prisoner collecting point as well as their deputies.

Certified:

[Illegible signature]

Captain

EXTRACTS FROM THE TESTIMONY OF DEFENDANT HERMANN REINECKE¹

DIRECT EXAMINATION

* * * * *

DR. SURHOLT (counsel for defendant Reinecke): Your Honor, I would now like to deal with Document NO-3417, Prosecution Exhibit 363.² General, we have already briefly mentioned this document concerning the question of the general treatment of

¹ The complete testimony is recorded in the mimeographed transcript, 2, 6, 7-9, 12 July 1948; pp. 7179-7445, 7484-7652.

² Document reproduced in part, earlier in this section.

PW's. Now I would like to put to you questions about the segregation. Please would you keep your answers in conformity with this? What is the document called?

DEFENDANT REINECKE: The document consists of two parts. One is an instruction by the Chief of the Security Police and the Security Service, to which is enclosed an instruction of the OKW dated 8 September 1941, dealing with the treatment of Soviet PW's.

Q. What is the date of the instruction of the Chief of the Security Police and the Security Service?

A. 26 September 1941.

* * * * *

Q. General, how many parts does the decree of the OKW dated 8 September 1941, have?

A. It consists of two parts.

Q. What are they—what kind are they?

A. The first part is a so-called "cover instruction", and the second part contains the actual instructions in this field.

Q. If you take these instructions, the part Roman figure III, what is the subject of the document here?

A. The subject can be seen from the heading "Segregation of civilians and those PW's from the Eastern Campaign who are politically undesirable."

Q. General, how did the working out of this section of the instruction arise, what was the external reason for it?

A. Without the corresponding material from the files, I cannot definitely remember the individual incidents. After I have been able to go through all this material, a large number of individual incidents came back to me and with regard to this one, I can comment. First of all, I remember that one fine day I received the order—together with receiving some kind of documents which Keitel gave me at that time—to have an instruction worked out which basically regulated the question of the treatment of the Soviet PW's; the same time also to announce measures which Hitler had ordered, the purpose of which was to remove dangerous Communist PW's who could have been active as agitators among the PW's.

* * * * *

Q. General, were you with your Department PW Affairs responsible for dealing with the segregation of political elements?

A. No.

Q. Who was responsible?

A. Exclusively the Office Foreign Counterintelligence.

Q. Who there?

A. The Counterintelligence Department III, whose chief was Colonel von Bentivegni, who in turn was subordinate to Admiral Canaris.

Q. Do you know why the competent department did not issue these orders?

A. If I base my recollection on the period in question, then I can only remember that I received the order from Keitel to prepare this instruction, and I can only conclude that Canaris probably—

Q. Did you find out anything from members of Canaris' office about why the Office Foreign Counterintelligence did not work on the matters?

A. Well, today I cannot say with absolute certainty how things went.

Q. What was your attitude or your agency's with regard to the new task, the handing over of PW's to police agencies at that time?

A. In itself in this case, too, as already in a similar field in the previous years in other cases, I was against any handing over of PW's to the police.

Q. General, were you informed about what happened to the PW's with the police?

A. With those people who were to be segregated according to this instruction?

Q. Yes.

A. I was only informed that they were to be segregated and were to have no contact at all with civilian population and other PW's; as a result they were to be guarded particularly strongly and not to be used for general labor.

Q. Were you informed about the reason for this?

A. Yes. I was.

Q. What kind of reasons were these—did you agree with them, did you think they were adequate, or did you reject them?

A. I was told that the reasons were, as I have already stated, that under all circumstances they were to be segregated from the other PW's, from the general work, and from the civilian population.

Q. Well, that is a fact, but not a reason—

A. In order to prevent Communist influence being exerted in any way to the disadvantage of the other PW's and the civilian population—

PRESIDING JUDGE YOUNG: Just one question. Did you ever know of any camps that the police had for containing these prisoners of war that were turned over to them?

DR. SURHOLT: Excuse me, Your Honor, I don't think the translation I heard was quite correct.

PRESIDING JUDGE YOUNG: I will ask the question again. Did the police have any prisoner of war camps?

DEFENDANT REINECKE: I assume that, after they had received PW's from us.

Q. Well, you had charge of the PW's didn't you?

A. No. They were not under me. I had to work on PW affairs in the OKW.

Q. Were the PW's, after they were turned over to the police, were they still PW's?

A. As far as I know, they were then released as PW's.

Q. What did they become then?

A. The Russian PW's were then treated in the same way as Russian civilians.

Q. You never heard of the police having a civilian camp then for these prisoners of war that were released and turned over to them, did you?

A. Well, I always assumed—

Q. I asked not what you assumed—did you ever hear of it?

A. I never heard anything at all about the existence of a definite PW camp with the police, that is, a locality.

Q. All right, not having heard of a camp, what did you assume became of them after they were turned over to the police?

A. Well, I assumed, and I think that it was correct, that since the police, at least Himmler, always needed a lot of labor, that he used them for labor in his sphere.

* * * * *

DR. SURHOLT: Your Honor, in connection with the discussion about the document in front of you, I would now like to refer to document NO-3414, Prosecution Exhibit 362.* Have you got the document, Witness?

DEFENDANT REINECKE: Yes.

Q. Will you please go through it and describe it?

A. The document deals with the Operational Order No. 8 of the Chief of the Security Police and the Security Service, dated 17 July 1941. The general directives are discussed for the Kommandos of the Chief of the Security Police and the Security Service to be detailed to permanent PW camps and transient PW camps.

Q. It is Operational Order No. 8; therefore, it must have had a predecessor, Witness. I want to know whether these operational orders of the Chief of the Security Police and the Security Service sent to the General Armed Forces Office or any of its agencies?

A. I cannot remember ever having seen such an order.

Q. Do you know the contents of this order?

* Document reproduced above in this section.

A. I do now.

Q. Also enclosure 2?

A. I would like to correct my answer. At the time in question, that is before 8 September 1941, I must have seen enclosure 1, or, at least the contents thereof, since a number of passages included in this enclosure, as I have already said, are contained in the instructions of 8 September. On the other hand, under no circumstances was enclosure 2 known to me.

Q. Why do you say "under no circumstances"?

A. Because I know, after having read it through, that I do not know the order as contained herein.

Q. It is a repetition, but that is not a reason for special emphasis—"under no circumstances".

A. I do not know it; under no circumstances.

Q. General, if not at the time, did you hear at any later date of executions of political elements, not agreeable to the police, from among the prisoners of war?

A. After 8 September, yes, of course.

Q. When was that?

A. Well, it is rather difficult to determine the exact period, but I think I remember—

Q. When approximately?

A. I seem to remember that I was enlightened for the first time about the Hitler order, which I received as an oral order, to the effect that commissars and Politruks were to be executed during a visit to a prisoner of war camp in the East.

Q. Witness, I didn't quite understand this. Did you hear about this order, or were you officially informed about that order?

A. Officially I did not receive this order. At the time I heard about it from a commander of a prisoner of war camp.

Q. You did not mention the period, when, according to your memory, did this happen?

A. I was interrogated in connection with this question, and originally I seemed to remember that it was in July or August on the occasion of one of my three journeys to the eastern front; but from the examination of the witness Bremer here I discovered that I was in Riga on the 2d of September, so, it must have been after that date.

Q. Why after the 2d of September? On what occasion did you find out about it?

A. Because only after my trip to Riga could I have been in this camp where I found out about these matters.

Q. When did you take that trip?

A. That was in October.

Q. At the beginning or the end?

A. I could not tell you exactly; it was quite cool at the time.

Q. What were your experiences?

A. By agreement with the then commander of the Army Group Rear Area, I visited a transient camp and I talked to the commander and looked at general conditions. On that occasion the commandant told me very indignantly about the fact that prisoners of war were to be turned over to the Security Police, that is Russian commissars, and that they were to be exterminated.

Q. How did you react to that?

A. On my return journey I went to East Prussia, to the Fuehrer Headquarters and I reported it to Keitel.

Q. Where was the Fuehrer Headquarters at the time?

A. Near Rastenburg in East Prussia.

Q. Was that on your general route, or did you purposely visit this headquarters?

A. No. I went to the headquarters for that purpose.

Q. What was the subject matter of your discussion with Keitel?

A. I reported to Keitel about my observations, and I also reported to him this fact. At that time Keitel did not give me a precise answer to my question as to whether that really was a Fuehrer order or not. He merely—as had happened in many cases before which did not actually concern my sphere of tasks in the OKW—pointed out that it was not my business, “so please don’t bother about things which don’t concern you”. As I had been informed on frequent occasions before, he described again, a number of cruelties and brutalities which had been carried out by Russian soldiers on German prisoners of war; he cited these instances and informed me about details in order thus to make it clear to me that such measures were of course possible. At a later date Keitel confirmed this fact to me, saying that this was actually a Fuehrer order which was in existence. But I never saw the Fuehrer order myself. I had always believed that it was a reprisal order issued by Hitler and passed on orally.

Q. Why were you against the turning over at the time when the order of the 8 September was being drawn up?

A. Because I thought it was quite possible that even in the armed forces prisoner of war camps segregations were possible, and that every soldier would take the attitude that a prisoner of war is, of course, a soldier and therefore has to be guarded by soldiers.

Q. Did you hear anything at the time about considerations of international law, or did you interest yourself in the matter?

A. For this purpose and also for other reasons, especially when prisoners of war of other nations were concerned, I very often discussed the individual articles of the Geneva Convention with

Keitel in which military authorities were mentioned; on various occasions Keitel replied that Hitler took the point of view that neither in the Hague Convention, that is, in the Hague Rules of Land Warfare, nor in the Geneva Convention, had a binding statement been made to the effect that the armed forces was the only authority entitled to keep prisoners of war, but that, on the contrary, at various places it had been expressly mentioned that the custodial state and the government of the enemy state were responsible for the prisoners of war.

Q. When considering these matters did you ever express the thought that prisoners of war were not to be turned over because the treatment, if left to the police, was inhuman, or that these people would even be executed?

A. If I had known at the time what I know today, these considerations, of course, would have been the basis for my discussion. But I did not know it at the time and I did not deem it possible.

Q. Did you at the time initiate any negotiations dealing with matters of prisoners of war and which were to improve the state of affairs especially concerning Russia?

A. Yes.

Q. Of what nature were they and when was it?

A. I think I have already pointed out that in August, at that very time, I took pains myself to come to some kind of agreement with the Russian Government by utilizing my relationship with Professor Burckhardt, President of the International Red Cross, and Minister Patterson [Chargé d'Affaires Jefferson Patterson] of the American Embassy. I asked these gentlemen, without being authorized to do so, to inspect our camps in the East in which we housed Russian prisoners of war, and I believe and know that at least Professor Burckhardt did actually inspect one such camp, if not others. I do not remember exactly whether Mr. Patterson did. At the time, I asked the International Red Cross, which we set great hopes on at the time—in spite of Hitler's orders that no lists were to be kept about Russian prisoners of war—to have lists of Russian prisoners of war prepared, and I told the representatives of the International Red Cross about this state of affairs. I kept these lists in readiness so that at any moment when contact would be established with the Russians they would be able to say, "We have already inspected German camps where Russian prisoners of war are housed. We have lists of Russian prisoners of war in German hands. Now let us go to Soviet Russia and let us inspect the camps of German prisoners of war, and give us list of your German prisoners of war".

I know that this preparation which I made without the knowledge or approval of Keitel meant a considerable risk for me, and that for a long time I had hoped that—that hope of course, was

destroyed after a year—the efforts of the International Red Cross would be successful.

Q. General, did you know there were concentration camps at the time?

A. I did know that there were concentration camps in existence, and I also had seen a concentration camp.

Q. When was that?

A. In spring 1939, 6 months before the beginning of the war.

Q. On what occasion?

A. In Munich a training course had been initiated for about 160 regimental commanders of the army, commandants of the larger warships of the navy, wing commanders of the air force and, upon a request of one of three branches of the armed forces—I don't know which it was—I had also included in the program the inspection of one of the concentration camps because at the time rumors had spread within the German people, especially concerning the name Niemoeller, that the inmates of these concentration camps were maltreated. We spent a whole morning in the concentration camp Dachau. Himmler, who was most interested in the matter for reasons of propaganda, was present himself. He showed us around together with his SS officers and he gave us a lecture about the inmates of concentration camps and we were given the possibility in smaller groups to look around in the camp, to see the inmates, to convince ourselves of their condition, to visit the barracks and a few groups also were given the chance to speak to the inmates. After this I told the gentlemen that if we had the opportunity to do so, we would like to ask the Reich Leader SS Himmler a few questions which then would be discussed.

Q. What was the result?

A. The result was thus—that information and rumors that had spread were not confirmed. The inmates looked extremely healthy, well-fed, of course not very beautiful because they were wearing these striped suits, but they were properly dressed, and of course they did not look very pleased but no animosity showed in their faces. They discussed matters with us quite normally.

Q. Did you ever see another concentration camp during the war?

A. No.

Q. General, when working out the order of 8 September 1941, was the segregation of Jews also discussed?

A. No.

* * * * *

Q. What practical cooperation was done by the armed forces agencies?

A. They did not take part in the segregation.

Q. But I am asking you about the general measures.

A. Within the framework of the segregation measures. Only the counterintelligence officers were to support the commanders.

Q. What was the task of the commanders?

A. The commanders had to turn over to the police those persons segregated by the Einsatzkommandos.

Q. Were the regulations known to the counterintelligence officers and to the commanders which served the Einsatzkommandos as a general basis for their judgment?

A. No.

Q. Why not? How do you know that?

A. If they did not find them out locally from a police officer they certainly did not find them out from the OKW.

Q. Did the police inform them about these regulations? If you had received them, would they have appeared in the order of 8 September?

A. I think so, certainly, if we had had them.

Q. They must have appeared there; is that not true?

A. Yes.

Q. Please turn to page 11 of the document. Now, what does the document say about that? To whom were the Einsatzkommandos subordinated?

A. To the Chief of the Security Police and the Security Service directly. They were especially trained for a special task, and carried out their measures and investigations within the framework of the rules prevailing in the camp according to the directives they obtained from the Chief of the Security Police.

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TRANSLATION OF DOCUMENT GENERAL DEFENSE
DEFENSE EXHIBIT 79

SUPPLEMENT TO EXPERT LEGAL OPINION BY PROFESSOR REINHART
MAURACH* (UNIVERSITY OF MUNICH), SUBMITTED ON BEHALF OF
THE DEFENSE IN CASE NO. 12

I

In my legal opinion, which was submitted to the defense in May 1948, in Case No. 12, I held the opinion that the provisions

* Professor Maurach, who before World War II was instructor (Dozent) at Koenigsberg University, is the author, among other works, of the following: "Anfaenge eines Voelkischen Schutzes im Alt-russischen Judenstrafrecht" ("Beginnings of Racial Protection in the Old [Czarist] Russian Criminal Law concerning Jews") in: Journal of the Academy for German Law, 1940, pp. 267-279; "Die Siedlungszonengesetzgebung des Russischen Reiches und ihre Bedeutung fuer das Ostjudenproblem" ("Legislation concerning Zonal Settlement in the Russian Empire, and its Significance for Eastern Jewry"), in the symposium "Judenviertel Europas" ("The Jewish Quarter of Europe"), edited by H. Hinkel, Essen, 1939; "Russische Judenpolitik" ("Russian Policies concerning Jews") Berlin, 1939.

of the Geneva Prisoner of War Convention of 1929, were binding upon every signatory power regardless whether its enemy in war had become a party to the convention or not.

On the other hand, the defense maintains that the provisions of this convention do not apply to a signatory power in cases in which it has been involved in war with a country not a party to the convention. In substantiation of this opinion the defense submitted material to me, following the completion of my legal opinion, which was unknown to me at the time I wrote my opinion. This material is of such decisive importance that it makes imperative a re-examination of the legal questions as outlined in paragraph 1.

II

In drawing up my legal opinion, I proceeded less from the text of the convention, which was capable of misinterpretation at that time, than from the origin of the agreement. The tendency of the Geneva Convention aimed at obviating the disadvantages inherent in the all-participation clause upon which the *Hague Convention of 1899-1907* was based. From the very outset it aimed at greater universality. The contractual, and hence the relative, point of view was supposed to step aside in favor of a humanitarian, and hence an absolute point of view. This explains the abolition of the all-participation clause of Article 2 of the Hague Rules of Land Warfare and its replacement by Article 82, paragraph 2 of the Convention of 1929. This conception was also clearly expressed in the German translation of the agreement, which reads as follows:

“If, in time of war, a belligerent is not a party to the conventions, their provisions shall, nevertheless, be binding for the belligerents who are parties thereto.”

This embodies—by reason of the prevalence of the efforts in Geneva of those having decisive authority—an *absolute* obligation for every party to the convention. Reasons of humanity demand that prisoners of war, in other words the victims of war, be treated in accordance with the convention, even if the native country of these prisoners of war has not been a party to the Geneva Convention.

No one-sided or intolerable imposition arose for the signatory power by virtue of this fact. For apart from the fact that it was obliged to act not on the basis of the relative maxim *do ut des*, but in accordance with the absolute principles of humanity, the Geneva Convention could proceed from the fact, as stated in the legal opinion, that the country which had not become a signatory to the convention would also observe the customary legal regula-

tions of international law, so that in principle the obligations of the two parties were thus offset. The Geneva Convention did not anticipate a case where a country which denied the principles of international law would become a belligerent.

This interpretation—namely, an absolute and not only a relative obligation of the convention—arises from events which led to its origin, and, in particular, its antithesis to the Hague Convention. My legal opinion was also based on this interpretation.

III

However, it must be admitted that this “historic interpretation”, which was of decisive importance in drawing my conclusions, cannot simply claim validity, and that it can, with justification, be opposed with divergent opinions. This point must now be discussed.

1. In formulating *the text* of the agreement the principle of absolute obligation was not clearly and unequivocally expressed. One can even infer the principle of *limited-absolute* obligation, in other words: through the participation in hostilities of nonsignatory powers, the agreement *per se* should not be affected, but rather it should have further application (absolute obligation); however, its provisions should only be *applicable* between *those* belligerent which were parties to the convention (limitation of the principle of absolute obligation). This interpretation follows from the French (authentic) text of Article 82, paragraph 2:

“Au cas, ou, en temps de guerre, un des belligérants ne serait pas partie à la convention, ses dispositions, demeureront néanmoins obligatoires entre les belligérants qui y participent”.

And likewise the English “Manual of Military Law” (though not an authentic version of the agreement, but in any event of material importance for the interpretation) adopts the authentic version in the verbatim translation in Chapter XIV (Amendments, No. 12, sec. 6, par. 3):

“If, in time of war, a belligerent is not a party to the conventions, their provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto”.

Herewith the expression “fuer” [for], implying an absolute sense, in the German translation is replaced by the relative expression “entre” in the authoritative French text, and by the corresponding expression “between” in the English translation. Here is the result of the purely reciprocal effect of the obligation. In the case of the participation of the U.S.S.R., in hostilities from 1939–1945, the Geneva Convention was to be applicable in relations between the German Reich on the one hand and the Western

Powers on the other, but not, however, between the German Reich and the U.S.S.R.

2. Of even greater importance are the arguments which the defense submits concerning the negotiations between the German Reich and the U.S.S.R., with respect to the application of the Geneva Convention. The defense submits the following:

“When Germany, at the outbreak of war, attempted to initiate negotiations concerning the treatment of prisoners of war, the U.S.S.R., is supposed to have stated [habe ***erklaert] that it attached no importance to the treatment of its prisoners in accordance with the principles of the convention, since they regarded these prisoners as traitors, and in addition did not wish to impose any restrictions upon itself with respect to the treatment of German prisoners of war.”

The defense will presumably submit the proof of this statement to the Court. If one assumes that this will be proved, this constitutes further important substantiation for this interpretation in line with the legal opinion of the defense. The question should not be examined here whether the homeland's renunciation of the application of the convention is admissible and operative (the question would have to be answered in the negative in substantiating the above-mentioned absolute or humanitarian standards). The attitude of the U.S.S.R., however, indicates a symptomatic significance. For one can deduce therefrom that the Geneva Convention should apply only in the “limited-absolute” sense, in line with the statements under III, 1: not “for”, but “between”.

IV

To sum up, the arguments of the defense appear to me to be of such significance that they justify an opinion in opposition to mine.

For the sake of completeness, however, may I point out that *in the final analysis* my legal opinion coincides with that of the defense. For, whereas the defense has rejected the *formal legal* validity of the Geneva Convention as applied to the German-Russian war, I held the view in my legal opinion that the agreement, in accordance with Article 82, paragraph 2, binds the enemy of a nonsignatory power also as far as the formal wording of the agreement is concerned; but that, however, is only the case in the event of a war between two *countries which adhere to the principles of international law*. If one of the partners, consistent with its politics and dynamics, remains outside the community observing international law, then the Geneva provisions, for material

reasons, are not applicable. In this respect, reference is made to the statements in the legal opinion under IV.

Diessen/Ammersee, 22 July 1948

Signed: MAURACH
(Prof. Dr. Reinhart Maurach)

TRANSLATION OF DOCUMENT REINECKE 120
REINECKE DEFENSE EXHIBIT 120

AFFIDAVIT OF REINHARD VON WESTREM,* 21 JUNE 1948

I, Reinhard von Westrem, born 29 April 1879, at Haus Huelgrath, Duesseldorf have been warned that I am liable to punishment if I make a false affidavit. I declare in lieu of oath that my statement is true and was made to be submitted as evidence to the Military Tribunal Court V A, Case No. 2, in Nuernberg.

From November 1939 until the beginning of August 1940, I was the commander of the officer's prisoner of war camp in Mainz; from August to September 1940, commander of the senior staff of the two new officer prisoner of war camps to be set up near Nuernberg; and from October 1940 until 28 February 1943, I was commander of prisoners of war in Military District XII, Wiesbaden.

1. As commander of prisoners of war, I was subordinate, in regard to orders and discipline, only to the military district commander of prisoners of war and to the deputy commanding general. The office of a commander of prisoners of war was a division of the military district command, just as, for instance, the office of the commander of the signal corps units, or of the corps medical officer, etc. The correspondence had the following heading: "Military District Command XII, Commander of Prisoners of War".

The military district commands were subordinate to the High Command of the Army/Commander of the Replacement Army.

The OKW/General Armed Forces Office (General Reinecke) had neither the power to issue orders to, or exercise disciplinary measures against the commanders of the prisoners of war. The OKW issued the basic, i.e., the generally valid basic decrees and instructions. Beyond this the OKW only had the right to inspect, i.e., a right to inspect the camps and work details. The OKW made ample use of this right through the inspector, as well as through individual officers of the OKW (PW [Affairs]).

2. In the camps under my command there were prisoners of war from all enemy countries, about 120,000 in all, with the ex-

* Extracts of von Westrem's testimony concerning the contents of this affidavit are reproduced below in this section.

ception of Americans. The number of English prisoners was small, in 1940 they were only placed in transit camps.

3. In the treatment of the prisoners of war—with the exception of the Russians, which I will elaborate on later—the provisions of the Geneva Convention were strictly complied with. The camps and the work details were inspected regularly. The work details, and especially the industrial work details, received our particular attention. The observations made in regard to the treatment of the prisoners of war were satisfactory. Sometimes the treatment was so good that it aroused the ill will of the offices of the four Party district leaders [Gauleiter] in my district. They did not consider the prisoners of war as honorable prisoners, but rather as criminals. The offices of the Gauleiter disliked the Geneva Convention. I personally only came upon one case of maltreatment by a German of these industrial details (a low trick by a foreman); this was at Saarbruecken, and I immediately intervened. I also paid a great deal of attention to the food for the prisoners. This was especially necessary where the industrial concerns had turned over the serving of meals to contractors. My visits and inspections in the camps occurred without previous announcement, so that I was always informed about the conditions as they actually were. Usually I was on the road three days of every week. Each time a report was made to the military district in which the good and bad observations were reported frankly and precisely. The chief of staff, the commander of the military district and the deputy commanding general, all of whom took a great interest in the prisoners of war in the camps and work details, read each one of these reports and commented on them. Deficiencies that arose were immediately investigated and taken care of through the corps medical officer or the administrative office. Besides my personal inspections, I often sent officers of my staff on surprise visits, for instance, at night and on holidays. Furthermore, according to regulations, each PW main camp commander had his regular deputy and enough vehicles so that he could visit the work details personally at any time or have them inspected by his officers.

All these things were not peculiar to Military District Command XII. They were in accordance with the basic decrees and directives of the OKW/General Armed Forces Office, and based on the experience and reports of the commanders of prisoners of war, who, in the beginning, were mostly general staff officers from the old army—men with a strict conception of duty and great talents for organization. All the measures were absolutely on the lines laid down by the OKW/General Armed Forces Office.

At the meetings of the commanders of the prisoners of war,

which were called by the OKW in order to explain the ideas of the Fuehrer and of the chief of the OKW concerning the basic decrees, Colonel Breyer, as Reinecke's representative always pointed out that the provisions of the Geneva Convention had to be observed. I remember once that one of the participants made a proposal—for practical reasons, no doubt—which was immediately turned down by the representative of the OKW/General Armed Forces Office as not being in conformity with the Geneva Convention. It was explained in connection with this that our own prisoners of war would have to suffer for any violation of the rights of prisoners of war.

The Control Commission (representatives of the protecting powers) received all necessary assistance in their work, especially on their visits to the camps and work details. These visits were relatively frequent. They could speak alone and without supervision with the representatives of the prisoners, whom the prisoners elected themselves from their own ranks. I did not learn of one single serious objection from a representative of the protecting powers. On the contrary, the American representatives (Senior Legation Counsel Patterson) always expressed their appreciation to me on the occasion of their visits. So far as the use of the French prisoners of war as workers is concerned, a special agreement had been reached with the French Government, the validity of which I had no occasion to doubt.

I only read recently in the newspapers, in the reports on the Nuernberg trials, to be exact, about dishonorable and inhuman treatment of the prisoners of war on the work details at the Krupp firm. Even though these work details did not belong to my district, I simply cannot imagine such events in view of the way prisoner of war affairs were regulated from above. The controls from above (OKW, commanders of the prisoners of war, commander of the PW permanent camps, the competent battalion commanders, their company commanders and officers who were always traveling) and the opportunities the prisoners themselves had to make complaints, were basically established and assured, i.e., for the camps and the work details, so that remedies must have been possible at all times through the prisoners themselves.

4. a. There were exceptions in the treatment of the Russian prisoners of war, but only insofar as they were expressly ordered.

b. At about the end of September, or the beginning of October 1941, before the arrival of the first Russian prisoners of war in the territory of Military District XII, the decree of the OKW, dated 8 September 1941, (NO-3417, Pros. Ex. 363)* concerning

* Document reproduced earlier in this section.

the treatment of Russian prisoners of war was announced orally—and also transmitted in written form—at one of the above-mentioned meetings of the commanders of prisoners of war. General Reinecke spoke first. But he had only spoken a few general, introductory sentences when he was called away, as far as I remember. Then Colonel Breyer spoke for him, limiting himself essentially to the order. At any rate, he did not go beyond the purely factual contents of the order. He did not speak sharply himself, nor did he demand such behavior from those present in their execution of the order, which also would not have been in keeping with his general attitude. I remember that General Reinecke remarked later that he did not have to announce his own opinion, but that of the Fuehrer, thus informing us of Hitler's attitude to the prisoners of war. There was another conference of the commanders 6 or 8 weeks later in which a basic change in regard to the treatment of the Russian prisoners of war was announced, with the intention of including the Russian prisoners of war in the labor program.

To describe this change I will quote the remark General Reinecke made in that respect, as I remember it. He said that the Reich Marshal demanded that the Russian prisoners of war be treated like raw eggs from now on!

c. The condition of the first Russian prisoners of war who arrived in my territory in about the first half of October 1941, was simply terrible and unworthy of man; they were totally starved. There were about 4,000 men. Mortality was about 15 to 20 percent. These were people who came from the first battles of the war in the East. The condition of those arriving later was better. Military District XII immediately issued special directions concerning better food (so-called feeding-up) and medical care. Later general directives of this sort were issued by OKW/General Armed Forces Office. At the end of December 1941, the condition of the Russian prisoners of war was normal, generally speaking.

d. The German guards were forbidden to mishandle Russian prisoners of war, or to use sticks or whips at all. Naturally they had to make use of their arms in cases of insubordination and flight. In general, the German guards had pity on the starved Russians. On the other hand, the Russian camp police, who were responsible for order in their own ranks, were rough. I myself saw a column of Russian prisoners of war on the march, in which two men were bleeding from head wounds. I stopped immediately and ascertained the facts.

It was a case of maltreatment of the Russians by their own compatriots who were assigned as camp police. I immediately

called the German in charge to account and informed him that I would have him confined immediately in case of a repetition. On this occasion I issued strict instructions to the PW main camp commandants.

e. Concerning the segregation of Russian prisoners of war, I can state the following—I happened to be in the Limburg camp when a segregation of this kind was made in my district. The commission making the segregation was composed of three or four men in civilian clothes. Three or four Russian prisoners in uniform who spoke German and were probably Jews stood by. Then the prisoners of war were led past, one after another, whereby these Jews named to the commission those who were politically suspected. Thereupon followed an interrogation during which the accusations were examined. This segregation was a second screening of the afore-mentioned first 4,000 prisoners of war, all of whom were brought to Limburg. Therefore the number of the segregated men probably amounted to only 20 or 30. At all events, two trucks were sufficient for their transport, inclusive of guards. The Higher SS Leader Roesener (Rhine sector) suggested that I have the segregated prisoners of war transported to Weimar by members of the armed forces. I declined this point blank. It was not the task of the armed forces to carry out these transportations. No orders of this kind had been given. Later on the segregations were discontinued.

It seemed to me to be quite reasonable that the commissars, who were not soldiers at all, were segregated, and that the German authorities wanted to have them in a separate camp for reasons of political security. This was not extraordinary, there were for instance camps for Mohammedans, Ukrainians, and the like. I only learned the truth about these things after the collapse, namely through the Nuernberg trials.

During the joint meetings of the commanders of prisoners of war which took place regularly, no remark was made, either by people from the General Armed Forces Office or any of the commanders, which would have admitted the conclusion that the segregated Russians were executed by the SS. In view of the basic attitude of the commanders at that time, particularly towards such matters and to the Party, if such things had become known, it would certainly have led to violent discussions and would have had official repercussions.

5. High ranking foreign officers who were lodged during the war as prisoners in Military District XII, expressed to me on their own initiative, after their return to their native countries, their thanks for the good treatment they had been given during their captivity. I am in possession of letters from the Dutch Admiral

von der Stadt, from the French Division General Keller, from General Bernard, senior camp inmate of Officer PW Camp XII A, Mainz, from the present French Military Governor in Calw (Wuerttemberg), Frénot.

In general, I should like to state that in those cases where prisoners of war were treated badly the Party's agitation against the PW's is to blame. With the long duration of the war, the Party meddled more and more with PW affairs. This resulted in continuous friction, in which we did not have sufficient backing in consequence of Keitel's attitude. But particularly because of this, the majority of the officers and noncommissioned officers protected the PW's and executed unintelligible orders of Hitler and Keitel in compliance with duty and honor.

I have carefully read the above affidavit and signed it personally. I have made the necessary corrections and countersigned same with my initials. I herewith declare in lieu of oath that all facts stated by me in this affidavit, consisting of 9 pages, correspond to the whole truth to the best of my knowledge and belief.

[Signed] REINHARD VON WESTREM

EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS REINHARD VON WESTREM¹

MR. DOBBS: I understand there is one affiant here for cross-examination.

PRESIDING JUDGE YOUNG: On which one of the defendants?

MR. DOBBS: Again in the case of Reinecke.

PRESIDING JUDGE YOUNG: You have a witness here then on an angle of the Reinecke case?

MR. DOBBS: Yes. He gave a defense affidavit and I would like to cross-examine him.

JUDGE HALE: What's the number of that affidavit or exhibit so we can get it, please?

MR. DOBBS: In this new instance, sir?

JUDGE HALE: The one you propose to cross-examine about an affidavit. We would like to get the affidavit he made, so that we may follow it.

MR. DOBBS: It is Defense Document Reinecke 120, bearing the same exhibit number.² The affiant's name is Reinhard von Westrem.

PRESIDING JUDGE YOUNG: You may call the witness.

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¹ Complete testimony is recorded in mimeographed transcript, 23 July 1948, pp. 8390-8408.

² Cf. preceding document.

CROSS-EXAMINATION

* * * * *

MR. DOBBS: General, there's a question that seems to be disputed around here. Maybe you can answer it for me. Did General Reinecke have anything at all to do with prisoner of war affairs?

WITNESS VON WESTREM: General Reinecke was the head of the General Armed Forces Office to which prisoner of war matters were subordinate. General Reinecke himself was subordinate to the Chief of the Army Command [Chef der Heeresleitung] or to Keitel.

Q. I noticed in your affidavit that you pointed out that Reinecke had no disciplinary power over the commanders of prisoners of war, etc. Well, how is it then, if he didn't have these powers to issue orders or to exercise disciplinary measures against the commanders of prisoners of war, can we say that he was concerned with prisoner of war matters?

A. General Reinecke had no authority in disciplinary respects, the commanders of prisoners of war were subordinate to the military district commanders.

Q. Did you feel that the OKW/General Armed Forces Office in Berlin was the head office for prisoner of war matters?

A. I am of the opinion that the OKW/General Armed Forces Office was the agency charged with handling prisoner of war matters.

Q. Do you recall telling me at one time that the General Armed Forces Office was one of the controls from above?

A. I beg your pardon. I didn't quite get you. I allegedly said that the General Armed Forces Office had exercised the control? Could you please repeat your question?

Q. Yes, I will. As a matter of fact, I don't think you told that to me. I think it appears in this affidavit on page 57 in the English and page 4 of the original. It says: "The controls from above—OKW, commanders of prisoners of war, and commander of the camps." The General Armed Forces Office was a control from above, isn't that so?

A. Yes. General Armed Forces Office, that is, the Department of Prisoners of War, did use extensively its right to control the prisoners of war, the camps, and also the work details. That was done in the first place by General Reinecke himself, who visited me twice, then by the inspector of prisoner of war matters who, on behalf of the General Armed Forces Office, was constantly traveling around. It was also done by individual officers on the staff of the General Armed Forces Offices who, by surprise, came to visit labor detachments and prisoner of war camps.

Q. General Westrem, when you looked for matters to be decided on a policy level concerning prisoners of war, where did such a decision come from?

A. I don't know who made the decisions in Berlin. The agency which communicated to us the decisions made in Berlin was the General Armed Forces Office, Department for Prisoners of War.

Q. Would I be correct in saying that for all practical purposes the chief of the General Armed Forces Office was the boss of prisoner of war matters?

A. Hitler was the highest authority in all matters, and everything which happened in this war, including prisoner of war matters, sprang from Hitler, I would also say partly from the caprices of Hitler, and that was so dominant that, unfortunately, the top authorities were not in a position always to check these erratic decisions of Hitler.

Q. General, do you think that there was any practical distinction between a directive and an order?

A. For a soldier, every directive is an order. It would be rebellious to make a distinction between a directive and an order.

* * * * *

EXAMINATION

JUDGE HARDING: Witness, it appears that you were commander of certain prisoner of war camps and also commander of prisoners of war in Military District XII, as I understand your various capacities. Is that correct?

WITNESS VON WESTREM: I am afraid I haven't quite understood the question, Your Honor. [Question repeated by interpreter] Yes. That is correct.

Q. Now, in those various capacities, if you received a directive from the General Armed Forces Office, could you disobey such a directive?

A. The order had to be obeyed of course, but the way in which it was obeyed, this was left to one's own discretion.

Q. That is, there might be certain latitude in certain cases, as I understand it?

A. Yes, that existed. Common sense would dictate what one should do.

Q. But you were supposed to and responsible for obeying that directive?

A. I never received an order which demanded that I or any of my subordinates should commit a crime. If any of the orders had asked us to commit a crime, we would have been able to disobey it on the basis of the service manual.

Q. Did such orders or directives come to you directly from the

General Armed Forces Office or did they have to go through some intermediary channel?

A. That differed, Your Honor. Most orders came to us through service channels via the Military District Headquarters. Those were the orders of which the commanding general had to have knowledge. However, if they were orders of a minor importance and mainly concerned administrative matters, then I think it may have happened that we received them directly from the General Armed Forces Office, Prisoner of War Department.

Q. Normally an order of the General Armed Forces Office was transmitted to you through certain official channels?

A. Yes, via the Military District Headquarters.

Q. But when it reached you it was still an order of the General Armed Forces Office, was it not?

A. No. In such a case it wasn't an order from the General Armed Forces Office but an order from the army command and the General Armed Forces Office was only the executive office.

Q. Well, I understand that. But as it came from the General Armed Forces Office it was transmitted to you through channels without modification?

A. The Military District Headquarters did not effect any modifications. The order would come from Berlin from the General Armed Forces Office and would be transmitted to us, as it stood, from the military district headquarters.

JUDGE HARDING: That's all. Thank you.

JUDGE HALE: May I ask the witness this? General, did any of the officials of the Party ever bring any pressure to bear upon you, regarding your treatment of the prisoners of war under your jurisdiction?

WITNESS VON WESTREM: My authority over prisoners of war in Military District XII comprised the territory of 4 Gauleitungen [Party districts] and all those 4 Gau administrations in increasing manner pressed us because they thought we treated prisoners of war too humanely. The Party and all the organs belonging to it considered the Geneva Agreement a red flag and they would either have us consider prisoners of war as criminal prisoners than as war prisoners and honorable prisoners. For instance, the Gauleiter [Party district leader] asked me to come and see him and he would then reproach me to the effect that prisoners of war were treated too well in the country at the farms where they were working. For instance, if they had to work for a farmer who was at the front they would be allowed to have their meals together with the wife of the farmer. For instance, the Gauleiter also told me one day, "I have found out that one prisoner of war living on a farm was given a quilted blanket to sleep under and

that doesn't seem correct." So that is the kind of reproaches that we heard. I answered him that if they could give me a different blanket I would send it to him, but probably the farmer's wife only had a quilted blanket to give the prisoner and hadn't got anything else. Other difficulties always arose from the religious care. For instance, the Gauleiter did not want us to allow the prisoners to visit churches. The Gauleiter, Sprenger of Frankfurt, for instance, had prohibited that Catholic religious services were given to prisoners of war because no German mother could be expected to pray in a church where the enemies had also received their religious service. That shows the kind of petty reproach that we were always hearing from Party organs.

Q. Do you know whether or not this Party intervention also extended to the AWA?

A. No. I don't know that. All I know is that we in subordinate position were under the impression that we had to defend ourselves against the Party interference. We were convinced that Keitel had forsaken us.

Q. Did General Reinecke ever make any protest against the intervention of the Party in the administration of his affairs?

A. No. General Reinecke—anyway I don't know about it.

JUDGE HALE: That's all.

* * * * *

TRANSLATION OF DOCUMENT VON ROQUES 24
VON ROQUES DEFENSE EXHIBIT 28

AFFIDAVIT OF HANS VON TETTAU, 30 APRIL 1948

I, Hans von Tettau, born on 30 November 1888, residing in Rheydt/Rhineland, Hindenburgwall 50, Lieutenant General of the Infantry (ret.), have been warned that I make myself liable to punishment by rendering a false affidavit. I declare in lieu of oath that my statement is true and was made to be submitted in evidence to the American Military Tribunal V, in Case No. 12, at the Palace of Justice in Nuernberg, **Germany**.

1. From 16 March 1940 onwards, I was commander of the 24th Infantry Division, which in 1941, was employed in the area of Army Group South on the eastern front in Russia. It was directly subordinated to the Army Group as reserve, after the fighting in the so-called Kiev pocket was over.

2. In September-October 1941, my division was withdrawn from this area of operation. It was to be committed in the Crimea. The transfer was to be carried out on foot from the region of Kremenchug to the Crimea. The order for this march was re-

ceived by the division from Army Group South. The Army Group also attached with it an order to transport on foot to the rear Russian prisoners of war who, during the battle of the Dnepr bend were captured in very great numbers. During the transfer period my division remained directly subordinated to the Army Group. Considering the limited means of communication then available on the eastern front, it is quite possible that reports made by my division during that time went via the Commander of the Army Group Rear Area or the commander of an army rear area to Army Group South. This happened merely for technical reasons, but does not prove the subordination of my division to any of these commanders.

3. In regard to the transport of these prisoners of war to the rear I can say the following:

As far as I remember, my division had to transport about 200,000 men. The majority of the prisoners were already in a very poor physical condition at the time of capture. Many of the Russian units had already participated in the heavy fighting at the start of the war and in the long retreats, which tends to worsen the condition of any troops, as experience has shown. In addition, the Russian soldiers had fought to the utmost during the pocket battles [Kesselschlachten]. The fighting lasted long and was extremely severe. The Russian units were surrounded on all sides, so that the supply of clothing, food, and medical equipment was held up. All these circumstances contributed to the poor physical condition in which the Russian soldiers were found when captured.

My division did everything humanly possible to relieve the plight of the prisoners. The whole engineer battalion was motorized and sent ahead of the marching columns, in order to prepare proper quarters. Supplies for the prisoners were organized by sending motorized columns of the division with foodstuffs ahead into the villages through which the march was to go. There the food was prepared by the civilian population and distributed to the prisoners. Cooking facilities were also installed in the camps, especially for preparing drinks.

There were, of course, many more or less seriously wounded among the prisoners. A special camp was set up for them. The daily march, in consideration of the condition of the prisoners, was fixed at 20 to 25 kilometers.

Furthermore long rest periods were ordered on the way. Prior to each march, Russian and German medical personnel ascertained who was not capable of marching. If possible these people followed behind in horse-drawn columns. As far as this was not possible, they were retained under guard and later brought into collection camps for sick prisoners. There many died of exhaus-

tion and wounds, which was unavoidable in spite of the use of all available means.

With the aid of interpreters it was properly announced that in cases of attempted escape, which usually occurred during the rest periods thoughtfully provided, weapons would be used in accordance with the regulations. Nevertheless attempts to flee were made frequently due to the extended marching columns and large resting areas. On such occasions prisoners were shot by the legal use of arms.

I personally made daily motor trips along the marching columns and received reports from the commanding officers. I also inspected the camps before they were occupied and ordered additional improvements. On my inspection trips the question of those unable to march never came up because this was settled basically in advance. I once more refer to the fact that each marching column had horse-drawn vehicles for those unable to march, and that, as far as was possible, those unable to march were received into special collection camps for the sick. These measures aimed at separating in advance those unable to march, so that disturbances and difficulties on the way should be avoided. I know nothing about shootings of prisoners of war unable to march. If actually such shootings occurred then it was a case of excesses by individual guards acting against the general rules as well as against specific instructions issued by me for the special care of those unable to march. I would have intervened if I had known of such excesses.

If, a report of my division quoted in Document NOKW-1615, Prosecution Exhibit 257* states: "Due to shootings and exhaustion already more than 1,000 dead" then this does not mean that exhausted prisoners were shot. This sentence must be taken in connection with the preceding one, in which there is mention of disobedience and flight attempts by prisoners of war. The shootings, therefore, refer to disobedience and flight attempts, during which arms had to be used. As a matter of fact nothing can be gained from this report about how many of the dead died from exhaustion and how many had to be shot for the reasons mentioned. One must realize that the number of prisoners was 200,000 so that the figure mentioned is not excessively high, considering the condition of the prisoners in respect to health.

4. My division did not take any part in the partisan fighting within the Army Group Rear Area on a large scale during the march through this area. However, it is possible that parts of the division engaged in operations against partisans during the

* Document reproduced above in this section.

transfer march to the Crimea, when these operations took place by chance in the areas passed on the march.

[Signed] HANS VON TETTAU

EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS
KARL SCHALL*

DIRECT EXAMINATION

DR. TIPP (counsel for defendant von Roques): Witness, will you please state your full name?

WITNESS KARL SCHALL: My name is Karl Schall.

Q. How old are you?

A. Sixty-two years.

Q. What was your last rank in the German armed forces?

A. The rank of colonel.

Q. What is your profession?

A. I am a professional soldier, that is, originally. After the First World War, I voluntarily quit the service and from 1920, until 1933, I was working in industry. My last position was authorized manager of a large machine factory. In 1933, during the economic crisis of the time, I rejoined the armed forces upon the request of former comrades.

Q. What assignments were you given during the last war?

A. First I was commander of Military District Sub-Area [Wehrbezirk] Stuttgart No. 2. In 1940, I was assigned to a newly activated division on the Upper Rhine as First General Staff Officer. As First General Staff Officer, I participated in the attack across the Rhine at Breisach. After the disbandment of this division, I was transferred to the headquarters of Army Group A, as a so-called "Leader of the Home Staff"; Army Group A, under Field Marshal von Rundstedt, was located at the time in St. Germain, near Paris.

Q. What was your sphere of work?

A. In case of an invasion of Great Britain, for which at that time certain preparations had been ordered, the Home Staff attached to Army Group A was to secure the supply for this invasion after the army group headquarters were transferred to the British Isles. After the preparations for the invasion of Great Britain had been called off, I was transferred as, Second General Staff Officer to the staff of the Army Group Command.

Q. You said previously that the headquarters of Army Group A was in the surroundings of Paris. Did the Army Group remain in this vicinity or was it transferred while you were on its staff?

* Complete testimony is recorded in the mimeographed transcript, 1 June 1948, pp. 5023-5033.

A. The Army Group Headquarters remained there for some time, until the middle of April 1941. From the middle of April, the staff was gradually transferred to Breslau. It was first called "Working Staff Silesia." When the camouflage was dropped, the new name of Army Group South was adopted.

* * * * *

Q. And now a special question regarding prisoner of war matters. Witness, in this connection, I will put a document to you. It is NOKW-2423, Prosecution Exhibit 244. In this document you will find an order by the High Command of the Army, that is, from the Generalquartiermeister section of the High Command of the Army, dated 24 July 1941. In this order the classification of prisoners of war in certain camps is ordered to take place according to certain aspects. Can you tell whether this classification of prisoners of war was also effected in the camps of the Army Group Rear Area and where this classification of prisoners of war took place?

A. The segregation of prisoners of war according to certain categories, for instance, separation of officers, noncommissioned officers, and enlisted men, or a screening according to political aspects, took place on principle during the interrogation of prisoners, that is, shortly after their capture, when they were still with the [field] armies. In the PW transient camps they were mainly classified according to their profession or occupations. Segregations were also effected in the camps, but the main classification was according to their occupation, because this classification naturally governed the assignment of prisoners of war for labor.

Q. Now a more general question. Do you remember suggestions from the staff of the Commander of Army Group South regarding the amelioration of the position of the prisoners of war which were transmitted to your staff?

A. Yes. I do. I do recall them. In the case of these suggestions, they were usually about the improvement of the position of the prisoners of war as regards housing, feeding, and sanitation. Regarding the feeding, the Army Group, could not effect any change on their own initiative because ration scales were uniformly laid down, at least for the whole of the eastern theater of war by the Generalquartiermeister section of the High Command of the Army. However, at a date which I can no longer recall, probably at the approach of winter, following an application from the Commander of the Army Group Rear Area, an increased ration scale was asked for by the command of the Army Group, which, as far as I recall, was approved by the High Command of the Army and put into effect.

* * * * *

Q. Colonel, we stopped at the problem of the suggestion which the commander of the rear area had given in order to improve the condition of the PW's, and the last thing you stated was that the suggestion for an increase in PW rations made by the Commander of the Rear Area to the Army Group, went on to the High Command of the Army and was later on approved. Now may I ask you to continue with your description of the condition?

A: The health of the PW's became worse as the cold weather set in, and also that of the German troops too. The typhus epidemic began to get out of hand, the number of deaths increased considerably, since there were not enough antityphus remedies available. They were also in no way adequate even for the German troops in order to bring the epidemic to an end. So the one possibility in this sphere to bring about an improvement of conditions was to separate the PW's into smaller camps, along the railways and along the roads, and to set up their accommodations there in smaller camps as near as possible to their places of work, and these camps had to be built by the PW's themselves. In these camps, of course, the accommodation and the hygienic welfare could be arranged much better and more thoroughly. At the same time the separation of the PW's into smaller detachments over a large area had to be regulated according to the needs for the employment of PW's and the work which came into the question; actually during the winter months an extensive improvement of the PW conditions was achieved in this way. Complete suppression of the typhus epidemic and the losses resulting from this was actually achieved, as was expected, when the warmer weather set in, that was in 1942.

* * * * *

3. KILLING OF "DISPERSED" SOLDIERS

PARTIAL TRANSLATION OF DOCUMENT NOKW-2538 PROSECUTION EXHIBIT 630

ORDERS TO SUBORDINATE UNITS, 21 AND 26 NOVEMBER 1941,
SIGNED BY DEFENDANT VON SALMUTH CONCERNING ANTIPARTI-
SAN WARFARE; AND IMPLEMENTATION INSTRUCTIONS THERETO
DISTRIBUTED BY SUBORDINATE 72d INFANTRY DIVISION,
28 NOVEMBER 1941

[Handwritten] Distributed: "K" 72d Division 150

[Stamp] Secret

Headquarters XXX Army Corps

Section Ia/Ic

No. 744/41 Secret

Corps Command Post, 21 November 1941

[Stamp] 72d Division

Received: 22 November 1941

Diary No. Ic 352/41 Secret

File No. 1434 Ic

Ia [Illegible initial]

Subject: Antipartisan warfare

* * * * *

Corps Headquarters orders the following:

* * * * *

6. The following is ordered pertaining to the control of the
civilian population:

* * * * *

b. Every civilian and also every dispersed soldier who is found
in the possession of arms in the area of the XXX Army Corps is
to be shot immediately. This instruction also is to be made known
to the population through the Ortskommandanturen [local head-
quarters].

* * * * *

The Commanding General

[Signed] v. SALMUTH

Distribution:

72d division down to all supply installations

Qu. for all Ortskommandanten [local commanders]

Rumanians (Motorized Regiment, Mountain Corps, Mountain
Brigade)

50th Division Corps and GHQ troops

Sonderkommandos 10a and 11a.

Headquarters XXX Army Corps
Section Ic No. 754/41 secret

[Stamp]

72d Division
Ic 357/41 secret
Received: 27 November 1941
File No.: 1449 Ic.
[Illegible initial]

[Stamp] Secret

Corps Command Post, 26 November 1941

Subject: Antipartisan warfare

1. The incidents which happened during the past few days, during which several German and Rumanian soldiers lost their lives from attacks by partisans, require the most severe counter-measures.

2. Therefore the following persons are to be taken as hostages immediately in all localities where troops are stationed:

a. Persons whose relatives are partisans.

b. Persons who are suspected being in contact with partisans.

c. Party members, Komsomols, party candidates.

d. Persons who were formerly members of the Party.

e. Persons, who, prior to the entry of the German and Rumanian troops held any official functions, i.e., village magistrates and deputies, members of the local Soviet, party officials of any kind, directors of state institutions of any kind, sanatoria, etc.

f. Persons who are found outside the closed villages without a special permit from the local commander.

3. These hostages are to be accommodated in concentration camps. Their food must be supplied by the inhabitants of the village.

4. Ten of these hostages are to be shot for each German and Rumanian soldier killed by partisans, and one hostage is to be shot for every German or Rumanian soldier wounded by partisans; if possible they are to be shot near the place where the German or Rumanian soldier was killed, and then they are to be left hanging at that place for 3 days.

5. The arrest of hostages in places where no troops are stationed (especially in the mountains) is to be arranged by the 1st Rumanian Mountain Brigade. For this purpose these places are to be temporarily occupied by troops.

FOR CORPS HEADQUARTERS:

The Chief of Staff
[Signed] BOTSCH

Distribution : Only on the draft

F

[Handwritten] Distribution : "K"

Division Command Post, 28 November 1941

[Stamp] Secret

72d Infantry Division
Section Ic No. 358/41 Secret

Subject: Antipartisan warfare

Reference: Corps Hq. XXX Army Corps Ic No. 754/41 secret
(72d Infantry Division Ic No. 357/41 secret
26 November 1941

In addition to the general provisions in the above corps order the following is ordered as supplement:

1. Concentration camps are to be set up in—

Kuchuk Muskomya by 124th Infantry Regiment
Alsu by the 1st Rumanian Mountain Infantry Regiment
Varnutka by 26th Infantry Regiment
Biyuk Muskomya by 105th Infantry Regiment
Haita (4 km west of Baidari) by the 14th Rumanian M.G.
Battalion
Baidari by 172d Artillery Regiment
Sachtik by 72d Engineer Battalion
Foros by 72d Antitank Battalion

2. Attached map tracing 1:100,000 shows the delineation of the areas from where the hostages for the concentration camps concerned are to be taken.

They are to be shot and hanged according to the key given in the above-mentioned order, if attacks by partisans occur in the area concerned.

3. The commanders who have to set up the concentration camp are also responsible for the antipartisan warfare. When the commanders are relieved, the tasks are taken over by the successors.

4. The commanders appoint Ortskommandanten in the above mentioned places and entrust them with the setting up of the concentration camps. Arrest of the hostages and instruction of the civilian population is carried out according to their orders.

* * * * *

6. If supply troops, during transfer or on the march, temporarily occupy villages which had so far not been occupied, the unit leader concerned is to arrest hostages immediately. When the

march is continued, these hostages are to be taken along and to be handed over to the Ortskommandantur of the nearest place in which troops are permanently stationed.

* * * * *

Supplement—As Ortskommandanten, officers of those units are to be selected, which remain permanently in the village concerned, even after the infantry regiments are relieved.

1 enclosure

[Signed] MATTENKLOTT

PARTIAL TRANSLATION OF DOCUMENT NOKW-1906
PROSECUTION EXHIBIT 247

LETTER FROM XXX ARMY CORPS (COMMANDED BY DEFENDANT VON SALMUTH) TO SUBORDINATE UNITS, 7 AUGUST 1941, TRANSCRIBING EXTRACTS FROM ARMY HIGH COMMAND REGULATION CONCERNING TREATMENT OF ENEMY CIVILIANS AND RUSSIAN PRISONERS OF WAR, 25 JULY 1941

War Diary

[Handwritten] Enclosure 77

Corps Headquarters, 7 August 1941

Corps Headquarters XXX Army Corps
Quartiermeister No. 331/41 Secret

Secret

The following copy forwarded for your information and guidance.

The army is preparing and will shortly distribute posters ordering dispersed Russian soldiers still roving in the rear area in uniform or civilian clothes to report to the nearest German armed forces office.

FOR CORPS HEADQUARTERS:

The Chief of the General Staff

BY ORDER:

[Illegible signature]

Major, GSC

Distribution:

Down to battalions and on the premises.

Secret

Copy of extracts from the regulation High Command of the Army, general for special missions with the Commander in Chief of the Army, file No. 453, group legal affairs No. 1332/41 secret, 25 July 1941.

Subject: Treatment of enemy civilians and Russian prisoners of war

The great expanse of the areas of operation in the East, and the cunning and peculiar character of the Bolshevik enemy, call for especially extensive and effective measures from the very beginning—particularly in the purely Russian territories—for the control of the conquered territories and the exploitation of the country.

It has become known, that the requisite harshness has not been applied everywhere. This is partly due to the insufficient instruction of newly assigned and committed authorities and troops. The change of offices must in no circumstances interrupt or jeopardize the mission.

The Commander in Chief of the Army has therefore ordered that attention be emphatically drawn once again to the following aspects:

The guiding principle in every action and for all measures to be taken must be the idea of absolute security for the German soldier.

I. *Treatment of enemy civilians*

The Russian always has been used to harsh and ruthless action by those in authority. The necessary *speedy* pacification of the country can be achieved only if every mere *threat* from the enemy civilian population is ruthlessly stopped. Any leniency and softness is weakness and means danger.

The proposed commitment of *partisan detachments* in our own rear area, the call for the *formation of bands* among youths, and the whole insidious actions of the supporters of the Jewish-Bolshevik system indicate that guerrilla warfare can be expected to revive even in the *areas hitherto quiet*. Attacks and activities on the part of the enemy population directed particularly against individual soldiers, such as messengers, installations in the rear, mopping-up detachments, resistance, destruction of historic buildings, blowing up of bridges, damaging of main traffic routes, and other acts of sabotage will ensue.

Attacks and all kinds of *acts of violence* against persons and objects, as well as all *attempts*, are to be ruthlessly suppressed by use of arms until the enemy is destroyed.

In cases of *passive resistance* or road blocks, shootings, raids, or other acts of sabotage where the *culprits cannot be determined at once* and liquidated in the manner already ordered, *collective coercive measures* are to be carried out without delay by order of an officer not below the rank of a battalion commander. It is specifically pointed out that a previous arrest of hostages for *future* offenses is not necessary. The population is held responsible for order in their areas even without special previous announcement and arrest.

Attacks and assaults on indigenous inhabitants assigned by us to work (for instance road construction, agriculture, trades, factories), and on supervising personnel, constitute attacks on the occupation forces and are to be punished as such.

Dispersed Russian soldiers who are still roving about in the rear area in uniform or civilian clothes and who, individually or by forming bands might become a danger to the pacified country, are to be ordered by public announcement (posters, radio) to report immediately to the nearest German armed forces office. If they fail to comply, they are to be considered guerrillas as from a certain date, to be fixed in each area, and are to be treated as such.

Any *encouragement* or aid to partisans, dispersed persons, etc., on the part of the civilian population is to be punished as guerrilla activity in the same manner.

Suspected elements who, although they cannot be proved guilty of a serious crime, seem dangerous because of their *opinions* and behavior are to be handed over to the Einsatzgruppen or the Kommandos of the Security Police (Security Service). The moving about of civilians without travel authorization must be stopped.

Order and pacification in an area is achieved most quickly and surely if it is possible to get the civilian inhabitants to *work*. Therefore, all possibilities are to be utilized and all measures to this effect are to be emphatically supported.

Every commander and commandant—down to the last Ortskommandant—must be quite clear in his own mind that these are *acute* matters, which require the speediest and most energetic action in every case. He must feel *personally* responsible for the complete execution of the requisite measures.

II. *Supervision of prisoners of war*

The diligent and obedient prisoner of war is to be treated decently. Anyone violating the regulations, however, is to be punished according to his offense.

It is in accordance with the prestige and the dignity of the German Army, for every German soldier to keep the necessary

distance from and that bearing towards Russian prisoners of war which is in keeping with animosity and inhuman brutality of the Russians during the fighting.

Any leniency or even fraternization is to be punished most severely. The feeling of pride and superiority must be evident at all times.

The regulations of 17 January 1936, concerning the *use of arms* on the part of the armed forces can only apply with limitations, since they are based on generally peaceful conditions during intervention inside Germany. Where it is necessary to put down disobedience, rebellion, etc., arms are to be used *immediately*. In particular, escaping prisoners of war are to be fired upon *immediately* without previous warning. Any belated use of arms may be dangerous. On the other hand any arbitrary action is forbidden.

The Chief of the High Command of the Army expects these directives to suffice to bring home most emphatically the significance of the tasks to all authorities.

BY ORDER:

Certified copy:

Signed: MUELLER

[Signed] PALM

1st Lieutenant

EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS
FRANZ MATTENKLOTT*

DIRECT EXAMINATION

DR. GOLLNICK (counsel for defendant von Salmuth): General, please state your full name for the Tribunal.

WITNESS MATTENKLOTT: Franz MattenkloTT, M-a-t-t-e-n-k-l-o-t-t.

Q. When were you born?

A. On 19 November 1884.

Q. What are you, by profession, and what was your last military rank?

A. I am a professional officer, lieutenant general of the infantry.

Q. How long have you known General von Salmuth?

A. From the years 1932 and 1933, when General von Salmuth was Chief of the General Staff [of the 2d Infantry Division] in Stettin.

Q. When and in what capacity were you subordinate to General von Salmuth during the Second World War?

* Complete testimony is recorded in mimeographed transcript, 19 May 1948, pp. 4233-4274.

A. During the Second World War, I was subordinate to General von Salmuth in my position as divisional commander of the 72d Infantry Division from 8 September 1941 onward, until 15 December 1941, altogether three months.

Q. I will now put to you Document NOKW-2538, Prosecution Exhibit, 630,* and I should like to ask you to have a look at that document and to tell the court what sort of a document it is.

A. This is a document referring to antipartisan fighting. The orders which are contained therein were not new to us because from the time of the First World War we had had certain experiences in the Pripet marshes so that I would feel inclined to assume that these orders were taken over in substance and meaning from the time of the First World War.

Q. Were the measures set down in this order against the partisans necessary and justified?

A. I consider that these measures were necessary and justified. The troops welcomed them. They now had something tangible to go by and they could act accordingly.

Q. What sort of precautionary measures were provided in order to finish the partisan fighting without bloodshed? If you would perhaps look at paragraph 5a, g, and h, you might tell us something.

A. Local commanders were appointed in all localities who were responsible for the antipartisan fighting being carried out in an orderly manner. In addition there were the troops commanders who were mainly concerned with the actual fighting.

Q. What is stated in 5a, if you would tell us, in 5a, g, and h?

A. 5a, g, and h?

Q. Yes.

A. The population was being called upon to report the partisans bands, in addition they were to inform the partisans to report voluntarily to the German authorities, and to deliver up their arms and knives. It was even announced that rewards would be given to anybody making such a report. Moreover, the provisions concerning antipartisan fighting were publicly announced by way of posters and by way of announcements to the mayor. The army appointed patrols and guards to the various localities, which moved around from one locality to another in mutual agreement.

Q. In paragraph 6b it is said that every civilian and dispersed soldier also, who was found in the area of the XXX Corps with arms was to be shot on the spot. Why was this provision made and to what extent was it militarily necessary?

A. A civilian during wartime behind the front line carrying arms is an impossibility. If such a person is found anywhere one

* Document reproduced in part earlier in this section.

has to assume that he has something evil in mind. I believe even a nonmilitary man knows that it is unthinkable and punishable in wartime for him to carry arms. To that extent therefore, I think these paragraphs were merely included in the order to recall to the population that the carrying of arms is a punishable offense. As far as the dispersed soldiers were concerned, the situation was somewhat similar. If I have lost my own unit and find myself behind the enemy lines, I can no longer fight as an honest soldier. Instead such a person must necessarily have something evil in mind because otherwise he would just throw away his weapons. Why should such a man, an isolated dispersed soldier behind the front lines need a weapon? He could only need it in order to harm our own, that is the German Armed Forces. That is why this order was given, in my opinion.

Q. Did you learn that pursuant to that provision such civilians or dispersed soldiers were in actual fact shot?

A. I did not hear of any such instance, at any rate not in the area of my division. I gained knowledge of no cases in which civilians were shot. Particularly in our area, in the Crimea, the population was certainly for the most part friendly to the Germans. There were German colonies there, where not one Russian word was spoken. Therefore, this measure can be regarded merely as a precautionary order.

Q. If I understand you correctly you mean by "precautionary" that it was a deterrent?

A. Yes.

Q. Was that order made sufficiently well known? You can find an answer to that in the order itself if you care to look at it.

A. Yes. That order was adequately announced by posters. That ought to be stated here somewhere.

Q. I believe under paragraph 5b [6b].

A. Yes. By posters exhibited for the benefit of the population, and I remember also that in conferences with the local village spokesmen this fact was announced.

* * * * *

EXAMINATION

JUDGE HALE: What is your definition of a dispersed soldier?

WITNESS MATTENKLOTT: A soldier is considered dispersed if he is behind the front lines and no longer in a position to serve his country, with his weapons; but has to act independently.

Q. Well, would any division that was cut off from the main body be counted as dispersed soldiers?

A. No.

Q. Well where does the line begin?

A. The practice of war has shown, after we experienced the dropping of parachutists from planes, that this particular point has not been clearly defined in international law because international law, as far as I know, was created at a time when behind the front lines hardly any soldiers could be found with their weapons in their hands. I believe it is very difficult to give a definition about such a term. I, for instance, would throw away my weapon if I found myself behind the front lines, if only for the sole reason that I did not want to become a partisan suspect and run the danger of being treated as a partisan, and thus give the enemy a reason for shooting me.

Q. Weren't there times when whole German armies were cut off and behind the Russian lines?

A. Well, I don't think it applies to that, because in every war there were fortresses that were cut off behind the front lines. This refers to a man who has no longer any chance of combating the enemy, and is strictly on his own initiative, and not under specific orders or control of his unit, and is not in a position to fight in a decent soldierly manner.

Q. Suppose a company were cut off, should he forthwith surrender his arms or try to fight back to his command?

A. No. A company is a closed unit and has to try to fight its way back to its main body, even if there is only a one percent chance.

Q. Suppose a detail under a sergeant is sent out and cut off behind the enemy lines, should it throw down its arms or try to rejoin its command?

A. No.

Q. No what?

A. They should keep their arms because they are to try and fight their way back to their own lines. If for any reason they believe that they can no longer fight, because the situation has become hopeless, then there is only one thing to do—hands up, abandon arms.

Q. Well, then, if a squad of five men, under a corporal, is sent out and is cut off behind the enemy lines, what is their duty? To try to rejoin their company or to lay down their arms?

A. No. They are not to throw down their arms since they are a unit, a patrol, and since they were sent off as such they are to exploit every possibility to find their way back through the enemy lines to their own lines.

Q. Well, we still don't have a very clear definition of what a dispersed soldier is. Does it apply to individuals?

A. I am afraid I cannot render a definition; that will have to be decided for each individual case separately, according to the

conditions of the case. Nobody, I believe, can give you a general definition.

Q. To pass to another subject. When did you first learn that the Security Service was being used as extermination groups against Jews, Communists, and other undesirable elements?

A. An order for the extermination of the Jews—

Q. No. My question was: When did you first learn the Security Service—just a minute—when did you first learn the Security Service was being used as extermination units against Jews, Communists, and other undesirable elements?

A. I learned of the existence of the Security Service when I was a prisoner. That certain people were to be eliminated. I know from the Commissar Order. About Jews I know nothing at all.

Q. And you knew nothing of the use of the Security Service as extermination groups, until the surrender when you were made prisoner?

A. No. I knew nothing, nothing.

* * * * *

4. THE COMMANDO ORDER

TRANSLATION OF DOCUMENT 498-PS PROSECUTION EXHIBIT 124

THE "COMMANDO ORDER", 18 OCTOBER 1942, SIGNED BY HITLER
WITH A NOTE BY THE DEFENDANT WARLIMONT CONCERNING
DISTRIBUTION OF ORDER

[Stamp] DRAFT

Fuehrer Headquarters, 18 October 1942

The Fuehrer

No. 003830/42 Top Secret
OKW/Armed Forces Operations Staff

23 copies—23d copy

[Stamp] Top Secret

1. For some time our enemies have been using in their warfare methods which are outside the international Geneva Convention. Especially brutal and treacherous is the behavior of the so-called commandos who, as is established, are partially recruited even from ex-convicts in enemy countries. Captured orders reveal that they are directed not only to shackle prisoners, but also to kill

defenseless prisoners whenever they believe that prisoners burden them or otherwise constitute a hindrance to the fulfillment of their mission. Finally, orders have been found in which the killing of prisoners has been required as a standard practice.

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

3. I therefore order:

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

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

5. This order does not apply to the treatment of any enemy soldier who, in the course of normal hostilities (large-scale offensive actions, landing operations, and airborne operations) are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after battles at sea, or enemy soldiers trying to save their lives by parachute after combat.

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

[Signed] ADOLF HITLER

Certified:

[Signed] KIPP

Major

The original decree (signed by the Fuehrer—copies 1 and 3) sent subsequently on 20 October 1942 to the General Staff of the Army and the High Command of the Air Force/Air Force Operations Staff. (original copies 4–11 destroyed)

Distribution:

General Staff of the Army, 1st copy
Chief of Army Armament and Commander of Replacement
Army, 2d copy
Naval High Command/Naval War Staff, 3d copy
Air Force High Command/Air Force Operations Staff, 4th copy
Armed Forces Commander Norway, 5th copy
Armed Forces Commander Netherlands, 6th copy
Armed Forces Commander Southeast, 7th copy
Armed Forces Commander Ostland, 8th copy
Armed Forces Commander Ukraine, 9th copy
Commander in Chief West, 10th copy
20th Mountain Army, 11th copy
Commander of German troops in Denmark, 12th copy
Commander in Chief South, 13th copy
Panzer Army Africa, 14th copy
German General with the Italian High Command, 15th copy
Reich Leader SS and Chief of German Police, and also Main
Office of the Security Police, 16th and 17th copies
OKW/General Armed Forces Office, 18th copy
Office Foreign Counter Intelligence, 19th copy
Armed Forces Legal Department, 20th copy
Armed Forces Propaganda, 21st copy
Armed Forces Operations Staff/Ops. (Army) War, (Navy)
Diary, (Air Force), 22d copy
Org. Qu. (also draft), 23d copy

Note on distribution—This order is not to be distributed beyond the battalions and equivalent staffs of the other branches of the armed forces. After having been noted, *copies distributed beyond the regiments* and the equivalent staffs of the other branches of the armed forces are *to be collected and destroyed*.

[Initial] W [Warlimont]

[Handwritten] On 25 February 43 (M 916) copy sent to Air Force High Command (Air Force Legal Dept.; on 5/12/43 copy to Qu (Admin. 2). On 5/4/44 copy to General Staff of the Army, Legal Dept.

1 Copy to Armed Forces Legal Dept. on 2/6

[Handwritten] Note—Upon telephone request from adjutant to the Reich Leader SS (Miss Fenske, Berghof 370) and after conference with Chief Qu. distribution of 8 copies to subordinated offices approved according to request, and with instruction that these offices must collect and destroy all copies which have been distributed further down, if any.

17/11 [Initials] Ki [Kipp]

TRANSLATION OF DOCUMENT 503-PS
PROSECUTION EXHIBIT 125

LETTER FROM OKW, 19 OCTOBER 1942, TRANSMITTING SUPPLEMENT
TO COMMANDO ORDER SIGNED BY HITLER

[Stamp] Top Secret

High Command of the Armed Forces
Armed Forces Operations Staff/Quartiermeister
No. 55 1781/42 Top Secret
Matter for Chiefs

Fuehrer Headquarters, 19 October 1942

22 copies—21st copy

[Stamp]

Top Secret

Through officer only

As an addition to the decree concerning the destruction of terror and sabotage units (*OKW/Armed Forces Operational Staff No. 003830/42 Top Secret, dated 18 October 1942*) a supplementary order of the Fuehrer is enclosed.

This order is intended for commanders only and must not under any circumstances fall into enemy hands.

The further distribution is to be limited accordingly by the receiving agencies.

The agencies named in the distribution list are held responsible for the return and destruction of all distributed copies of the order and extra copies made thereof.

BY ORDER:

The Chief of the High Command of the Armed Forces

[Signed] JODL

1 enclosure

(Distribution [list]—over)

Distribution:

General Staff of the Army, 1st copy
Chief of Army Armament and Commander of Replacement
Army, 2d copy
High Command of the Navy, Naval War Staff, 3d copy
High Command of the Air Force Operations Staff, 4th copy
Armed Forces Commander Norway, 5th copy
Armed Forces Commander the Netherlands, 6th copy
Armed Forces Commander the Southeast, 7th copy
Armed Forces Commander Ostland, 8th copy
Armed Forces Commander Ukraine, 9th copy
Commander in Chief West, 10th copy
20th Mountain Army, 11th copy
Commander Officer of German troops in Denmark, 12th copy
Commander in Chief South, 13th copy
Panzer Army Africa, 14th copy
German General with the Italian High Command, 15th copy
Reich Leader SS and Chief of German Police and Main Office
of the Security Police, 16th and 17th copies
High Command of the Armed Forces:
Office Foreign Counterintelligence, 18th copy
Armed Forces Legal Department, 19th copy
Armed Forces Propaganda, 20th copy
Armed Forces Operations Staff, Quartiermeister (draft, in
21st copy)
War Diary, 22d copy

[Stamp]

Top Secret

Through officer only

The Fuehrer and Supreme Commander of the Armed Forces

18 October 1942

I have been compelled to issue a strict order for the destruction of enemy sabotage troops and to declare noncompliance with this order severely punishable. I deem it necessary to announce to the competent commanding officers and commanders the reasons for this decree.

In this war as in no previous one, a method has been developed of destruction of communications behind the front, intimidation of the populace working for Germany, as well as the destruction of war-important industrial plants in territories which we have occupied.

In the East, as early as last winter this type of combat in the form of partisan warfare led to severe encroachments upon our fighting strength and cost the lives of numerous German soldiers,

railroad workers, members of the Organization Todt, the labor service, etc. It severely interfered with and sometimes delayed for days the transportation necessary for the maintenance of the fighting strength of the troops. By a successful continuation or perhaps even intensification of this form of warfare, a grave crisis might develop at one or another point along the front. Many measures against these cruel as well as insidious sabotage activities have failed, simply because the German officer and his soldiers were unaware of the great danger confronting them and, therefore, in individual cases did not act against these enemy groups as would have been necessary in order to help the forward echelons at the front and thereby the entire conduct of the war.

It was, therefore, to some extent necessary to organize special units in the East who mastered this danger, or to assign this task to special SS formations.

Only where the fight against this partisan nuisance was begun and executed with ruthless brutality were results achieved which eased the situation on the fighting front.

In all Eastern territories the war against the partisans is therefore a struggle for the absolute annihilation of one or the other side.

As soon as the realization of this fact becomes common knowledge among the troops, they will regularly be able to cope with these occurrences quickly; otherwise their efforts will achieve no decisive results and will become purposeless.

England and America have decided upon a similar kind of warfare even though under a different name. While the Russians attempt to put partisan troops behind our front via the land routes and only in exceptional cases use air transportation to land men and supplies, England and America use this method of warfare primarily by landing sabotage troops from submarines or pneumatic rubber boats, or by dropping parachute agents. Essentially, however, this form of warfare does not differ from the activities of the Russian partisans. For it is the task of these units—

1. To build up a general espionage service with the assistance of willing indigenous inhabitants.
2. To organize groups of terrorists and supply them with the necessary weapons and explosives.
3. To undertake sabotage activities which by the destruction of traffic installations not only continuously disrupt our communications, but also, when things become serious, make troop movements absolutely impossible and eliminate our communication system.

Finally, these units are to make attacks on war-important installations, in which, according to a scientifically worked out pro-

gram, they blow up key plants, thereby forcing whole industries into idleness.

The consequences of these activities are extraordinarily serious. I do not know whether every commander and officer is aware of the fact that the destruction of one single electric power plant, for instance, can deprive the air force of many thousands of tons of aluminum, thereby eliminating the construction of countless aircraft; these aircraft will be lacking at the front, and in this way serious damage will result to the homeland as well as bloody casualties to the fighting soldiers.

Yet this form of war is completely without danger for the adversary. Since he lands his sabotage troops in uniform and at the same time supplies them with civilian clothes, they can appear as soldiers or civilians according to need. While they themselves have orders ruthlessly to eliminate any German soldiers or even indigenous inhabitants who get in their way, they run no danger of suffering really serious losses in their operations, since at the worst, if they are caught, they can immediately surrender and thus as they think, theoretically fall under the provisions of the Geneva Convention. There is no doubt, however, that this is misuse in the worst form of the Geneva agreements, especially since some of these elements are even criminals liberated from prisons, who can rehabilitate themselves through these activities.

England and America will therefore always be able to find volunteers for this kind of warfare, as long as these volunteers can be rightly told that their life is not imperiled. At worst, all they have to do is to attack people, traffic installations, or other installations successfully, and upon being encountered by the enemy, to surrender.

If the German conduct of war is not to suffer grievous damage through these incidents, it must be made clear to the adversary that all sabotage units will be exterminated without exception to the last man.

This means that their chance of escaping with their lives is nil. Under no circumstances can it be permitted therefore that a dynamite, sabotage, or terrorist unit simply allows itself to be captured, expecting to be treated according to rules of the Geneva Convention. The unit must under all circumstances be ruthlessly exterminated.

The report on this subject appearing in the armed forces communique will briefly and laconically state that a sabotage, terror, or destruction unit has been encountered and exterminated to the last man.

I, therefore, expect the commanding officers of armies as well as individual commanding officers not only to realize the necessity

of taking such measures, but also to carry out this order with all energy. Officers and noncommissioned officers who fail through some weakness are to be reported without exception, or in certain circumstances—when there is danger in delay—to be called to strict account at once. The homeland as well as the fighting soldiers at the front has the right to expect that behind their backs the essentials of nourishment as well as the supply of war-important weapons and ammunition remain secure.

These are the reasons for the decree I have issued.

If it should become necessary, for reasons of interrogation, to spare one or two men temporarily, then they are to be shot immediately after interrogation.

[Signed] ADOLF HITLER

PARTIAL TRANSLATION OF DOCUMENT 1263-PS*
PROSECUTION EXHIBIT 122

TWO DRAFTS OF MEMORANDUM ON COMMANDO ORDER, 14 AND 15 OCTOBER 1942, SIGNED BY WARLIMONT, TRANSMITTING DRAFT OF COMMANDO ORDER AND TELETYPE MESSAGE FROM CANARIS' OFFICE, 10 OCTOBER 1942, ON SAME SUBJECT

[Page 5 of original document.]

14 October 1942

Armed Forces Operations Staff/Quartiermeister (Adm.)

Subject: Combating enemy sabotage troops

Note for an oral report

As ordered, a draft order concerning the combating of terror and sabotage units is submitted herewith. A counterdraft of the Office Foreign Counterintelligence is contained in the teletype of 10 October, with handwritten corrections made in accordance with the teletype of 13 October.

In agreement with the Chief of the Armed Forces Legal Department it is pointed out that the attached order can have repercussions which can obstruct our intentions as to the future conduct of the war.

Reasons—Sabotage has become an essential part of warfare in the age of total war. In this respect it is sufficient to point out

* See Nazi Conspiracy and Aggression, *op. cit. supra*, vol. Supp. A, pp. 362-367, for a more complete translation of document.

our own attitude. Proof can be gathered by the enemy from reports of our own propaganda companies.

Therefore, in agreement with the Chief of the Armed Forces Legal Department, the motion is made to hold a discussion at the Armed Forces Operations Staff, at which the Chief of the Office Foreign Counterintelligence, the representatives of Armed Forces Propaganda and Armed Forces Legal Department should take part in order to ascertain in a discussion to what extent the goal can be reached of fighting against the sabotage warfare of the enemy without considerably impairing our own effort. At the meeting, the points should be discussed which appear in the enclosure. Telephonic discussion is not feasible because the answers to the questions under discussion would permit conclusions about our future operational intentions. The Chief of Armed Forces Legal Department does not expect that anything will be gained by a preliminary discussion with the Office of Foreign Counterintelligence. To prevent enemy use of sabotage troops, the following questions must be clarified before an order is formulated:

1. Do we ourselves intend to use sabotage units only in the operational zone of the enemy, or also farther to the rear?

2. Who will commit more sabotage troops, the enemy or we?

3. Can we establish the principle: Sabotage troops do not use permissible means of combat; they are to be liquidated in combat without mercy?

4. Do we attach importance to arresting individual members of these troops first for interrogation by counterintelligence instead of killing them immediately?

[Pages 3 and 4 of original document.]

15 October 1942

Armed Forces Operations Staff/Quartiermeister (Adm.)

[Handwritten] Check distribution (WR and Abwehr)

Subject: Combating enemy sabotage troops

[Initial] W [Warlimont] 18/10
Disposed of 15/10

Note for an Oral Report

Following the radio announcement of 7 October 1942, WFSt asked the Office Foreign Counterintelligence and WR to suggest an order carrying it out.

The *suggestion* of the *Office Foreign Counterintelligence* is submitted as enclosure 1.

Position of Armed Forces Operations Staff.—The suggestion is not in accordance with the above-mentioned radio announcement and is too strongly influenced by the particular interests of the *Office Foreign Counterintelligence*, especially *Counterintelligence II*.

The Chief of Armed Forces Legal Department has expressed the opinion that the order should be drawn up so that our own interests, bearing in mind future operations, should be considered therein. In this way he wants to avoid repercussions which could obstruct our further intentions. Sabotage is an essential part of the conduct of war during total war; we ourselves have strongly developed this method of warfare.

[Handwritten] But the English need it far more. J. [Jodl]

To draw up such an order, however, it is necessary to *clarify preliminary questions*; he could approach these only in a personal conference, if possible together with the Chief of the *Office Foreign Counterintelligence* at the *Armed Forces Operational Staff*. A telephonic discussion was out of the question because of the necessary treatment of future intentions.

Only then could one explain to the troops which sabotage troops should be regarded as bandits.

Position of Armed Forces Operations Staff—The intention of liquidating in the future all terror and sabotage units has *already been made public over the radio*. Therefore, the only task of the *Armed Forces Operations Staff* is to issue *definite instructions* how the troops are to proceed against terror and sabotage units.

The question of the *publication* of this order, which was raised by *Armed Forces Legal Department* needs no further discussion since the publication of the principle in the *Armed Forces communique* of 7 October should be sufficient from the standpoint of its deterring effect.

Armed Forces Operations Staff therefore proposes the order as submitted in the enclosure 2.

[Signed] WARLIMONT

Enclosure 1

Copy of Extracts

From teletype KR
GWOKA 02822

10 October 1942, 1430 hours
Received: 10 October, 1625 hours

[Stamp] Top Secret

To Armed Forces Operations Staff

Subject: Treatment of British terror and sabotage troops

A. Members of terror and sabotage troops of the British Army who are found, contrary to the rules of warfare, without uniform or in German uniform will be treated as bandits. During battle or in flight, they are to be shot without mercy. If military necessity calls for their temporary arrest or if they fall into German hands outside of military operations, they are to be led at once before an officer for interrogation. Thereafter they are to be tried before a Standgericht [summary court martial].

[Handwritten by Jodl] No.

B. Uniformed members of terror and sabotage troops of the British Army who, in the opinion of the unit are guilty of dishonorable conduct or of activities contrary to international law, shall be put under separate arrest after their capture. Armed Forces Operations Staff has to be notified immediately about their behavior. Directives concerning their treatment will be issued by Armed Forces Operations Staff in agreement with Armed Forces Legal Department and the Office Foreign Counterintelligence.

[Handwritten] No good either. J. [Jodl]

OKW Office Foreign Counterintelligence
No. 00381/42 Top Secret
Foreign 1 G 1 b(5)

Enclosure 2

Fuehrer Headquarters, the October 1942

The Chief of the High Command of the Armed Forces

No. 00 42 top secret, Armed Forces Operations Staff/Quartiermeister (Adm.)

[Stamp] TOP SECRET

Copies
Copy

1. The *addendum to the** armed forces communique of 7 October 1942, announced that in future all terror and sabotage units of the British and of their associates who do not act like soldiers but like bandits will be ruthlessly exterminated in combat when and wherever they appear.

2. In future, an attitude *on the part of terror and sabotage units* contrary to the rules of war has *always* to be assumed if (outside the battlefield proper [crossed out in original] individual *attackers* as saboteurs (X) (commit acts deviating from the basic rules of war, such as murder or the destruction of valuable property [crossed out in original] thus placing themselves outside the laws of war.

3. In these cases the aggressors are to be annihilated *in combat or in flight* to the last man without mercy.

4. (XX) Confinement in PW camps *even temporarily* is prohibited.

5. This order is not to go down beyond army level; from there on, it is to be announced orally. The order has to be destroyed after its contents have been noted.

(X) *or agents, no matter whether soldiers or in whatever (not in [crossed out in original]) uniform carry out acts of violence or surprise raids which in the opinion of their captors deviate from the basic rules of warfare.*

4. (XX) *If military necessity demands the temporary arrest of individual participants, after military screening they are on principle to be handed over to the Security Service.*

* All words in italic in this document represent ink corrections made on the original document in Warlimont's handwriting, cf. Warlimont testimony in defense evidence in this section.

PARTIAL TRANSLATION OF DOCUMENT 523-PS
PROSECUTION EXHIBIT 123

DRAFT OF COMMANDO ORDER WITH HANDWRITTEN COMMENTS
BY JODL, OCTOBER 1942

Enclosure 2
[Handwritten] 1st Draft
(Armed Forces Operations Staff/Quartiermeister)

The Chief of the High Command of the Armed Forces
No. 00 /42 Top Secret
Armed Forces Operations Staff/Quartiermeister (Adm.)

Fuehrer Headquarters, -- October 1942

Copies
Copy

File under "Reprisals"

J. [Jodl]

1. The addendum to the armed forces communique of 7 October 1942, announced that in future all terror and sabotage units of the British and of their associates who do not act like soldiers but like bandits will be ruthlessly exterminated in combat (when and [crossed out in original]) wherever they appear.

2. In future, an attitude on the part of terror and sabotage units contrary to the rules of war is always to be assumed if individual attackers as saboteurs or agents, no matter whether soldiers or in whatever uniform, carry out acts of violence or surprise raids which (in the opinion of their captors [crossed out in original]) deviate from the basic rules of *open and honorable* warfare, thus placing themselves outside the laws of war. *In judging such cases, a strict standard is to be applied.* X*

3. In these cases the aggressors are to be annihilated in combat or in flight to the last man without mercy.

4. If military necessity demands the temporary arrest of individual participants, after military screening they are on principle to be handed over to the Security Service. Confinement in PW camps, even temporarily, is prohibited. XX

5. This order is not to go down beyond (army [crossed out in original]) *corps* level; from there on, it is to be announced orally.

* All words in italic on this reproduction appear on the original document in Jodl's handwriting, cf. Warlimont testimony in defense evidence below in this section.

The order has to be destroyed after its contents have been noted *and only to be kept by operational staffs of the Wehrmacht branches.* [Initial] W [Warlimont]

X *Especially as the publication of the OKW [order] dated about which the troops have to be instructed reveals the ruthless and brutal manner in which British troops have behaved toward defenseless German soldiers in every theater of war.*

XX *In these cases, everything possible must be done to prevent the arrest of such persons from becoming known to troops not directly involved, much less to the population.*

Distributed:

PARTIAL TRANSLATION OF DOCUMENT NOKW-1737
PROSECUTION EXHIBIT 126

COVERING LETTER FROM HIGH COMMAND OF THE ARMY, 21 OCTOBER 1942, DISTRIBUTING COMMANDO ORDER TO UNITS IN THE EAST

[Stamp] Top Secret

High Command of the Army
Army General Staff/Operations Section (Ia)
No. 6595/42 Top Secret

Headquarters, High Command of the Army, 21 October 1942

55 copies—10th copy

[Handwritten] taken care of

[Stamp] To Army Group B, Ia No. 3639, 42, Top Secret

Enclosed is forwarded an order from the Fuehrer concerning the destruction of terror and sabotage units (OKW/Armed Forces Operations Staff No. 003830/42, Top Secret, dated 18 October 1942).

The order is not to be distributed beyond battalion staff. After having been noted, the copies issued via regimental headquarters to lower echelons are to be collected and destroyed.

Headquarters of our allies are to be informed only *orally* about the order through the chiefs of the liaison staffs, according to instructions from the Army Group Commands.

BY ORDER:

[Signed] ZEITZLER

1 Enclosure.*

* Text of the Commando Order not reproduced here. See Document 498-PS, Pros. Ex. 124 (reproduced above in this section) for text.

Distribution:

Army Group A, 1st copy

with extra copies for—

Commander of the Crimea, 2d copy

17th Army, 3d copy

1st Panzer Army, 4th copy

Commander Army Group Area A, 5th copy

Army Group B, 6th copy

with extra copies for—

4th Panzer Army, 7th copy

6th Army, 8th copy

2d Army, 9th copy

Commander Army Group Area B, 10th copy [underlined by hand]

German General with the 2d Hungarian Army, 11th copy

German General with the 8th Italian Army, 12th copy

Chief of the Liaison Staff to the 3d Rumanian Army, 13th copy

Army Group Center, 14th copy

with extra copies for—

2d Panzer Army, 15th copy

4th Army, 16th copy

3d Panzer Army, 17th copy

9th Army, 18th copy

Group-General von der Chevallerie, 19th copy

Commander Army Group Area Center, 20th copy

Army Group North, 21st copy

with extra copies for—

16th Army, 22d copy

18th Army, 23d copy

Commander Army Group Area North, 24th copy

11th Army Command, 25th copy

Chief of the German Army Mission to Rumania, 26th copy

OKW/Armed Forces Operations Staff/Operations, 27th copy

High Command of the Army/Adjutant to the Chief of the Army General Staff, 28th copy

Oberquartiermeister IV, 29th copy

Central Section of the General Staff, 30th copy

Organization Section, 31st copy

Training Section, 32d copy

Section "Foreign Armies East", 33d copy

Chief of Transportation, 34th copy

Generalquartiermeister, 35th copy

Chief, Army Signal Communications, 36th copy

General for Special Missions at the Army High Command,
 37th copy
 Army Organization Section, 38th copy
 General of the Army with the Reich Marshal and Commander
 in Chief of the Air Force, 39th copy
 Operations Section/Chief, 40th copy
 I, 41st copy
 II, 42d copy
 III, 43d copy
 Ia, 44th copy
 Extra copies, 45th-55th copies

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-3482
 PROSECUTION REBUTTAL EXHIBIT 46

EXTRACT FROM WAR DIARY OF 3d PANZER ARMY (COMMANDER
 DEFENDANT REINHARDT), 18 NOVEMBER 1942, CONCERNING EXE-
 CUTION OF THE COMMANDO ORDER

War Diary No. 5 of the 3d Panzer Army for the period
 1 October 1942—18 January 1943

From 1 October 1942 until 18 January 1943 the 3d Panzer Army
 was subordinate to Army Group Center

The war diary was kept from 1 October 1942 until 18 January
 1943 by 1st Lt. Bader.

* * * * *

18 November 1942

* * * * *

1815 hours—*Telephone conversation Ia—Ia Army Group.*
 Various difficulties have arisen concerning the execution of the
 Fuehrer Order of 21 October, relative to the shooting of terrorists
 and groups of bandits. The Panzer army asks the army group
 to clarify above all, whether this order merely concerns terror
 groups landed by the British or whether it also applies to the
 bands in the occupied territory. In this connection, the army
 group takes the view that until an intended new OKW decree is
 published, all bandits are to be shot to death even if they wear
 uniforms. Bandits who voluntarily surrender without being
 forced to do so by their situation, will be treated as PW's. An
 order should be issued to the troops about this.

* * * * *

TRANSLATION OF DOCUMENT NOKW-3358
PROSECUTION REBUTTAL EXHIBIT 40

TELETYPE FROM 3d PANZER ARMY (COMMANDER DEFENDANT REINHARDT) TO SUBORDINATE UNITS, 19 NOVEMBER 1942, CONCERNING EXECUTION OF COMMANDO ORDER

[Stamp] Top Secret

Teletype to:

<i>IX Army Corps</i>	Transmitted 19/11	1748 hours
<i>XX Army Corps</i>	Transmitted 19/11	1815 hours
<i>XLVI Panzer Corps</i>	Transmitted 19/11	1715 hours
<i>Commander of Army Rear Area 590</i>	Transmitted 19/11	1940 hours

Subject: Treatment of bandits

Reference: 3d Panzer Army Ia No. 4706/42 Top Secret dated
26 October 1942

Until intended new regulation of OKW is published, bandits who surrender voluntarily without being forced by other circumstances, will be treated as prisoners of war. All other bandits, including the uniformed ones, will be shot.

This order will be destroyed after reading, this order will not be passed on in writing.

3d Panzer Army, Ia

No. 4706/42 Top Secret, II

19 November 1942

PARTIAL TRANSLATION OF DOCUMENT NOKW-2906
PROSECUTION EXHIBIT 1269

MEMORANDUM, 26 NOVEMBER 1942, SIGNED BY DEFENDANT WARLIMONT, CONCERNING THE DESTRUCTION OF THE COMMANDO ORDER, AND DRAFT INSTRUCTION TO THIS EFFECT,
28 NOVEMBER 1942

Armed Forces Operations Staff/Quartiermeister
(Administration)

26 November 1942

Urgent [Jodl's handwriting]

Note for an oral report

In consideration of the situation in the East, the Army General Staff deems necessary the destruction of all copies of the order concerning the treatment of so-called commando operations dated 18 October insofar as they were issued beyond army level and beyond staffs of other branches of the armed forces on the same level.

[Handwritten] Yes.

On other fronts also there is a danger of this order falling into the hands of the enemy. After a personal report by the Chief Armed Forces Operational Staff, to the Fuehrer the distribution at the time was especially ordered in accordance with the note to distribution list on page 3. A decision is requested.

[Signed] WARLIMONT

[Handwritten] The order is to be destroyed down to army level inclusive in the East and in Africa.

[Initial] J. [Jodl]

[Handwritten] In advance by phone on 27 November, 1930 hours, to Col. von Tippelskirch. [Illegible initial]

[Initial] W [Warlimont] 27/11 2200 hours

Priority teletype

28 November 1942

[Stamp] DRAFT

[Stamp] Top Secret

16 copies—1st copy

To:

1. Army General Staff
2. Navy High Command/Naval War Staff
3. Commander in Chief Air Force/Air Force Operational Staff
4. Armed Forces Commander Norway
5. Armed Forces Commander South East
6. 20th Mountain Army
7. Commander in Chief South
8. Panzer Army Africa

Reference: The Fuehrer No. 003830/42 Top Secret, OKW/Armed Forces Operations Staff dated 18 October 1942

Copies of the above-mentioned order issued in the East beyond army group level and beyond staffs of other branches of the armed forces on the same level are to be recalled and destroyed.

All copies with the German troops in Africa and in Finland are to be destroyed.

OKW/Armed Forces Operations Staff/Quartiermeister
(Administration)

No. 003830/42 top secret II

For information:

Chief Army Armament and Commander of Replacement Army,
2d copy

Armed Forces Commander Netherlands, 3d copy

Armed Forces Commander Ostland, 4th copy

Armed Forces Commander Ukraine, 5th copy

Commander in Chief West, 6th copy

Commander of German Troops in Denmark, 7th copy

German General with the Italian High Command, 8th copy

Reich Leader SS and Chief of the German Police, 9th copy

Simultaneously for Main Office Security Police, 10th copy

OKW/General Armed Forces, 11th copy

Office Foreign Counterintelligence, 12th copy

Armed Forces Legal Department, 13th copy

Armed Forces Propaganda Section, 14th copy

Armed Forces Operations Staff/Ops (Army) (Navy) (Air Force), War Diary, 15th copy

Organization, 16th copy

Quartiermeister (Simultaneous Teletype), 17th copy

* * * * *

TRANSLATION OF DOCUMENT NOKW-004
PROSECUTION EXHIBIT 149*

LETTER FROM CHIEF OF PRISONER OF WAR AFFAIRS TO ARMED
FORCES OPERATIONS STAFF, 18 MAY 1943, ON REPORTING DEATHS
OF MEMBERS OF ENEMY COMMANDO UNITS; AND ANSWER
THERETO, 25 MAY 1943, BY DEFENDANT WARLIMONT

[Stamp] Top Secret

Chief of Prisoners of War Affairs

18 May 1943

[Initial] W [Warlimont]

File No. 2 f 24.76 General (VIa)

No. 90/43 Top Secret

2 copies—1st copy

To Armed Forces Operations Staff
Quartiermeister (Administration)

[stamp]

OKW/Armed Forces Opera-
tions Staff

Courier Office

20 May 1943

No. 002406/43 Top Secret

Reference: Armed Forces Operations Staff No. 003830/42 Top
Secret dated 18 October 1942

Subject: Reports procedure concerning destruction of sabotage
units

The reference instruction regulates the treatment of enemy
commandos taken prisoner by German troops. Since even a tem-
porary detention of these troops under military guard (PW
camps) has been forbidden, they are not to be considered as PW's.

A decision is requested as to whether members of these enemy
commandos are to be considered as members of the enemy armed
forces killed in action—such as, for example, enemy airmen who
have been shot down—and a corresponding report made to the
enemy nation, according to international agreements, or whether
no report at all is to be made in these cases.

[Handwritten and crossed out]

[In my opinion the first-named procedure should be decided
upon.]

[Initial] K [Kipp]

[Signed] GRAEVENITZ

* Photographic reproductions of this document appear on pages 323 and 324.

[Stamp] Draft

Fuehrer Headquarters, 25 May 1943

Armed Forces Operations
Staff/Quartiermeister (IV)
No. 002406/43 Top Secret

[Stamp] Top Secret

2 copies—2d copy

To: Chief of Prisoners of War Affairs

Reference: Communication from the Chief of Prisoner of War
Affairs File No. 2 f 24. 76 General (VIa) No. 90/43
Top Secret dated 18/5/43

Subject: Reports procedure concerning destruction of sabotage
units

The order dated 18 September 1942 is based on the fact that we do not regard members of enemy sabotage units as soldiers, since they are really common criminals, and must be dealt with accordingly.

The Armed Forces Operations Staff considers it out of the question hereafter for saboteurs, treated in accordance with the Fuehrer's decree, to be recognized as soldiers which would be the case if their deaths were reported to the enemy nation in accordance with the regulations valid for enemy soldiers fallen in battle. Thus, the Armed Forces Operations Staff is of the opinion that no reports of deaths should be made at all.

A Fuehrer decree is in question here, therefore a decision in this matter does not rest with the Armed Forces Operations Staff. The Chief of PW Affairs must provide for the necessary decision directly through the Chief of the General Armed Forces Office and the Chief OKW.

BY ORDER:

[Initial] W [Warlimont]

27 May

TRANSLATION OF DOCUMENT 510-PS
PROSECUTION EXHIBIT 154

TELETYPE FROM DEFENDANT WARLIMONT TO COMMANDER IN
CHIEF SOUTHEAST, 26 FEBRUARY 1944, CONCERNING LANDING OF
BRITISH COMMANDOS IN DODECANESE ISLANDS

Armed Forces Operations Staff/Quartiermeister 2
(South/Southeast)

SSD—Teletype

26 February 1944

1 copy

[Stamp] Top Secret

To Commander in Chief Southeast, Ia

Reference: Decree of the Fuehrer No. 003830/42 Top Secret
OKW/Armed Forces Operations Staff, dated 18 Oc-
tober 1942

Subject: Landings of British commandos between 19 and/or
23 February on the Dodecanese Islands of Patmo
and Piscopi

On the occasion of the reported landings by English commandos
on Patmo on 19 February and on Piscopi on 23 February, refer-
ence is made once again to reference order.

[Initial] W [Warlimont]

OKW/Armed Forces Operations Staff/Quartiermeister 2
(South/Southeast)

Nr 002085/44 Top Secret

PARTIAL TRANSLATION OF DOCUMENT NOKW-227
PROSECUTION EXHIBIT 155

TELETYPE FROM DEFENDANT WARLIMONT TO COMMANDER IN CHIEF SOUTHEAST, 4 JUNE 1944, CONCERNING TWO PRISONERS CAPTURED ON THE ISLAND OF ALIMNIA, AND CORRESPONDING TELETYPE FROM COMMANDER IN CHIEF SOUTHEAST, 5 JUNE 1944, TO COUNTERINTELLIGENCE OFFICER, ARMY GROUP E

[Stamp]	[Stamp]
Teletype Station	Commander in Chief Southeast
HURX/FK	Army Group Command F (/)
Ref. 2093 D. No.	Ic/Counterintelligence Officer
Received: 1800, 4 June	No. 3687 Top Secret 4 June 1944 Enc
by haj through	Ic 03 05 07 D Ic/L zbV
6 HZPH	Counterintelligence AI AII
Transmitted:	AIII, State Police, Secret Field Police
Hrs on to through	
Remarks: to:	

[Stamp] Top Secret

Urgent GWASL 08365 4 June 1235 [hours]

To: CinC Southeast Ic Top Secret

Subject: British commandos at Alimnia

Reference: Your teletype No. 3687/44 Top Secret

3d copy dated 22 May 44:

Since details transmitted are sufficient for representations to the Turkish Government, according to information received from the Foreign Office, the British radio operator Carpenter and Greek sailor Lisgaris captured at Alimnia are no longer needed and may be released for special treatment according to the Fuehrer Order.

[signed] By Order Warlimont OKW/Armed Forces Operations Staff Ic/II No. 005822/44 Top Secret.

[Stamp] Top Secret

[Handwritten] 008887/2240—

Teletype

[Handwritten] 1625 HURX/FUE 6 a 19/2
2 copies—1st copy

To Army Group E Ic/Counterintelligence Officer

Subject: British Radio Operator Carpenter, Greek Sailor Lisgaris

By order OKW/Armed Forces Operations Staff, the British radio operator Carpenter, and Greek sailor Lisgaris, captured at

Alimnia are no longer needed and will be released for special treatment according to Fuehrer order.

CinC Southeast (Army Group Command F)
Ic/Counterintelligence Officer
No. 3687/44 Top Secret dated 5 June 1944

[Handwritten] "Alimnia" files

Certified:

[Signed] VON HARLING
Lt. Col., GSC

TRANSLATION OF DOCUMENT NOKW-013
PROSECUTION EXHIBIT 156

TELETYPE REPORT FROM COMMANDER IN CHIEF SOUTHEAST TO
DEFENDANT WARLIMONT, 14 JUNE 1944, CONCERNING APPLICATION
OF COMMANDO ORDER BY BULGARIAN ARMED FORCES

Teletype Office [Initial] J taken care of 16 June
2140
2522

GWASL 09130 Transmitted: OKW/WFST
Current Number [Initial] W [Warlimont]

Teletype Date:
Call letters Teletype No. 13385 [initials]
Received: At: 12 June
Received for: [Stamp]
Date: 15 June 1944 To: 19 June 1944 c 15 June
Time: 1145 By: c
From: HZPH
Through: Haarmann

1200 R An.
2518

[Stamp] Top Secret

Remarks

HURX/FUE 009636 15 June 0900

To OKW/Armed Forces Operations Staff
Attention Lt. Gen. Warlimont

Date of Transmission: Hour of dispatch:
Top Secret To

Reference: Telephone request from the Deputy Chief of Staff of the Armed Forces Operations Staff to Chief of Staff, Commander in Chief Southeast

The Chief of Army Mission to Bulgaria reports on 14 June that after conversation between chief of Mission and deputy chief of staff of Bulgarian War Department, Bulgarian army will deal with enemy agents, saboteurs, etc., according to Fuehrer Order of 18 October 1942.

Commander in chief Southeast

(Commanding General, Army Group F)

Ic/Intelligence Officer

No. 4952/44 Top Secret, dated 14 June 1944.

PARTIAL TRANSLATION OF DOCUMENT NOKW-3240
PROSECUTION EXHIBIT 1635

TELEGRAM FROM NEUBACHER, GERMAN SPECIAL PLENIPOTENTIARY SOUTHEAST, TO THE REICH FOREIGN MINISTER, 6 JUNE 1944, CONCERNING APPLICATION OF COMMANDO ORDER TO WAR CORRESPONDENTS AS ORDERED BY DEFENDANT WARLIMONT, AND FOREIGN OFFICE MEMORANDUM THERETO, 1 JUNE 1944

[Stamp] Top Secret

[Handwritten] Received 9 June

[Handwritten] OKW

[Initial] E

Telegram

[Handwritten] 9 June evening

From Belgrade, No. 1268, dated 6 June 1944

Special Plenipotentiary Southeast

For the personal attention of the Reich Foreign Minister

Armed Forces Operations Staff, General Warlimont, ordered the Chief of Staff of Army Group F by telephone to hand over the captured war correspondents Talbot, Slape, and Fowler to the Security Service, after interrogation by military authorities and the Foreign Office, in accordance with the Fuehrer Order of 18 October 1942 concerning the treatment of prisoners from British commando operations.

I request that the Foreign Office keep these newspaper men available and point out that above order evidently cannot be applied to war correspondents unless there is a special decision from the Fuehrer for this special case. May I further point out that it has become known to the world that we have captured the three correspondents alive. The disappearance of these three men would also become known and would unleash against us an enormous propaganda wave to the effect that these men were non-combatants who were captured at the headquarters of a unit whose militant forces are treated by us as prisoners of war. It cannot be assumed that these war correspondents were military advisers for band warfare.

I fear the severest reprisals against German prisoners held by Tito if special treatment is given to the three war correspondents in accordance with the Fuehrer Order of 18 October 1942; we could certainly avenge these reprisals but could not render them undone. Always assuming that there is no special Fuehrer order explicitly for this Talbot case, I hold strong misgivings from a point of view of foreign policy, about provoking the solidarity of international journalism, also in neutral countries, by executing the three men whose activity here was apparently given consideration in the Fuehrer order concerning the treatment of prisoners from British commando operations.

[Signed] NEUBACHER

[Handwritten]

Received by Megerle upon his telephone call.

Megerle: Report has been submitted to F.

Ri: Then unless I get special instructions from the Reich Foreign Minister I shall do nothing at the OKW.

[Initial] N
9 June

[Stamp] 361562

* * * * *

Dr. Megerle

BFI Staff Reich Foreign Office

Very Urgent

Fuschl, 1 June 1944

[Initial] N 2 June

Note for Ambassador Ritter*

[Initial] E 1 June 1050

1 Enclosure

Globe-Reuter reports the following from London on 31 May:

"Reuter's special correspondent, John Talbot, who was assigned to Tito's headquarters, has been captured in Yugoslavia, together with two press photographers. Stoyan Pribichevich, a fourth member of the group from the press was also captured, but is said to have escaped. He is a correspondent of the American magazines 'Time' and 'Life' and also represents the British and American press."

The Reich Foreign Minister has ordered that these captured enemy journalists be brought to Germany as quickly as possible to be interrogated by the Foreign Office. Our Foreign Office representative attached to the Commander in Chief Southeast, Lieutenant Ritter, confirms that enemy war correspondents have been captured. However, they had not yet arrived at the competent army staff. In order to make possible their speedy transport to Germany, and to prevent interference by previous interrogations, it is necessary to obtain an appropriate order from the Armed Forces Operations Staff to the Commander in Chief Southeast. The Reich Foreign Minister requests you to see that this order is obtained as quickly as possible.

In accordance with our telephone conversation, I enclose the draft of a letter to the Armed Forces Operations Staff; however, I recommend, if it is at all possible, to carry this out by telephone in order to prevent the Propaganda Ministry cutting in via Armed Forces Propaganda and attempting to take these prisoners away from us.

[Signed] MEGERLE

[Stamp] 361566

* Defendant in the case of United States vs. Ernst von Weizsaecker, et al., Case No. 11, vols. XII, XIII, and XIV.

TRANSLATION OF DOCUMENT 506-PS
PROSECUTION EXHIBIT 158

DRAFT OF A REPLY FROM DEFENDANT WARLIMONT TO ARMED
FORCES LEGAL DEPARTMENT, 22 JUNE 1944, CONCERNING APPLI-
CATION OF COMMANDO ORDER

Draft

Fuehrer Headquarters, 22 June 1944

Armed Forces Operations Staff/Quartiermeister (Adm. 1)
No. 006580/44 Top Secret

[Stamp] Top Secret

2 copies — 2d copy

Reference: Armed Forces Legal Department 2 f 10.34 (III/10)
No 158/44 Top Secret, 119/44, dated 17 June 1944

Subject: Enemy agents
Fuehrer Order 003830/42 Top Secret, OKW/Armed
Forces Operations Staff, dated 18 October 1942

To Armed Forces Legal Department

[Handwritten] Dispatched 24/6

[Initials] SCH

The Armed Forces Operations Staff agrees with the view taken in the letter of the Army Group Judge Advocate [Heeresgruppenrichter] attached to the Commander in Chief Southwest, dated 20 May 1944 (Ref. No. 68/44 Top Secret). The Fuehrer Order is to be applied even if the enemy employs only *one* person for a task. Therefore, it does not make any difference if several persons or only one person takes part in a commando operation. The reason for the special treatment of participants in a commando operation is that such operations do not correspond to the German concept of usage and customs of warfare.

BY ORDER:

[Initial] W [Warlimont]

3 Enclosures

[Handwritten]

Quartiermeister 2 with request to note.

All questions connected with the *Commando Order* (18 October 1942) are to be handled according to previous directive of Chief Quartiermeister at Quartiermeister 2 (W), file 2140, not at Administration.

[Initial] I [Ihnen]

TRANSLATION OF DOCUMENT 531-PS
PROSECUTION EXHIBIT 159

MEMORANDUM ON TREATMENT OF MEMBERS OF COMMANDO
UNITS IN NORMANDY, 23 JUNE 1944, SIGNED BY DEFENDANT
WARLIMONT

Armed Forces Operations Staff/Quartiermeister (Adm. 1)

Fuehrer Headquarters, 23 June 1944

No. 006688/44 Top Secret

TOP SECRET

3 copies — 1st copy

Reference: Fuehrer Order No. 003830/42, OKW/Armed Forces
Operations Staff, dated 18 October 1942

Subject: Treatment of members of commando units

Note for an oral report

Commander in Chief West reports in teletype message No.
1750/44 Top Secret, dated 23 June 44:

“The treatment of enemy commando units has so far been carried out according to reference order. With the large-scale landing a new situation has arisen. The reference order directs in paragraph 5 that enemy soldiers taken prisoner in open combat or who surrender within the framework of normal combat operations (large-scale landing and land operations) are not to be treated according to paragraphs 3 and 4. It must be established in a form easily understood by the troops how far the concept ‘within the framework of normal combat operations, etc.’ is to be extended. The view of Commander in Chief West is as follows:

“a. The commitment of airborne troops and commandos in Normandy clearly falls under paragraph 5.

“b. It is likewise not to be contested that paratroop units or groups landed further to the rear are connected with the large-scale landing operation, if their mission is to interrupt supply lines or to carry out deceptive maneuvers, etc. The German combat soldier will not always be able, during battle, to decide whether he is dealing with sabotage units parachuted down or larger airborne operations coordinated more or less closely with a landing from the sea already concluded or still in progress.

“c. As a result of the frequent troop transfers in the area

of the Commander in Chief West, especially recently, it is possible that a considerable number of soldiers are ignorant of the reference order, which dates back more than 1½ years ago. It will hardly be possible to explain to ethnic Germans and foreigners the differentiation in the treatment of prisoners owing to language difficulties. The Commander in Chief West thinks it wrong to issue further reproduction of the order in the present situation, where cases of losses must be considered. Considerable repercussions for our own prisoners must be expected if its contents become known.

“d. The application of paragraph 5 for all enemy *soldiers in uniform* penetrating from the outside into the Occupied Western Territory is held by Commander in Chief West to be the most correct and clearest solution. On the other hand, an order from the Reich Security Main Office to the Commander of the Security Police and the Security Service in Paris has decided that paragraphs 3 and 4 of the reference order are to be applied in the future, as before, in the case of uniformed parachutists committed in groups. A conversation with representatives of the Higher SS and Police Leader in France, and of the Commander of the Security Police and Security Service in Paris gave the result that according to the opinion of all concerned the difficulty lies in the determination of the ‘framework of normal combat operations’. As a solution it was agreed to set a line (e.g., Seine from the estuary to Rouen-Argentan-Avranches) north of which paragraph 5 and inland of which paragraphs 3 and 4 apply. This solution also must be called incomplete, since the combat situation can at any time necessitate the extension of this line to other coastal areas as well. In case of a large-scale airborne landing in the interior, such boundaries cannot be drawn at all. Commander in Chief West requests, therefore, that in agreement with the Reich Leader SS the decision be made that, in view of the new situation, paragraph 5 is to be applied throughout the Occupied Western Territory.”

Position taken by Armed Forces Operations Staff

1. The Commando Order remains basically in effect even after the enemy landing in the West.

2. Paragraph 5 of the order is to be applied to the extent that the order is not valid for *those* enemy soldiers in uniform, who surrender to or who are captured in open combat in the immediate combat zone of the landing area by our troops committed there. By troops committed in the immediate combat zone is meant, the

divisions fighting in the front line as well as the reserves up to and including corps headquarters.

3. Furthermore, *in doubtful cases* enemy personnel captured alive are to be turned over to the Security Service upon whom it is incumbent to determine whether the Commando Order is to be applied or not.

4. The Commander in Chief West is to see that all troop units committed in his area are orally informed in a suitable manner about the order concerning the treatment of members of commando operations, dated 18 October 1942, together with the above explanation.

Proposal: Attached teletype message.¹

[Signed] WARLIMONT

Distribution:

Chief of the High Command of the Armed Forces through
Deputy² Chief of the Armed Forces Operations Staff—1st
copy

War Diary—2d copy

Quartiermeister—Draft—3d copy

TRANSLATION OF DOCUMENT 530-PS
PROSECUTION EXHIBIT 160

DRAFT OF AN ORDER,³ 24 JUNE 1944, SIGNED BY DEFENDANT
WARLIMONT, CONCERNING TREATMENT OF MEMBERS OF COM-
MANDO UNITS IN NORMANDY

Armed Forces Operations Staff/Quartiermeister (Administra-
tion 1)

Fuehrer Headquarters, 24 June 1944
5 copies—1st copy

[Stamp] Top Secret

SSD—Teletype

To: (1) Commander in Chief West

For information:

(2) Chief of Army General Staff

(3) High Command of the Air Force/Air Force Operations
Staff

¹ Document 530-PS, Pros. Ex. 160 immediately following.

² "Deputy" crossed out; cf., Warlimont's testimony below in this section.

³ Text of this order is crossed out in original document, by a diagonal hand-drawn line; cf., Warlimont's testimony below in this section.

- (4) High Command of the Navy/1st Naval War Staff
- (5) Reich Leader SS, Command Staff
- (6) Military Commander, France
- (7) OKW/Armed Forces Legal Department

Reference: 1. Fuehrer Order No. 003830/42, Top Secret, dated
18 October 1942, OKW/Armed Forces Operations Staff
2. Teletype, Commander in Chief West No. 1750/44
Top Secret, dated 23 June 1944

Subject: Treatment of members of commando units

1. Order referred to in 1 [of reference above] remains fully in force.

2. Paragraph 5 [of Commando Order] refers to enemy soldiers in uniform, who surrender or are captured in the immediate combat area of the bridgehead in open combat by our own troops committed there. Troops committed in the immediate combat area means the divisions fighting in the front line as well as the reserves up to and including corps headquarters.

3. Furthermore in doubtful cases, enemy personnel captured alive are to be turned over to the Security Service, upon whom it is incumbent to determine whether the Commando Order is to be applied or not.

4. Commander in Chief West is to see that all troop units committed in his area are orally informed in a suitable manner about the order concerning the treatment of members of commando operations dated 18 October 1942, together with the above explanation.

[Initial] W [Warlimont]

OKW/Armed Forces Operations Staff/Quartiermeister (Admin.
1) No. 006688/44 Top Secret

After dispatch:

- Operations Department (Army) 2d copy
- Operations Department (Air Force/Navy) 3d copy
- Liaison Officer Foreign Countries 4th copy
- War Diary 5th copy

[Initial] P [Poleck]

27/6

TRANSLATION OF DOCUMENT NOKW-005
PROSECUTION EXHIBIT 161

INTER-OFFICE MEMORANDUM FROM ARMED FORCES OPERATIONS
STAFF TO QUARTIERMEISTER SECTION, 25 JUNE 1944, SIGNED BY
WARLIMONT, CONCERNING THE DRAFTING OF AN INSTRUCTION
ON THE TREATMENT OF MEMBERS OF COMMANDO UNITS IN
NORMANDY

Fuehrer Headquarters, 25 June 1944

Deputy Chief Armed Forces Operations Staff

[Handwritten] Administration 1

[Initial] I 25 June

To Quartiermeister [Section]

Subject: Treatment of members of commando units

Chief, Armed Forces Operations Staff desires that the following order be given without any formalities, clearly, and simply:

1. All sabotage units, etc., encountered outside the actual combat area in Normandy will be killed in battle; in special cases they will be handed over to the Security Service.

2. Concise instructions will be given accordingly to all troops committed outside the combat area in Normandy.

3. Starting immediately, Commander in Chief West will report daily on the number of saboteurs liquidated in this manner. This number will be published daily in the armed forces communique in order to create a deterrent effect as was already achieved in the same manner regarding previous commando operations. This applies in particular to the operations of the military commander.

Submit order today.

Signed: WARLIMONT

Certified:

[Illegible signature]

Captain

PARTIAL TRANSLATION OF DOCUMENT 551-PS
PROSECUTION EXHIBIT 162

OKW DIRECTIVE ON APPLICATION OF COMMANDO ORDER IN AREA
OF COMMANDER IN CHIEF WEST, 25 JUNE 1944, INITIALED BY
DEFENDANT WARLIMONT

Armed Forces Operations Staff/Quartiermeister (Adm. 1)

[Handwritten] Chief OKW.

[Initial] K [Keitel]

[Stamp] Top Secret

25 June 1944

5 copies—1st copy

[Handwritten] Checked before release

Chief, Armed Forces Operations Staff

KR—Teletype

To:

1. Commander in Chief West
2. Chief of Army General Staff [OKH]
3. High Command of the Air Force/Air Force Operations Staff
4. High Command of the Navy/1st Naval War Staff
5. Reich Leader SS—Command Staff
6. Military Commander France
7. Military Commander Belgium/Northern France
8. Armed Forces Commander Netherlands
9. OKW/Armed Forces Legal Department
10. [Handwritten] Commander in Chief Southwest

Reference: 1. Fuehrer Order No. 003830/42 Top Secret, dated 18
October 1942, OKW/Armed Forces Operations
Staff

2. Teletype Commander in Chief West No. 1750/44
Top Secret, dated 23 June 1944 (only to OKW/
Armed Forces Operations Staff)

Subject: Treatment of members of commando units

1. Even after the landing of the Anglo-Americans in France, the Fuehrer order on the destruction of terror and sabotage units dated 18 October 1942, remains fully in force. Exceptions are enemy soldiers in uniform in the immediate combat area of the bridgehead, that is, in the area of the divisions fighting in the

front line as well as of the reserves up to the corps headquarters, according to paragraph 5 of the basic order dated 18 October 1942.

2. All members of terror and sabotage units found outside the immediate combat area, this includes in principle all paratroopers, are to be killed in battle. In special cases, they are to be handed over to the Security Service.

3. All troops committed outside the combat area in Normandy are to be informed concisely about the duty to destroy enemy terror and sabotage units according to the directives issued therefor.

4. Starting immediately, Commander in Chief West will report daily how many saboteurs have been liquidated in this manner. This applies in particular to the operations of the military commanders. The number shall be published daily in the armed forces communique in order to create a deterrent effect, as was already achieved in the same manner regarding previous commando operations.

[Initial] W [Warlimont]

[Signed] KEITEL

OKW/Armed Forces Operations Staff Quartiermeister (Adm. 1)

No. 006688/44 Top Secret

[Handwritten] *Addition for Commander in Chief Southwest.*

Similar action is to be taken in the Italian Theater of War.

[Initial] J [Jodl]

After dispatch:

Qu (Adm. 1) Simultaneously teletype, 1st copy

Op. (Army), 2d copy

Op (Navy/Air Force) War Diary, 3d copy

Liaison Officer Foreign Countries, 4th copy

Liaison Officer Armed Forces Propaganda, 5th copy

Copy sent on 18 August to the Chief of the Security Police and the Security Service.

* * * * *

893964—51—8

TRANSLATION OF DOCUMENT NOKW-213
PROSECUTION EXHIBIT 163*

LETTER FROM ARMY GROUP G TO SUBORDINATE UNITS, 29 JUNE
1944, TRANSMITTING OKW ORDER CONCERNING CONTINUED
APPLICATION OF COMMANDO ORDER

[Stamp] Top Secret

8 copies—7th copy

On the premises

Ic

Liaison Officer Military Commander
Headquarters

War Diary

Ia (E)

29 June 1944

To: 1st Army
19th Army
Corps Headquarters, LVIII Panzer Corps
189th Reserve Division (by courier)
Main Liaison Staff 564 (by courier)

KR

Subject: Treatment of members of commando units

OKW has ordered:

1. The Fuehrer's order concerning the destruction of terror and sabotage units, dated 18 October 1942, remains fully in force even after the landing of the Anglo-Americans in France.

Exempted are, as before, enemy soldiers in uniform in the immediate combat area of the bridgehead, that is in the area of the divisions fighting in the front line and of the reserves up to, and including the corps headquarters, as provided by paragraph 5 of the basic order dated 18 October 1942.

2. All members of terror and sabotage units, to which in principle all paratroopers belong, are to be exterminated in combat whenever they are found outside the immediate combat area. In special cases they are to be handed over to the Security Service.

3. All German army units committed outside the Normandy combat area are to be instructed concisely as to the regulations regarding the duty to exterminate enemy terror and sabotage units.

* Photographic reproduction of this document appears on page 325.

4. Effective immediately, Commander in Chief West will report daily how many saboteurs have thus been liquidated. This applies particularly also to the operations of the military commanders. The figure will be published daily in the armed forces communique in order to create a deterrent effect as was already achieved in the same manner regarding previous commando operations.

Signed: KEITEL [crossed out]

Postscript—For Army Group Command G

The reports are to be entered into the daily report.

Army Group Command G
Ia No. 841/44 Top Secret
dated 29 June 1944

[Initial] M 29 June

TRANSLATION OF DOCUMENT NOKW-010
PROSECUTION EXHIBIT 164

NOTE ON TELEPHONE CALL BY COMMANDER IN CHIEF WEST,
29 JUNE 1944, INITIALED BY WARLIMONT, CONCERNING
COMMANDO ORDER

29 June 1944

Qu. 1 (Administration)

[Stamp] Top Secret

[Initial] W [Warlimont] 29 June

Subject: Treatment of members of commando units

Note

Telephone call by Commander in Chief West, Ic (Lt. Col. Meyer-Detering), dated 29 June 1944, 1800 hours.

Report to paragraph 4 of the order of the Armed Forces Operations Staff of 26 June/44. No. 006688/44 top secret, concerning the liquidation of saboteurs can only arrive in the next few days. The troop units must first be notified of the order, particularly, the many new units that do not yet have any knowledge at all of the Fuehrer Order of 18 October 1942.

Commander in Chief West announced his divergent point of view prior to the issuing of the Armed Forces Operations Staff

order and accordingly did not voice any further objections now.

[Handwritten] *matter closed!*

[Initial] I 29 June

[Signed] POLECK¹

EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS
HANS SCHOENIG²

DIRECT EXAMINATION

MR. MCHANEY: Witness, your name is Hans Erich Schoenig?

WITNESS HANS SCHOENIG: Yes.

Q. And your surname is spelled S-c-h-o-e-n-i-g?

A. That is correct.

Q. You are a German?

A. Yes.

Q. Were you a former member of the German Army?

A. I was a member of the German Army from 1918 to 1919.

Q. Well, did you participate as a member of the German Army
in World War II?

A. Yes, I did.

Q. What rank did you attain?

A. I was captain of the reserve.

Q. Were you at one time the intelligence officer, or Ic, of the
LXXX Corps?

A. I was Ic of the LXXX Corps since 1943.

Q. You held that position from 1943 until the end of the war?

A. Until January 1945. Then I had to leave because of illness.

Q. Where was the headquarters of the LXXX Corps located
in June and July of 1944?

A. It was near Poitiers in southwestern France.

Q. And who was the commanding general of the LXXX Corps?

A. General of the Artillery Gallenkamp.

Q. Who was the chief of staff of the LXXX Corps?

A. That was Colonel of the General Staff Koestlin.

Q. And you were directly subordinated to Colonel Koestlin, is
that right?

A. Yes, that is correct.

Q. Of what army was the LXXX Corps a part?

A. Part of the First Army.

Q. Was the headquarters of the Commander in Chief West the
highest headquarters in France?

¹ Chief of Quartiermeister Department, Armed Forces Operations Staff, High Command, German Armed Forces.

² Complete testimony is recorded in mimeographed transcript, 17 February 1948, pp. 743-762.

A. Yes.

Q. And who was the Commander in Chief West?

A. That was Field Marshal von Rundstedt.

Q. Witness, did you become familiar with the so-called Commando Order during the course of the war?

A. The Commando Order, that is, the so-called first version of the Commando Order became known to me in spring 1944.

Q. Did you also know the Commando Order by the name, "Fuehrer Order of 18 October 1942"?

A. I heard of that later.

Q. Now, Witness, did the LXXX Corps ever capture any Allied commandos?

A. Commandos? Never. No, never, up until the beginning of July.

Q. Well, Witness, will you please speak a little bit louder so that the defense counsel can hear you distinctly?

A. Yes.

Q. Did you ever capture any Allied paratroopers?

A. Yes.

Q. When?

A. At the beginning of June one or two British paratroopers were handed over to us, they were briefly interrogated by my interpreter, and we then sent them immediately to the air force agencies in Tours. I myself never saw these two men.

Q. Well now Witness, what had these paratroopers done, how did it come about that they were taken by the LXXX Corps?

A. During the first days of July 1944, an explosion had taken place during the early morning hours in the vicinity of the corps command post. Immediately after the explosion, the guard from the signal detachment arrested two men in overalls who spoke English. They were immediately brought before my interpreter, and he interrogated them. This interrogation revealed that the men involved were two British soldiers, but nothing else of very much use for IC purposes. All they said was that they were supposed to dynamite the railroad track 800 to 1,000 meters distant from the command post, and that they had succeeded in fulfilling this mission. On account of their pay books they proved to be British soldiers. That was all we could find out about them.

Q. Now, exactly how were these two British soldiers dressed, did they wear a uniform?

A. They wore overalls with no badges of rank or other military insignia. If I had met these people in the street I would not have recognized them as soldiers, particularly since they wore no headgear.

Q. Now, what happened to these two British paratroopers after they were captured and interrogated by your office?

A. They were taken to the armed forces prison in Poitiers.

Q. Did any further interrogations take place?

A. Yes. The Security Service Command Detachment Poitiers asked to be permitted to interrogate these two British soldiers because a sabotage act was involved. The Security Service in Poitiers was the agency which dealt with sabotage acts.

Q. And what transpired?

A. Nothing.

Q. Did the Security Service get any additional information from these two British paratroopers?

A. Only later.

Q. And what information did they get?

A. The Security Service informed me that these two prisoners were members of a larger group which was supposed to comprise about 30 people, and this group was encamped in a wood near Poitiers.

Q. Now, Witness, will you tell us again, as exactly as you can recall, just exactly when these first two British paratroopers were captured?

A. I can no longer tell you the date, but that could be ascertained from my interrogation in connection with the trial in Wuppertal.* It was towards the end of June, approximately.

Q. The end of June 1944?

A. Yes sir.

Q. Now, did your interrogating officer ask these British paratroopers whether they were with a larger group?

A. Yes.

Q. And what did they tell you, did they refuse to give information on that?

A. They gave no information to my interpreter. They merely referred to their pay books and said that they didn't have to give further information according to the Geneva Convention.

Q. And then you turned them over to the Security Service, is that right?

A. Not "turned over". The Security Service asked to be allowed to interrogate them.

Q. And a few days later the Security Service reported back to you the information that these two British paratroopers had

* General Blumentritt, C/S West (Army Group D), General Gallenkamp, CG of LXXX Corps, Colonel Koestlin, C/S of LXXX Corps, and Captain Schoenig, G-2 of LXXX Corps, were tried by a British Military Court at Wuppertal, 25 March—1 April 1947. Blumentritt was found not guilty, Gallenkamp was sentenced to death (later commuted to life imprisonment), Koestlin to life imprisonment, and Schoenig to 5 years' imprisonment.

stated that they were with a larger group of some 30 paratroopers, is that right?

A. Yes. Later on it was revealed that this group of men was even larger. Further, they stated at the time that they were in contact with the Maquis in this camp in the woods.

Q. Witness, I will again have to ask you to speak a little louder. I will ask how you explain the fact that these two soldiers failed to give information to you, yet a few days later gave that information to the Security Service?

A. I was annoyed about it myself. How the Security Service managed to get the information, I don't know. I asked the Security Service and I did not receive an answer.

Q. Now, was the capture of these two British paratroopers reported to the Commanding General Gallenkamp, and to your chief of staff?

A. Of course, immediately after the interrogation I reported the arrest of these two men to my Chief of Staff, Colonel Koestlin, and to General Gallenkamp.

Q. Was this also reported to the First Army?

A. The First Army was also informed about this in the evening report. We had to make two daily reports, one in the evening and one in the morning. The First Army was informed in the evening report that we had taken two prisoners who had been carrying out sabotage.

Q. Now, after the information was obtained from these two British paratroopers that they were with a larger group, what happened then?

A. A sabotage troop was involved here, and therefore the whole matter had to be followed up by the Security Service. The commander of the Security Service in Poitiers decided to capture this group of paratroopers who were in the woods near Poitiers. Since his own forces were not strong enough, he asked the chief of staff for military support in capturing these paratroopers and the Maquis.

Q. Well, how was the raid carried out?

A. The Security Service was given a squadron of cyclists for this purpose. This bicycle squadron was subordinated to the corps headquarters for a temporary period and was intended as protection for the headquarters against possible surprise attacks by the Maquis.

Q. This was a bicycle squadron of the 258th Reserve Division, is that right?

A. Yes, that is correct.

Q. Now, when was this raid carried out?

A. The operation was carried out in the early morning hours of a Monday. It must have been 3d of July.

Q. And what was the result?

A. The raid was successful. The members of the camp were taken by surprise and after a short burst of firing 34 Englishmen surrendered.

Q. You say you took 34 prisoners?

A. Yes, 34 prisoners, that is quite correct.

Q. Did you take any booty?

A. Some booty was taken also. There were three jeeps which had also been dropped by parachute, one radio transmitter with which the Englishmen kept in contact with their home country, some weapons, and some trucks.

Q. Was anybody wounded in this action?

A. Three wounded British prisoners were brought in and soon after the raid they were taken to the Hotel Dieu in Poitiers by the Security Service.

Q. What were the nationalities of these prisoners?

A. They were three Englishmen.

Q. No, I mean the total number of prisoners taken. You mentioned the figure "34"; what was their nationality?

A. They were all British, with one exception, one American was among them.

Q. One American—were these prisoners wearing uniforms?

A. Yes, these people wore uniforms.

Q. What color were the uniforms?

A. Khaki uniforms.

Q. What did your interpreter report to you concerning the status of these men as soldiers?

A. What do you mean by "status", do you mean whether they were married or single, or what kind of status?

Q. Whether they were soldiers or not?

A. Yes, of course, undoubtedly they were soldiers. There was no doubt about that.

Q. Did you report this capture to your commanding officer and Chief of Staff?

A. Immediately after I had received the report that the raid had been successful, I informed the Chief of Staff and the commanding general of the facts. In addition, an officer of the corps headquarters who had participated gave more detailed facts. I myself did not participate. Furthermore I reported the raid as a special event immediately by telephone to the Ic of the First Army.

Q. Well, what happened after that, did you have any contact with the First Army concerning what should be done with these prisoners?

A. No. We did not discuss what was to happen to them, because in the meantime, in agreement with the Chief of Staff, I had tried to turn over these prisoners to the air force. I had contacted Tours airfield and had asked them to take these prisoners off our hands. Once before we had turned over two prisoners to this airfield. In this particular instance, however, Tours airfield did not agree to this request because the airfield had just been completely destroyed by an air attack. Furthermore, I asked the Cognac airfield which was nearby, to take over these prisoners, and they did not want them either. The Marignac airfield also turned down my request. When I reported to Major Hay of the First Army, I asked him to let me turn the prisoners over to him since the army should be interested in interrogating these people. Major Hay refused to take over these prisoners because they had neither suitable accommodations nor guards for them.

Q. What was your purpose in reporting this matter to your chief of staff?

A. I wanted to get rid of the prisoners, and I discussed this with Major Hay when I talked to him on the telephone. During this conversation Major Hay said to me, "Do you know, Schoenig, this whole paratrooper affair is too hot to handle?"

Q. Witness, did you receive a message from the Commander in Chief West concerning these prisoners?

A. Later, only the next day. On the following day a teletype arrived from the Ic of the Commander in Chief West. The text was approximately as follows. I don't want to commit myself as to the actual wording, but approximately it was this: "Immediate telegraphic reply to Ic Commander in Chief West concerning whereabouts of prisoners. Report destruction of teletype involved." It was signed by the Commander in Chief West. This teletype was given first of all to the Chief of Staff. The Chief of Staff handed it on to me with the request to submit it immediately to the commanding general.

Q. Did you submit this message to your Chief of Staff?

A. I received the information from the Chief of Staff and I submitted it to the commanding general.

Q. What transpired then?

A. The commanding general was furious and said approximately the following, "Do you know that this teletype has put me in an awkward situation and that the whole thing is most inconvenient? Have the Chief of Staff draw up an answer to this teletype immediately."

Q. Well, did the Chief of Staff do that?

A. The Chief of Staff drew up an answer to this teletype. He wrote the following: "Interrogation not yet concluded." I went to the commanding general with the draft of this answer, I showed it to him and he initialed it.

Q. Now, Witness, were these commandos executed?

A. After three days the prisoners were shot. That was done as a consequence of the Commando Order.

Q. Did you see the execution?

A. I was ordered to witness the execution as an observer and representative of the Corps Headquarters, in order to avoid at all costs the occurrence of irregularities during the execution. This means that the corps headquarters was interested in having the prisoners summarily shot under observance of all regulations and rules of military tradition and honor, as ordered.

Q. Who gave the order to kill these commandos?

A. This order was given by the Chief of Staff to First Lieutenant Vogt who was the commander of the squadron. First Lieutenant Vogt was the man who prepared, carried out, and organized the execution.

Q. Now, Chief of Staff Koestlin, gave the order for the execution, and the execution was carried out by First Lieutenant Vogt, is that right?

A. Yes, that is how it was.

Q. How many of these soldiers were executed?

A. Thirty-one were shot.

Q. Did that include the first two British paratroopers captured at the end of June?

A. They were also part of that group—they were included in the 31 prisoners.

Q. And the only ones not executed were the three soldiers who were wounded in the raid, is that right?

A. Yes. These three men were still in the Hotel Dieu in Poitiers in custody of the Security Service.

Q. And all others were shot?

A. Yes.

Q. Who carried out this execution—what troops?

A. The bicycle squad.

Q. The bicycle squad which was subordinated to the LXXX Corps, is that right?

A. Yes.

Q. And your best—

PRESIDING JUDGE YOUNG: I am advised that it will be necessary to stop for just a moment because they are having difficulty with the sound machine. The Tribunal will take a short recess.

(Recess)

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE YOUNG: You may proceed.

MR. MCHANEY: Witness, the American airman captured in this group was executed too, was he not?

WITNESS SCHOENIG: He was shot, together with the 31 Englishmen. The reason given was that he was with them in the Maquis and had also participated in the acts of sabotage.

Q. If I suggest to you the name, Lieutenant Bundy, do you recall that that was the name of this American airman?

A. No, I cannot recall any name. My English is not very good, and I couldn't recall English names after all this.

Q. Did you have any proof that this American airman was actually working with this British paratrooper unit?

A. The interrogations must have revealed that.

Q. Witness, will you tell us in your own words what you remember about the execution which you witnessed?

A. During the execution I stood rather apart, in such a way that I was not seen either by the Englishmen or by the Germans. The execution took place in a clearing in the woods. It seems important to me to state here that before the execution the prisoners were told by the interpreters that the execution was taking place by order of the Fuehrer and Supreme Commander of the Armed Forces. They were told that this was done because they had parachuted down far behind the lines, had carried out acts of sabotage, had worked in conjunction with the Maquis; and had organized, led and supplied the Maquis with arms.

Q. Will you tell us just how many men were used in the execution and how it was carried out, just what happened as you saw it?

A. In the execution squad there were two riflemen for each prisoner. In addition there was a number of master sergeants who were to give the *coup de grace* after the execution. They chose master sergeants because there were not enough officers available. A medical officer was present to certify that death had occurred. These things, however, had nothing to do with me; First Lieutenant Vogt, who was in charge of the execution dealt with all that.

Q. Did the soldiers die immediately?

A. I was under the impression that they did, because the salvo was fired from a short distance, about four or five meters, and it was aimed at the heart.

Q. Where were they buried?

A. The corpses were buried in two previously prepared mass graves. These graves had been dug at a certain distance from the place of execution by the execution squad.

Q. Witness, you have used the German phrase "standrechtliche erschiessung" [summary shooting] to describe this execution, is that right?

A. That was what the Chief [Chief of Staff] called it.

Q. Was there a court martial before this execution?

A. Not to the best of my knowledge.

Q. What happened to the identity tags of these soldiers who were executed?

A. On my instigation and in agreement with the Chief of Staff, the identity tags of all the dead persons were passed on to the First Army headquarters with the request to send them via the International Red Cross to the British Government. This was to be done so that the next of kin should not be left in doubt or anxiety about the fate of their relatives, and particularly so that they should not be left in uncertainty.

Q. Witness, don't you know that that American flyer had simply parachuted from his disabled plane and was just by chance with this British unit in an effort to avoid capture?

A. I did not know that he was only by chance with the British men.

Q. Were you, General Gallenkamp, and Colonel Koestlin tried by the British for the killing of the 31 soldiers?

A. Not I, because I was not responsible; I was only there as an observer.

Q. You were tried, was the question asked, Witness. You were tried with General Gallenkamp and Colonel Koestlin?

A. Yes, that is correct.

Q. And were you convicted, and if so, what sentence was imposed on you?

A. I was sentenced to five years' imprisonment.

Q. And your Chief of Staff, Colonel Koestlin?

A. Colonel Koestlin was sentenced to life imprisonment.

Q. And General Gallenkamp?

A. General Gallenkamp was sentenced to death and the death sentence was later commuted to life imprisonment.

Q. I have no further questions at this time.

A. May I add something, please?

Q. Did you wish to say something, Witness?

A. I wanted to be allowed to say the following concerning the Commando Order. The Commando Order as such was sacred to the men in command of the corps headquarters, because it hinted that these summary shootings were reprisals,—reprisals

for the Dieppe operation. That was the purely military aspect. Seen from a purely humane point of view, the men in charge of the corps headquarters considered it, to say the least, unpleasant, because they thought it unchivalrous. That is the reason why the corps headquarters did everything in its power and made every effort to change the fate of these prisoners and to turn them over to other agencies. That they could no longer do this was due to other circumstances, and above all to the teletype which in the meantime had arrived from the Commander in Chief West, and to the armed forces report which had already designated these Englishmen as being dead while they were still alive.

MR. MCHANEY: If the Tribunal please, I am advised by Mr. Rapp that there was a translation mistake. I would ask the indulgence of the Tribunal if he could explain it to the Tribunal, or, perhaps, clarify it. I am not sufficiently familiar with the German language to be able to do so myself.

PRESIDING JUDGE YOUNG: He may do so.

MR. RAPP: I merely have a question to the interpreter. I would like to ask you what English term you have used to translate the German word, "standrechtlich erschossen." That is all I ask.

INTERPRETER SCHAEFFER: I cannot remember that it came up just now. When it does come up I use "summarily shot".

MR. RAPP: Thank you.

CROSS-EXAMINATION

DR. LEVERKUEHN (counsel for defendant Warlimont): Witness, you said that three wounded prisoners were sent to the Hotel Dieu. That in French means a hospital, does it not, "Hotel Dieu?"

WITNESS SCHOENIG: Yes, that is the hospital in Poitiers. The name of it was Hotel Dieu.

Q. You also mentioned that arms were found during the raid on the camp in the woods. Do you happen to know exactly what kind of arms were found?

A. Whether I can now give all the arms that were found seems rather doubtful, but I do know that pistols were among them, machine pistols, machine guns, daggers.

Q. When you say "daggers," what do you mean, because a dagger is really not a military weapon, is it?

A. They must have been the knives which our airmen, I believe, also used in order to cut the strings of the parachutes. Those were knives and the blade was then left in the shaft.

Q. I see. Witness, when you mentioned the two first prisoners, you said that they appeared in a kind of clothing in which

you would not have recognized them as soldiers. Now in the camp were other pieces of similar clothing found?

A. I don't know that. Nothing of that sort became known to me, because the booty was claimed by the SD and was left to the SD. This was done because the SD was the organization in charge of the raid. Of the whole booty the corps headquarters only kept one jeep. Everything else was taken by the SD.

Q. Did I understand you correctly to state that you designated this whole group of people as a paratroop unit?

A. I do not want to call this group a "unit" in the military sense of the word, because we did not learn anything about the organization of the SAS [Special Air Service] units from the prisoners.

Q. I see.

A. I call this group of 31 men a certain unit.

Q. All right. The results of the interrogations of these 31 men who were later found in the camp which you raided, where did the results go and who interrogated the men?

A. My interpreter interrogated these 31 men and the results of the interrogations were passed on directly to the First Army, but, as I have stated before, they were not of any great military importance, because the men didn't tell us anything about things we were interested in.

Q. Do you remember whether anything transpired about any connection with the Maquis?

A. Would you please repeat that question?

Q. Do you remember whether during these interrogations anything transpired about any connection with the Maquis?

A. The connection with the Maquis was admitted to exist by the British.

Q. I see. Would you be in a position to state today where the written results, the records, and the protocols about these interrogations could be found?

A. The question would be whether or not the army passed them on, whether they seemed to be of sufficient importance to the army to be passed on.

Q. Did you receive copies?

A. Undoubtedly we had carbon copies on 29 August, however, the corps headquarters in Cargnon was surprised by an American tank attack. All files which existed there were lost. Partly they were burned, and partly they were probably captured by the enemy.

Q. Just before you mentioned that on instructions of the commanding general, a teletype was passed on to the Commander

in Chief West to the effect that interrogations had not been concluded.

A. Yes.

Q. And your next statement was in answer to the question put to you that three days later the prisoners were shot. Now what took place during these three days; what happened?

A. Immediately after the arrival of the teletype from the Commander in Chief West, the Wehrmacht report arrived. Now in the Wehrmacht report it was stated that during an operation in southwest France, 43 enemy paratroopers were liquidated. This "43" was an obvious mistake, a twisting of the figure of "34" into "43", it was just an error. Now apart from this what happened in the office of the Ia or the Chief of Staff? I don't know, and I had no right to ask about this. I only know that I asked the chief of staff, after he had passed on Vogt's task to him, whether the paratroopers could not possibly be saved. The Chief of Staff answered he was committed through an order he had received. Furthermore he did not give an account of his intended actions. It would not be customary for him to do so.

Q. He did not tell you whose order bound him?

A. No, he didn't say.

Q. You and the Ic of the Army, or you and the Ic of the Commander in Chief West, were you on such terms that you could tell him your opinion of such occurrences and that you could exchange opinions with him?

A. I was on such terms with the Ic of the Army. But on the telephone I couldn't do that. Our communications at that time were all overheard by the French and the French interpolated into our telephone conversations. On the occasions of executions when Major Hay came to visit us I discussed this whole matter with Hay. Concerning the Commander in Chief West, I had no connection at all neither with the Ic nor any private personal relations.

Q. Could I ask you please to spell the name Hay?

A. H-a-y.

Q. Hay. Thank you.

PRESIDING JUDGE YOUNG: Any further cross-examination? Any redirect?

MR. MCHANEY: Just a few questions, Your Honor.

REDIRECT EXAMINATION

MR. MCHANEY: Witness, during the cross-examination these three wounded paratroopers were adverted to. Would you please tell the Court what happened to those three wounded paratroopers?

WITNESS SCHOENIG: A few days, possibly two days after the execution, I received a report from the SD to the effect that the three wounded were brought to the Wehrmacht prison in Poitiers. On my question why that was done, I was told some members of the Maquis who had been wounded and taken prisoner and were also accommodated in the Hotel Dieu, had been kidnaped by the Maquis by armed force. The SD anticipated that the wounded Englishmen would likewise be taken away from the Hotel Dieu by force of arms, and that is why they were handed over to the Wehrmacht prison.

Q. Yes, Witness, but what happened to them in the prison?

A. The wounded died after approximately 5 days in the prison.

Q. Were you familiar with the uniform of a British paratrooper before June 1944?

A. Yes, but only on the basis of pictures because, what I saw, were the first paratroopers, the first ones I had come across.

Q. These were the first ones you had actually seen, is that right?

A. Yes.

Q. Was there ever any doubt whatever that these men were British and American soldiers?

A. No.

Q. How many Maquis were captured in this raid when the paratroopers were taken, Witness?

A. I don't know that because they were apprehended by the SD. I believe a number were taken at the same time but how many there were I cannot tell you.

Q. Now Witness, you were the Ic of the Staff. Didn't this bicycle squadron report to you how many of these resistance people they had captured—let me put it this way: Did you see any of the Maquis who were captured in this raid?

A. No, because the action was carried out by the SD and we made the bicycle squadron available only as an auxiliary unit.

EXAMINATION

JUDGE HALE: I would like to ask this of the witness. Was it your information that three wounded paratroopers were executed in prison by the SD?

WITNESS SCHOENIG: No.

PRESIDING JUDGE YOUNG: The witness may be excused.

PARTIAL TRANSLATION OF DOCUMENT 1279-PS*
PROSECUTION EXHIBIT 165

MEMORANDUM OF 22 JULY 1944, INITIALED BY WARLIMONT, CONCERNING TREATMENT OF MEMBERS OF FOREIGN MILITARY MISSIONS CAPTURED WITH PARTISAN BANDS

Armed Forces Operations Staff/Quartiermeister (Adm. 1)
No. 009074/44 Top Secret

22 July 1944

[Handwritten] One copy destroyed according to interrogation
Signed: Ihnen, 27 July

[Stamp] Top Secret

2 copies—2d copy

Subject: Treatment of members of foreign "military missions" captured with partisan bands

Note for an Oral Report

[Initial] W [Warlimont]

25 July

1. The Fuehrer has decided that members of Anglo-American and Soviet Russian so-called "military missions," captured in the partisan fighting in the Southeast, are to be treated in the same way as participants in a commando operation and not as prisoners of war.

2. Separately from the above, the Office Group Foreign Countries [of military intelligence], following inquiries by the Reich Security Main Office—military section—has put forward for decision the question of how British and American soldiers, captured with the partisan bands, are to be treated. The following are opinions expressed by:

a. *Commander in Chief Southeast*—The members of Allied military missions are to be handed over to the Security Service, should the opinion below in *b* be inapplicable.

b. *High Command of the Armed Forces/Prisoners of War General Office* in conjunction with *High Command of the Army/Army General Staff/Foreign Armies West*—Treatment as prisoners of war in accordance with order: Armed Forces Operations Staff/Op

* See *Nazi Conspiracy and Aggression, op. cit. supra*, vol. III, pp. 857-862, for translation of entire document.

(Army) Armed Forces Ops. Staff/Op. (Army) No. 03408/43 Secret, dated 18 September 1943.

c. High Command of the Armed Forces/Chief of Prisoners of War Section in conjunction with *Armed Forces Legal Department*—Treatment as prisoners of war in accordance with order: *Armed Forces Operations Staff/Org. II No. 02958/43 Secret*, dated 8 July 1943, which disregards differences of nationality. The only exception made is in the case of commando operations. (Then they are handed over to the Security Service.)

d. Reich Security Main Office/Section IV—Fundamental treatment as prisoners of war under the directives mentioned in *b* and *c*, but a more definite ruling is required to decide whether and in which cases they are to be handed over to the Security Service.

e. Reich Security Main Office/Military Section—Considers that the *Commando Order* cannot be applied to partisan fighting in the Southeast; that to do so would be dangerous in that it might imperil those taking part in our own operations (*Brandenburg*).

No opinion on the question of foreign missions.

f. Office Group Foreign Countries—Fundamental treatment as prisoners of war, unless the members of missions were taking part in a commando operation.

g. Armed Forces Operations Staff/Op. (Army)—The same treatment as the members of partisan bands themselves, i.e., as prisoners of war if in uniform and captured or surrender in open battle; or executed if in civilian clothes or captured in a sabotage or commando operation. [Paragraph *g* crossed out in original document.]

3. *Opinion and proposal of the Armed Forces Operations Staff*—According to the order issued to date even, for example, the British captured in the “*Roesselsprung*” operation must be treated as prisoners of war. This is in line with Op. CHI [crossed out in original document] [*operations-army*] Order of 18 August 1943.

The *Commando Order* has never yet been applied to such missions, its extended application to cover them has not yet been ordered. If the missions are to be treated otherwise than in accordance with the orders issued to date, it must first be decided whether a foreign mission operating with the partisan groups in the Southeast is to be called a commando operation and treated as such. Such a decision seems to be indicated even if it does not correspond completely with the wording of the *Commando Order* or with the previous definition of a commando operation (as an especially insidious and still unusual form of warfare which must be combated with the appropriate countermeasures).

The principle must be adopted from the start that in the Southeast too, all members of partisan groups are fundamentally guerrillas. It is true that they are treated like prisoners of war for reasons of expediency in order to obtain the largest possible number of deserters and workers. There is no reason for this with regard to the few members of foreign missions. There is, therefore, no necessity to treat them in every case in the same way as the members of partisan bands themselves. Basically, it would be far more appropriate to consider Anglo-American as well as Soviet Russian military missions as commando operations and to treat their members accordingly.

The appended order is therefore proposed.

[Initial] P [Poleck]

23 July

[Initial] W. [Warlimont]

* * * * *

TRANSLATION OF DOCUMENT 537-PS
PROSECUTION EXHIBIT 166

DRAFT OF OKW ORDER, 30 JULY 1944, CONCERNING TREATMENT
OF MEMBERS OF MILITARY MISSIONS CAPTURED WITH PARTISAN
BANDS

Draft

The High Command of the Armed Forces

No. 009074/44 Top Secret Armed Forces Operations Staff/Quar-
tiermeister (Adm. 1)

Fuehrer Headquarters 30 July 1944

[Stamp] Top Secret

Subject: *Treatment of members of foreign "military missions"
captured with partisan bands*

In the area of the Commanders in Chief Southeast and South-
west members of foreign so-called "military missions" (Anglo-
American as well as Soviet Russian) captured in antipartisan
warfare, will not receive the treatment as specified in the special
orders regarding the treatment of captured partisans. There-
fore, they are not to be treated as prisoners of war but in con-
formity with the Fuehrer's order concerning the destruction of

terror and sabotage units, dated 18 October 1942 (OKW/Armed Forces Operations Staff 003830/42, top secret).

This order shall not be transmitted beyond corps headquarters and staffs of the other branches of the armed forces on the same level. It is to be destroyed after being made known.

The Chief of the High Command of the Armed Forces

[Initial] P [Poleck]

28 July

[Initial] K [Keitel]

29 July

Distribution:

Commander in Chief Southeast, 1st copy

Commander in Chief Southwest, 2d copy

General Staff of the Army, 3d copy

High Command of the Navy/Naval War Staff, 4th copy

High Command of the Air Force/Air Force Operations Staff,
5th copy

Reich Leader SS and Chief of the German Police Command
Staff Reich Leader SS, Attention: SS Brigadier General and
Brigadier General of the Waffen SS Rohde, also for Reich
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EXTRACTS FROM THE TESTIMONY OF DEFENDANT WARLIMONT*

DIRECT EXAMINATION

* * * * *

DR. LEVERKUEHN (counsel for defendant Warlimont): Was the term "commandos" a part of German military terminology?

DEFENDANT WARLIMONT: No.

Q. When did you hear this term for the first time?

A. Approximately at the time when these documents were drafted.

* Complete testimony is recorded in mimeographed transcript, 21-25, 28-30 June; 1, 2 July 1948; pp. 6812-7103.

Q. Were there German commandos too?

A. No.

Q. Was it brought to your attention that German agencies had employed German commandos?

A. No.

Q. How did the so-called Commando Order originate in its original version?

A. This order, was issued by Hitler in its original form as an addendum to the armed forces communique dated 7 October 1942. The text is shown in Document 1266-PS, Prosecution Exhibit 118, under section I.

Q. Who issued the armed forces communique? Was that a task of your department?

A. No. The National Defense Department [of Armed Forces Operations Staff] had nothing to do with the compilation and issuance of the armed forces communique. The armed forces communique was compiled in the Armed Forces Propaganda Department which was later called the Wehrmacht Propaganda Group. It was submitted by this department to Jodl. It was frequently worked on very thoroughly by Jodl and who personally submitted it to Hitler during the noon situation conference.

Q. Now, did Hitler usually concern himself with this armed forces communique, and was he in the habit of effecting changes therein?

A. Hitler read it word by word and frequently changed either individual words or sentences and then drafted such additions as the one we have before us.

Q. Now, how did you obtain knowledge of the text of the armed forces communique, including such additions?

A. Every afternoon I found the armed forces communique among the incoming matter in my office, and I read it.

Q. Now, what does this addendum state?

A. This addendum reads: "All terror and sabotage troops of the British and their accomplices who do not act like soldiers but like bandits will henceforth have to be treated as such by German troops. They must be slaughtered ruthlessly in combat wherever they turn up."

Q. Do you recall any incidents which might have been the reason for this unusual order in this unusual form?

A. Yes, I do. The first incident was the British landing at Dieppe on the French coast in August 1942. German prisoners had been shackled there by the British. Afterward we found these prisoners with the shackles on. Thereupon Hitler had ordered a reprisal measure which aimed at shackling the British prisoners of war captured by the Germans in the Dieppe landing.

But I was not concerned with this question. This was dealt with by Jodl alone in conjunction with an expert from the Foreign Counterintelligence Department. Occasionally he also enlisted an expert from my Quartiermeister section.

Q. About how long before this armed forces communique of 7 October did this Dieppe raid occur?

A. The Dieppe landing took place in August 1942. If I am not mistaken on 22 August. That was approximately 6 weeks before this date. There was another incident which was the immediate reason for Hitler to issue this addendum to the armed forces communique. That was a British raid on a German "commando" [Kommando] on the British Channel Island of Sark.

Q. Now, you just used the word "commando". You meant the term in its German connotation, didn't you? That is a small troop detachment?

A. Yes, I did.

Q. Will you please revert to this incident on the Island of Sark?

A. This German detachment on the Island of Sark consisted of about 8 or 10 engineers. A raid was made on them by about twice that number of British. They were pulled from their beds in the middle of the night and, without any clothing, were put in chains and deported; when they tried to resist, several of them were killed while they were shackled. One or the other of them succeeded in escaping and they spread knowledge of this incident.

Q. Did you hear at the time whether any other reports were available to Hitler which might have induced him to issue such an order?

A. I was told that similar reports were available to Hitler from Africa and other theaters of war.

Q. Do you know that there was a British service regulation about so-called "irregular warfare"?

A. Yes, I do. Either in connection with these incidents or somewhat later I had a copy of this British service regulation in my own hands.

Q. What struck you about it?

A. The essential thing I recall is the picture of a soldier which occupied a full page of this service regulation. Either in the arm pits or below his shoulder, he wore a pistol on each side hidden beneath his uniform. He was pictured with his hands up, and from the picture it could be seen that from these pistols, strings connected through his sleeves so that when he lifted his arms to show that he was about to surrender, he could still fire these hidden arms against his opponent. In addition I recall

that the chains which these commandos had to use were also described. These shackles were so-called "death slings". They were to be applied in such a manner that with every movement which was different from the movement the man was prescribed to perform, he was bound to strangle himself in these shackles. A series of further regulations dealt with the fact that these soldiers were to be equipped with rubber gloves in order not to leave any traces, and that they were to blacken their faces when they were operating at night and similar matters of a completely unsoldierly nature.

Q. Do you recall that in this combat regulation there was mention that every soldier, in order to use the British term, in such a situation had to be a "potential gangster"?

A. No, I had forgotten that, but in fragments of the regulation which I saw again here I found the term again.

Q. And that the British were ordered to kick an opponent?

MR. RAPP: I object, Your Honor, to this type of examination. Up to now I think we have been extremely lenient. The witness has told what he knows, and I think this type of leading question is objectionable.

PRESIDING JUDGE YOUNG: If the Doctor wishes to offer it, I think that's the best way to arrive at this testimony. If you have it and wish to submit it?

DR. LEVERKUEHN: I'll submit it.* Do you recall that at the time publications appeared in the German press about this so-called "irregular warfare"?

DEFENDANT WARLIMONT: Yes, I do. For one, this addendum to the Wehrmacht communique dated 7 October 1942 was commented upon in the German press in conjunction with the incidents at Dieppe. A further report was featured in the German press on 16 or 17 October 1942, in which a series of similar incidents were enumerated.

Q. What was your interpretation of this type of warfare? Did you regard it as complying with international law or contrary to international law?

A. Now, if the premises were actually correct and if the regulations were really applied by the individual soldier, then in my view, he put himself outside the pale of international law and all decent military tradition.

Q. Now, according to your knowledge as a soldier of international law, did you think that a reprisal was justified and proper?

A. Yes. Above all I thought it was necessary to prevent German soldiers being shot down at the very last moment by a

* Document Warlimont 106, Warlimont Defense Exhibit 104, reproduced below in this section.

member of the enemy armed forces who walked toward them with his arms up, ostensibly to surrender.

Q. Did you understand Hitler's intentions such as they were conveyed to you by Jodl to mean that reprisal measures were intended?

A. Yes.

PRESIDING JUDGE YOUNG: May I just ask a question here? Is a reprisal measure a military or a civilian act?

DEFENDANT WARLIMONT: My legal qualifications and knowledge are not adequate to answer your question, Your Honor. At any rate, in my view, the individual commander cannot impose a reprisal measure, only the government can do so; to this extent I think it is a political act.

Q. Then you would say if it's a political act that a military commander never has authority to decree or determine reprisal measures?

A. That is my view, Your Honor.

Q. That's your understanding of international law?

A. Yes.

Q. And do you understand that civilians have a right to determine reprisals?

A. No.

Q. That's all.

DR. LEVERKUEHN: May I ask you again, didn't you think that Hitler was authorized to impose reprisals under international law as Supreme Commander of the Armed Forces and head of the German State?

A. I believe I said the very contrary. That, as head of the German Government, he was the sole person authorized to impose reprisal measures.

* * * * *

Q. I'll revert to Document 1266-PS, Prosecution Exhibit 118. You have acquainted the Tribunal with the first section, that is the announcement which was appended to the armed forces communique, and if I understood you, you received a communication and an order from Jodl?

A. Yes, the order which was given to me by Jodl is reproduced correctly on the whole in section II of the document. Jodl had commissioned me with the translation of this announcement contained in the armed forces communique into military terminology. I had not been present during the issuance of the order by Hitler and thus, I could only learn more particulars from Jodl. In the case of this directive which was reproduced here by my assistant, Colonel Tippelskirch, I stated that the order

had to be drafted very carefully and with circumspection, and I referred to the Commissar Order, discussed here this noon. Now this reference could only have one meaning, that I believed by our cooperation in the drafting of the Commissar Order we had substantially contributed to the mitigation and restriction of the scope of the order and that it thus became virtually inoperative, and I wanted to attain the same objective in this case. In the same section II, I requested the Quartiermeister section first to establish contact with the Armed Forces Legal Department and the Counterintelligence Office of the OKW, the two agencies which had experts on international law.

Q. Now what instructions did you give regarding its contents?

A. I had to comply with the instructions received by Jodl in section III, and I stated that members of commandos who had not been killed in action were to be turned over to the Security Service after close interrogation by the military counterintelligence agencies. They were not allowed to be accommodated in prisoner of war enclosures.

Q. Now, what else happened? What was done by the Armed Forces Legal Department and the Office Foreign Counterintelligence?

A. The Armed Forces Legal Department submitted on the same day a draft for such an order, this is contained on page 2 of Prosecution Exhibit 118. It is evident, however, that a civil servant, a Ministerialrat, of the Armed Forces Legal Department, apparently without further contact with his department chief, had merely made it his task to couch the contents in the form of a military order, but it is not a properly completed piece of work. I, myself, as is evident from page 3 of the original, called Admiral Canaris on the telephone.

Q. Where was Admiral Canaris and the Armed Forces Legal Department, and where were you?

A. At that time I was in or near Vinnitsa in the Ukraine. Admiral Canaris and his office and the Armed Forces Legal Department were both in Berlin.

Q. I beg your pardon. I think I interrupted you, Witness. You wanted to make some more statements.

A. I wanted to add that during this telephone conversation I requested Admiral Canaris for his advice and, at the same time, conveyed to him the draft the Armed Forces Legal Department had already made.

Q. Now, according to your view, what was the starting point from which to mitigate the written version of this order appended to the armed forces communique?

A. In my view, all depended on not generalizing this order.

That we were to avoid all violations of international law on our part, and that only such members of enemy commandos were to be called to account as had really been guilty of violations of the laws of war. That could not be decided by an order such as was demanded in this case, but it had to be left to the discretion of the commander at the front. In the draft order which was demanded, one had to leave them a certain amount of latitude so that they in turn could make the correct decisions in the proper way in all cases.

Q. Will you please look at Prosecution Exhibit 118 on page 4 at the bottom, and will you see how this matter proceeded? That's page 5 of the original document.

A. You will find a note there by an expert of the Quartiermeister section from which it is evident that meanwhile the head of the Armed Forces Legal Department had concerned himself with the question. He had directly established contact with Jodl and conveyed his opinion to Jodl. His opinion was in effect that he thought it necessary to hold a joint conference of all agencies involved to be held in Hitler's headquarters. That is, a conference to be attended by Jodl, Canaris, and himself, the head of the Armed Forces Legal Department. Before that, he expressly stated, he could not submit a draft and thus, he did not identify himself with a suggestion which one of his assistants had previously made.

Q. Thus, the formulation was handled by three members of the OKW who were higher in rank than you, is that correct?

A. Yes. Whereas the National Defense Department, according to Jodl's directives, was endeavoring to make a draft, negotiations about the very same matter were conducted on a higher level.

Q. Will you please turn to Document 1264-PS, Prosecution Exhibit 119? That's on page 13.

A. It's Exhibit 119 which contains a draft order from the Office Foreign Counterintelligence of the OKW. Thus, the Foreign Counterintelligence Office complied with the request which I had discussed personally with Admiral Canaris. In this draft the application of the order is limited to such members of commandos as were encountered, contrary to the laws of war, either without a uniform or in German uniform.

Q. And what was to be done with them?

A. It is evident from the suggestion that they were to be dealt with according to martial law and commandos who were captured in uniform were to be handled in a different manner. Canaris suggested in each case to seek a decision of the Armed

Forces Operations Staff in conjunction with Canaris' office and the Armed Forces Legal Department.

Q. What did you do with this draft order of the office of Canaris, the Foreign Counterintelligence Office?

A. I sent this draft to the Armed Forces Legal Department as is revealed by page 5, and I requested very urgently that a final comment be made since a whole week had elapsed in dealing with it. All this correspondence thus passed from Berlin to the Ukraine and the Ukraine back to Berlin.

Q. Will you please turn to the next document, NOKW-003; that is Prosecution Exhibit 120, on page 18 of the English.

A. This again is a note by one of my assistants who had once again discussed it with the Chief of the Armed Forces Legal Department and the latter, in the course of the conversation had voiced the very urgent wish to talk to me. This consultation took place on 15 October, as is evident from the right hand top corner. In this connection I conveyed to Dr. Lehmann that I also thought the conference which he had suggested was expedient, but I further stated that a decision had to be made by Jodl; I myself could not summon such a conference.

Q. Now, what progress does Prosecution Exhibit 121 show, that is Document 1265-PS?

A. Exhibit 121 contains first a teletype by Canaris; on page 3 of the original you will find a communication from the Armed Forces Legal Department which reveals that the Armed Forces Legal Department declared itself in agreement with the draft of Canaris. A notation at the top of page 3 of the original shows that this communication was immediately conveyed by telephone by my Quartiermeister section to the head of the Armed Forces Operations Staff, Jodl.

Q. This is followed by a comment, that is on page 5, I think, the comment by the Armed Forces Legal Department. Now, we will turn to Document 1263-PS, that is Prosecution Exhibit 122.*

A. This document contains a note for an oral report by the Quartiermeister section and on the last pages is also a draft of an order, dated 14 and 15 October 1942. Actually only the draft order had been called for, as it appears on page 7 of the original. Now, I on my own initiative, added this note for an oral report. The draft of this is contained on pages 1 and 2 of the original dated 14 October 1942. The fair copy is on pages 3 and 4 dated 15 October. On page 5 you will find—that is page 5 of the original—a previous draft which starts with the words: "As ordered a draft order," etc., "is submitted." The note

* Document reproduced in part earlier in this section.

for an oral report was in effect submitted to Jodl, that is the note on pages 3 and 4 of the original dated 15 October 1942.

Q. Together with the draft order which is on page 6 of the original. Is that right?

A. Yes, I believe it is page 7.

Q. Yes, you are right; it's pages 7 and 8. What remark did Jodl make regarding your suggestions? First of all tell me what does this draft order aim at?

A. The draft order aims fully at what I previously stated, that only "individual attackers," as it is stated in section 2, saboteurs or agents who had deviated from the basic laws of warfare, according to the troops, and thus put themselves outside the pale of the laws of war were to come under this order. The photostat shows that the essential words, or those words which I considered essential were inserted by me in my own handwriting. Again this draft order does not call for any reports in order not to get the troops into that dilemma. I tried to circumvent the turning over of possible prisoners of war to the Security Service, as suggested to me for this order, by inserting in section 4—a military interrogation must precede any turning over to the Security Service. Now, I would like to say something about the note for the oral report. I appended it in order in this manner once again to emphasize to General Jodl the various comments of the department dealing with international law, that is Canaris' office, and the Armed Forces Legal Department, which had been secured during this week of correspondence. It was expressly prohibited that I voice my opinion in any different manner at that time.

Q. Now, what was Jodl's view regarding this draft order?

A. First, Jodl made some remarks on my note expressing his disagreement. In the same manner he made remarks showing that he disagreed on the draft from Canaris' office, the Foreign Counterintelligence Office. At the end of section (a) on page 6 there is a "no" handwritten by Jodl; and further to the bottom at the end of the draft, you will find another marginal comment by Jodl, "no good either"; but I did not see these remarks of Jodl's at the time because I was no longer concerned with these matters afterwards.

Q. Will you please turn to Document 523-PS, Prosecution Exhibit 123*; that is, on page 26 of the English Document Book IV.

A. The first page of this exhibit contains once again the copy of the draft order as made by the departments to which I just referred. Everything that follows was done by Jodl. The photostat which I have before me contains both handwritten remarks

* Ibid.

by Jodl and the instruction to Jodl's personal clerk, whose name also appears, and from the typescript you can see that it is a completely different typewriter. I was no longer concerned with this.

Q. Now, what you just stated was the instruction to Jodl's clerk, is that what appears on page 4 of the original, on the top?

A. Yes, next to it are the letters Dae, because the clerk's name was Daenicke.

Q. Now, will you just dwell on this page 4 for a minute. In the German document book this is followed by a handwritten remark dated 17 October 1942—"refused by Hitler." You have the photostat, do you recognize the handwriting?

A. That was certainly written by Jodl, no doubt, and it was initialed by Jodl.

Q. In the same passage you will find another notation, "Chief of Staff of the OKW," followed by the symbol "WFSt/Quartiermeister/Administration."

A. That is the same letterhead which was contained on the very first draft which I had submitted and which was reproduced indiscriminately without any change in the subsequent drafts.

Q. Now, what do you infer from the subsequent pages of this Document 523-PS?

A. First, I would point out the corollary to this remark by Jodl on page 4 of the original, on the top. He says "Refused since the order is not clear enough for the troops"; which shows that the gist of my suggestion had been rejected, because this gist consisted in leaving it to the discretion of the troops to make a decision as to whether any violation of international law had occurred. From the subsequent pages of the Document 523-PS it is evident that Jodl himself had three more drafts made; they are contained on pages 7 to 11 of the original.

* * * * *

Q. In this connection I shall also put to you Prosecution Exhibit 1270—correction 1269. I shall leave the sequence which I have set myself for a moment and turn to this document which is Document NOKW-2906.*

A. This is a note for an oral report from the Quartiermeister Department; it is signed by me and addressed to Jodl. It is dated 26 November 1942, that is, more than a month after Hitler's order had been issued. In this note for an oral report it is stated that the General Staff of the German Army deems it necessary to withdraw those copies of the Commando Order

* Document reproduced earlier in this section.

which have been distributed beyond the headquarters of armies. The General Staff of the German Army moved that this be done in accordance with its jurisdictional authority in the eastern theater. I take up this suggestion in the note for an oral report and I ask Jodl to bring about a decision to the effect that this order be destroyed generally, not only in the East, at echelons lower than army level. The purpose here again was to contribute to the fact that this order be forgotten and disregarded.

Q. Will you please glance at the last sentence in this note for an oral report?

A. In the last sentence I point out to Jodl that the Commando Order of Hitler dated the 18th of October, in accordance with Jodl's oral report to Hitler, was provided with a special distribution list and a special notation to the distribution list. I stress this fact particularly because, according to this, I was not in a position to make any different decision nor was Jodl, since even the distribution list for the Commando Order, as is revealed by this sentence, was ordered by Hitler himself.

Q. That would refer to the distribution list which can be found in Document 498-PS* [Pros. Ex. 124] at the end of the document on page 4?

A. Yes, that is correct. That is the distribution list to which this sentence refers.

Q. As a rule, who gave instructions as to how orders were to be distributed to subordinate troop units?

A. That was an office matter of a technical nature which the office chief himself would regulate.

Q. Then this was an exception?

A. Yes, this was a very special exception.

Q. Now, is this Hitler Order dated 18 October 1942 in accordance with your suggestions?

A. No. Nothing was left either in substance or in wording of my suggestions, which I included in my draft order dated 15 October on instructions from Jodl. My suggestion was never brought to Hitler's attention because in the most decisive aspects Jodl had changed it before it was even shown to Hitler.

Q. And one of the essential points was the turning over of the decision to the troops?

A. Yes. According to my opinion and to my wishes, that was the most decisive factor and, as can be seen from the photostatic copy, Jodl crossed it out in the first draft in his own handwriting.

Q. Do you know that in his testimony before the International Military Tribunal Jodl made a statement to the effect that for all

* Ibid.

practical purposes he had no connection with the Commando Order?¹

A. Yes, I know that, and I not only know that, but I also know that he said at the time that his staff, that is I, drew up a draft on my own initiative. Here again I am afraid his memory failed him. It is evident that this drawing up of a draft was not done on my own initiative from one of the documents which was discussed just now, which starts with the words "As ordered, a draft is submitted herewith."

Q. Now, as to Document 523-PS, Prosecution Exhibit 123,² you have no doubt in identifying Jodl's handwriting in several places in the photostat?

A. I have not the slightest doubt that it is Jodl's handwriting.

Q. I shall now put to you Document 503-PS, Prosecution Exhibit 125, contained in document book 4 of the prosecution, on page 39 of the English text and page 50 of the German text.

A. Immediately following Hitler's Commando Order he issued a further explanatory order. This again was drafted by Hitler himself exclusively, as I learned immediately at the time. In this order he states reasons for issuing the order. He compares, among other things, the activity of the commandos with the partisan warfare in the East. In this connection I should like to state that in doing so he made exactly the same statement, as is contained in the British regulation, because therein it says that the members of commando units are to fight in the same manner as partisans. Furthermore, the special significance of Hitler's additional order is to be seen in the fact that in the last paragraphs which are on page 7 of the original he threatens heavy punishment for all those who disobey his order. I should like to read the sentence "Officers or noncommissioned officers who fail through some weakness are to be reported without exception, or in certain circumstances—when there is danger in delay—to be called to strict account at once."

* * * * *

Q. I shall now put to you NOKW-004, Exhibit 149.³

A. This document consists of two parts. I would like to discuss the earlier incident first. The date is 18 May 1943. This is a communication from the chief of the Prisoner of War Affairs, addressed to the Armed Forces Operations Staff, Quartiersmeister section. Therein it is inquired whether, if members of enemy commando units are killed in action, they are to be reported in the customary manner to the enemy state. After some long consideration this communication was answered by the Armed

¹ Jodl's testimony concerning the Commando Order is contained in Trial of the Major War Criminals, Nuremberg, 1947, vol. XV, pp. 318 ff.

² Document reproduced in part earlier in this section.

³ Document reproduced earlier in this section.

Forces Operations Staff on 25 May. It bears my signature, by order. In this reply I state that reports to the enemy state in such instances should be avoided. The reason, which is not contained in the communication, was the following: I knew and I had initiated myself, together with Canaris, that the troops were to make false reports in this respect. I did not know the report channels of the Prisoner of War Department, and I had to fear that through these reports a new channel would be opened for Hitler and other agencies to control and check these incidents and events. This had to be avoided at all costs. For this reason it is expressed in this reply that according to the opinion of the Armed Forces Operations Staff reports of the death of commando units are not to be made. I added, however, since I was not in a position to make any decisions in that sphere, that it was to be left to the chief of the Prisoner of War Affairs to obtain a decision from the Chief of the OKW.

* * * * *

DR. LEVERKUEHN: The defendant has asked me to make a supplementary statement to some of the testimony given by him yesterday. I had asked him whether there were such units as commandos with the German armed forces, and he answered in the negative, but this morning he asked me to make a statement about this.

PRESIDING JUDGE YOUNG: Does the defendant desire to make a statement?

DR. LEVERKUEHN: Yes.

MR. RAPP: I would like to find out, Your Honor, if this is to be a change in the testimony he made yesterday, or whether it is merely an elaboration on it. I think that is rather important.

PRESIDING JUDGE YOUNG: Well, the Tribunal cannot tell what that is. I suppose while he is on the stand he has a right to explain or to make any statements he desires with respect to his testimony, so you may proceed.

DEFENDANT WARLIMONT: Defense counsel asked me yesterday whether there were such units as commandos with the German Armed Forces. I answered that question in the negative. In doing so, perhaps I adhered too strictly to the term "commando". In addition, perhaps I adhered too strictly to the particular method of fighting which was customary with the British Commandos. I omitted, however, to add that in the German Armed Forces, in the Office Foreign Counterintelligence, there was a similar organization. That was the so-called Brandenburg Regiment, which was later extended to Brandenburg Division. This

division, after the dissolution of the Office Foreign Counter-intelligence, was for a temporary period subordinate to the Chief of the Armed Forces Operations Staff, Jodl. This regiment, which later became a division, consisted of selected men who were particularly suitable for military purposes, and most of them had some knowledge of foreign languages. In contrast to the British Commandos, however, these men were, to the best of my knowledge, only committed in the scope of large-scale combat actions. They were used for operations which demanded particular military bravery. I do not know that this regiment or its members were under any special regulations or provisions. Their method of fighting was to be carried out completely in accordance with the provisions which prevailed for the rest of the armed forces. During the time when this division was subordinate to the Armed Forces Operations Staff, to the best of my knowledge special operations did not occur at all. At this time the members of this division were mostly gathered into battalions and attached to particular divisions for special tasks.

DR. LEVERKUEHN: Were any discussions about international law ever held in connection with this division or with this regiment, to the best of your knowledge?

A. No, I never heard of any such discussions.

* * * * *

Q. Let's now discuss Document 510-PS, Prosecution Exhibit 154.¹

A. This is a teletype from the OKW, Armed Forces Operations Staff which was dealt with by the Quartiermeister Department. The date is 26 February 1944. The communication is addressed to the Commander in Chief Southeast [von Weichs].² The Commando Order is referred to in this communication. The reason given is that on 19 and 23 February, British Commandos had landed on the Dodecanese Islands of Patmo and Piscopi. I recall this incident. Hitler was particularly annoyed because these British Commandos had apparently operated from waters under Turkish sovereignty. In addition these islands were only manned by weak German forces. Hitler was particularly angry because substantial losses had been suffered on the German side and the commandos had escaped unmolested.

Q. You, therefore, had received a directive from a higher level to make renewed reference to this order, or did you do this on your own initiative?

A. No, I was there when these incidents were discussed in

¹ Ibid.

² Defendant in the case of United States vs. Wilhelm List, et al., Case No. 7, Vol. XI.

the military situation conference, and in the customary manner Jodl gave me the directive during the situation conference: "Make a renewed reference to the Commando Order."

Q. Did you know how the Commando Order was handled up to that time in the area of the Commander in Chief Southeast?

A. I knew that too, through General Foertsch¹ who was the Chief of Staff of the Commander in Chief Southeast. I knew that the Commando Order had not been applied up to that date. According to the principles with which I was familiar, no misgivings need exist that this renewed reference would change anything in the state of affairs.

Q. Do you know whether, by virtue of this reminder on your part, a change was effected and steps were taken in accordance with the Commando Order?

A. No. I know nothing to that effect.

* * * * *

Q. I shall now put to you Document NOKW-227, Prosecution Exhibit 155.²

A. This document contains a number of teletype messages which apparently all deal with commando units. It seems they were taken from the files of the Commander in Chief Southeast, not from the files of the Armed Forces Operations Staff.

* * * * *

They deal with a commando operation on the Island of Alimnia in the Aegean Sea. These messages show that in a commando operation in April 1944, among others an English radio operator and a Greek sailor were taken prisoner; that they had been captured and not annihilated in the first clash with German troops was, as a matter of fact, a violation of the Commando Order. To the best of my recollection that was not objected to at the time by Hitler because here again, he assumed that Turkey had violated its neutrality and he wanted to investigate the matter further.

It is further evident from the teletype, from the third teletype on page 2 of the original, that such an investigation was carried out in which the German Foreign Office participated. Since a top level Reich agency outside of the armed forces participated, this instruction can only have been given by Hitler himself. It is not evident from this document who passed this instruction on to the Commander in Chief Southeast.

Q. What else can you gather from this teletype? Was the investigation carried out?

¹ Ibid.

² Document reproduced in part earlier in this section.

A. Yes, the investigation was apparently carried out and lasted from April until June, because on page 3 of the original there is yet another teletype. I beg your pardon, it is page 2 of the original. This is a teletype from the OKW addressed to the Commander in Chief Southeast, dated 4 June 1944. Therein it is stated that the prisoners, after the conclusion of the investigation, were no longer needed, and I shall quote the last words, "may be released for special treatment according to the Fuehrer order". This teletype is not available in its original version, but only in the form in which it was allegedly received at the office of the Commander in Chief Southeast. In typewritten letters my name is at the bottom of the document preceded by the words, "By order".

Q. Do you recall the name of the Island of Alimnia, or do you only remember an occurrence which took place at the time because Turkish sovereign waters were concerned?

A. Turkish sovereign waters and their exploitation by British commandos played quite a part at that time, as I stated before, and I remember these incidents well. However, I cannot recall having heard the name "Alimnia" then. Even today I don't know whether there is such an island, or where it is located.

Q. As a rule, commando matters, according to your previous testimony were dealt with in your Quartiermeister department, is that correct?

A. Yes, exclusively.

Q. In the signature under this teletype, however, there is a notation, "OKW Armed Forces Operations Staff Ic." What does Ic mean in your language, has that any connection with the Quartiermeister department?

A. No, there was no such designation in the Quartiermeister department at all. On the staff we did have a liaison officer to the Office Foreign Counterintelligence, who dealt with the compilation of enemy information. In fall 1942, he had joined the department as our new member and in the abbreviated correspondence language he was designated Ic.

Q. The letters "Ic" are followed by "II", and then follows the secret file number. What does "II" mean after the letters "Ic"?

A. "II" means that the matter was dealt with in a group II of this subdivision Ic; but this subdivision Ic on the staff didn't have a group II at all. The Ic only consisted of the Ic officer, and an assisting officer. As a consequence I cannot give any explanation for the fact that this sign was allegedly used in this group of my staff.

Q. Apart from the Ic in your staff was there another Ic, perhaps attached to Jodl?

A. Yes. In the course of the investigations connected with this incident I encountered this officer. At the beginning of 1944, Canaris' office, with his most essential sections, had been transferred to the Reich Security Main Office. It was therefore removed from the organizations of the armed forces and the OKW. Remnants of this office were newly concentrated in a special department in spring 1944. That was a department which, for a time, went under the designation of "Department for Front Reconnaissance and Troop Counterintelligence Matters". This department was also called Armed Forces Operations Staff Ic. I conclude, therefore, that this teletype was dealt with in the department which I have just described, because it had several groups.

Q. Where did this department have its location? In the Fuehrer's headquarters or where was it located?

A. This department was located in Berlin or in Potsdam as a dispersion measure, but not in the Fuehrer's headquarters.

Q. How does it happen that your signature appears on such a document if this department to which you have referred was not subordinate to you?

A. The only explanation I can give is that the chief of this department, who sometimes came to Fuehrer headquarters from Berlin, reported orally about this matter to Jodl. Thereupon, he might have received the instruction to handle the matter in such and such a manner and he no longer had time to obtain Jodl's signature. Therefore, he reported the facts to me, and obtained mine "By order" of Jodl. However, I do not recollect this.

Q. In the address it states "To the Commander in Chief Southeast Ic". When you sent teletypes was it usual for you to send them to the Ic of the Commander in Chief Southeast?

A. No. My official contact was not with the Ic departments. On my level, I communicated with the chiefs of staff of the various commanders in chief, whom I also knew personally. In the closest circles of the Armed Forces Operations Staff it was not customary to add anything like that to the address. However, I just notice here that an inquiry from the Ic with the Commander in Chief Southeast preceded this teletype.

Q. From what do you derive this?

A. It is mentioned in the letter heading.

Q. According to this, who made the inquiry?

A. The Commander in Chief Southeast.

Q. And what officer on his staff?

A. The Commander in Chief Southeast Ic.

Q. I would like to draw your attention to the stamp which is

noted on page 2 of the original, the receipt stamp. There you see the stamp Commander in Chief Southeast.

A. Yes, and also under the line "Commander in Chief Southeast" there is in parenthesis "Army Group Command F" and then again to Group Ic counterintelligence officer, number, etc.

Q. The addressee was the Ic/AO. What does "AO" mean?

A. "AO" means counterintelligence officer.

Q. Therefore, an officer in Canaris' organization, is that right?

A. Yes. To the best of my knowledge, with the higher command authorities the Ic and the counterintelligence officer shared one agency. Therefore, the officer of Canaris' organization was a member of the Ic group.

Q. Did you have any reason to assume that officers of Canaris were going to carry out the Commando Order or were not going to carry it out?

A. According to Canaris' instructions, which I knew, concerning this subject matter, I had every reason to assume that members of his organization had been instructed not to carry out the Commando Order as far as it was in the power of the members of his organization to prevent its being carried out.

Q. About this question we shall submit Document Warlimont 18, [Warlimont Ex. 20], extracts from interrogations in the case of the "Southeast Generals."¹

Let us now discuss Document NOKW-013, Prosecution Exhibit 156.²

A. This is a report from the Chief of Staff of the Commander in Chief Southeast, addressed to the OKW/Armed Forces Operations Staff, for my attention. In this teletype report it is stated that the Bulgarian Army will also carry out the treatment of enemy agents and saboteurs in accordance with the Commando Order.

Q. Does the photostat tell you anything about whether or not Hitler concerned himself with this matter?

A. Yes. From the photostat I can gather that this report had to be submitted to Hitler, and was in actual fact submitted to Hitler on 16 June, the day after it had been received. I conclude from this fact that Hitler himself had requested this information to be addressed to the Bulgarian armed forces.

* * * * *

Q. Let us now discuss Document 506-PS, Prosecution Exhibit 158.³

¹ Commonly known as the "Hostage Case" (United States vs. Wilhelm List et al., Case No. 7, Vol. XI.)

² Document reproduced earlier in this section.

³ Ibid.

A. This is a communication from the Armed Forces Operations Staff, Quartiermeister Department, and this copy here is a draft. It is addressed to the Armed Forces Legal Department. The date is 22 June 1944. From the communication, the following becomes evident. The army group judge advocate, that is the judicial official with Army Group Southwest [Commander in Chief Southwest], on 20 May 1944 inquired of the Armed Forces Legal Department, whether the Commando Order was to apply only to groups of persons or also to individuals. Undoubtedly this is merely a theoretical inquiry. The Armed Forces Legal Department, as is further evident, passed on this inquiry to the Armed Forces Operations Staff. I submitted this inquiry to Jodl after having delayed it for some time. On his order, more than a month later, on 22 June 1944, I passed on information to the effect that commandos consisting of only one person were also subject to the order, because according to Hitler's order there was no doubt left about this.

Q. Did you inform other agencies also about this fact and did you pass on any orders?

A. No, this information was merely sent from the Armed Forces Operations Staff to the Armed Forces Legal Department. It does not constitute an order. It is information passed on from one agency to another.

Q. Do you know of any cases involving commandos consisting of one person?

A. No, neither in connection with this theoretical inquiry nor at any other time.

Q. Concerning this subject matter we shall submit an affidavit by General Westphal, the Chief of Staff with the Commander in Chief Southwest, as Warlimont Document 41 [Warlimont Defense Ex. 43].

We shall now discuss in a body Prosecution Exhibits 159 and 160. Exhibit 159 is Document 531-PS¹, and Prosecution Exhibit 160 is Document 530-PS.²

Will you comment on these documents, please, General?

A. These two documents belong together because of their contents. Exhibit 159 is a note for an oral report. Exhibit 160 is a draft of an order which was originally attached to the note for an oral report as an enclosure. This second document is crossed out. As to the contents I should like to make the following explanatory statement. The Commander in Chief West asked, on 23 June 1944, approximately 2 or 3 weeks after the landing in Normandy, for an explanation of Hitler's Commando Order. He

¹ Ibid.

² Ibid.

states in this written request that [the office of] the Reich Security Main Office in Paris still continues to adhere to Hitler's order. He, however, the Commander in Chief West, was of the opinion that after the beginning of the Allied landing, the whole of the French area was to be regarded as combat area. For the application of the Commando Order this fact was most important because the Commando Order, in its version of 18 October 1942, excluded, according to its paragraph 5, the application of the order if large scale combat actions were involved. The Commander in Chief West continues to report in this communication that for the time being he had agreed with the police agency in Paris to the effect that a line was to be established which was to define the combat area in Normandy. This demarkation line was to stretch from the lower Seine River through Rouen, Argentan, to Avranches, that is, fairly close behind the actual combat area. To the front of that line, the Commando Order was not to be applied. That was the contents of the request.

Q. During that time were you in a position to expect Hitler generally to revoke the Commando Order?

A. After all my experience in the daily situation conferences, I had to regard this as out of the question; but, of course, I went to Jodl first of all with this request in order to receive instructions as to how to deal with it. I was not in a position to make a decision about it myself.

Q. And what were the instructions you received from Jodl?

A. Jodl, without even asking Hitler, said it was completely impossible that in this situation the Commando Order could be revoked or even amended in the West. He instructed me to draw up a corresponding answer.

Q. Did you feel that you were in a position to meet the wishes of the Commander in Chief West halfway, and did you contact him or one of his officers?

A. This again brought me into a very difficult situation and I considered very thoroughly what could be done in order to satisfy the justified needs of the Commander in Chief West and to mitigate somewhat the Commando Order. In these considerations I arrived at the idea that one could possibly help the Commander in Chief West by not tying him down to a fixed line as he had suggested, but putting him instead into a position where he was to adhere to an instruction which was not rigid. In other words, he was to make his actions dependant on the fluctuating combat situation. In the formulation of orders this could be expressed by not determining a demarkation line dependent on the area, such as the Commander in Chief West had suggested, but asking him instead to make his decisions dependent on the combat situa-

tion which, in this case, applied to the area from which his reserves for the combat were to be drawn. Thus, the idea originated to exclude the application of the Commando Order for the whole of the area including the area of our own Corps reserves. In order to examine the correctness and suitability of this idea, I contacted the Chief of Staff of the Commander in Chief West on the telephone. I told General Blumentritt the following: "What you have requested cannot be carried out. Isn't it possible to handle it in this manner?" In other words, "Can you not in this manner suggested by me, circumvent the Commando Order?" General Blumentritt thought this was a good solution and he agreed to it. Thereupon, this idea was included in my comment and in the draft of the order which I submitted to Jodl.

Q. The Security Police and the Security Service are also mentioned in the order. Why was this necessary?

A. It was necessary because it was evident from the request of the Commander in Chief West that this request had originated from conferences with the police in Paris. As a consequence, a provision had to be included which would at least seem to contain a satisfactory solution for the Security Service.

Q. And how did you picture the practical execution of this suggestion? Did you think that the people had to be turned over to the Security Service or to the Security Police?

A. No. I believed I had taken precautions against such a contingency through the provision just discussed which preceded this paragraph. According to this provision the troops could at all times decide themselves whether enemy commando members were to be treated as such or not at that time. Therefore, now approximately 2 years later, I reverted to the same principle which had guided me when I dealt with the matter in October 1942. I wanted to leave the decision to the troops, and undoubtedly the troops have the most healthy judgment in all such instances.

Q. According to your draft how was the order to be announced?

A. Orally.

Q. About this subject matter we shall submit Warlimont Document 43, [Warlimont Defense Ex. 45], an affidavit executed by General Blumentritt who has been mentioned just now.

Now, let us discuss—

A. May I briefly refer to Prosecution Exhibit 160? This document is the draft which I just commented on. It had been elaborated in this manner by my Quartiermeister department, upon my instruction. In particular I would like to draw your attention to the distribution list at the conclusion of Prosecution Exhibit 159 where it states "Chief OKW through Deputy Chief, Armed Forces Operations Staff." I did not consider it proper to submit

this draft to Keitel directly. Therefore, I crossed out the word "Deputy" and passed on the draft to Jodl. Jodl, in turn, crossed out the draft, as Prosecution Exhibit 160 shows. He crossed out both pages of it.

Q. Therefore this order was never carried out.

A. Not in the wording which we have here.

PRESIDING JUDGE YOUNG: That is, 160 was never carried out; Prosecution Exhibit 160.

DR. LEVERKUEHN: Yes. Document NOKW-005, Prosecution Exhibit 161 is contained in English document book 4, on page 126.

DEFENDANT WARLIMONT: This is a note written by me and addressed to the Quartiermeister department of my staff. The date is 25 June 1944. In this note I inform the Quartiermeister department of the reason for Jodl's crossing out the draft which was discussed now, and I pass on information about his new instructions concerning the drafting of a new order. The substance of this note is that the order was to be couched in informal terms and that it was simply to be clearly ordered that all sabotage units found outside the actual combat area in Normandy were to be treated in accordance with the Commando Order. In paragraph 3 the particularly feared instruction is contained that a report is requested, in this case even a daily report is demanded. I can only assume that in the meantime Jodl had told Hitler about the matter and that this was the effect of Hitler's instructions. Thus, the very same was repeated that had happened in October 1942.

DR. LEVERKUEHN: I should like to discuss with you, Document 551-PS, Prosecution Exhibit 162.* This is the continuation of the matter which we have just discussed. The document contains two drafts to the orders addressed to the Commander in Chief West, and finally, the fair copy of this order. In chronological sequence the first draft is the one which is contained on page 3 of the original.

No translation into the English has been made of this part of the document to the best of my knowledge; therefore, as Document Warlimont 19 [Warlimont Defense Ex. 21] we shall include the complete translation of Exhibit 162 in our document book. The Court will not be able to follow everything the witness says on the basis of the documents now available to the Court.

Will you please continue, General?

A. This draft which was now drawn up in accordance with Jodl's instructions is, in spite of this, couched in approximately the same terms as my original draft. Above all, the provision was taken over into this version that the area including that

* Ibid.

of our own corps reserves was to be excluded from any application of the Commando Order. But, the efforts to retain the original draft did not succeed; this can be gathered from the fact that many handwritten amendments are visible in this order.

Q. Whose handwriting?

A. I am afraid I cannot state this definitely, but I feel inclined to assume that it is the handwriting of the man who was then in charge of the Quartiermeister department, Colonel Poleck. On page 1 of Prosecution Exhibit 162 there is a further draft bearing the same date, which takes into consideration the amendments entered on the first draft. Jodl has added to this draft that the Commander in Chief Southwest in the Italian theater of war was to receive corresponding instructions. In the meantime, therefore, Jodl had accepted the basic idea contained in the draft. Keitel also saw the draft and in his own handwriting entered into the distribution: "10. Commander in Chief Southwest". The third document on page 5 of the original and subsequent pages is the teletype as it was finally sent to the Commander in Chief West bearing Keitel's signature.

Q. Do you know of any further commando incidents which happened in the area of the Comander in Chief West?

A. No. Until I gave up my office in the first days of September 1944, no such occurrences were brought to my attention.

Q. In the order parachutists are also mentioned. Does that portion of the order constitute an innovation, an intensification of the order dated 18 October 1942?

A. No. This instruction is also one which I had received from Jodl and which probably originated with Hitler, namely, that the parachutists had to be mentioned especially. In this particular case we managed to add this to the instructions in such a form that nothing was changed in the valid orders of this type. Above all therefore, paratroopers were still to be excluded from the Commando Order in normal combat actions, and of course, parachutists who were forced to bale out.

Q. Were parachutists who were sabotage agents included in the original Commando Order?

A. Yes, they had been specially mentioned there also.

Q. Now, how was this order to be distributed?

A. The order was first of all sent to the Commander in Chief West, then to the Commander in Chief Southwest who had been included by Jodl. In addition, to the two High Commands of the Air Force and the Navy; also to the military commanders in the West; and, finally, to the Reich Leader SS, Command Staff. This order was distributed to considerably fewer agencies than the original Commando Order.

* * * * *

Q. Now, let us discuss Document 1279-PS, Prosecution Exhibit 165.* This document consists of several parts.

A. Yes.

Q. Will you please comment on them?

A. The document consists of a note for an oral report. In the photostatic copy, there are three versions; in the mimeographed copy I only find two versions. Attached is the draft of an order. The contents refer to an occurrence which had taken place in the antipartisan fighting in the southeastern theater. In May or June 1944, a large scale operation had been carried out against Tito's headquarters. Within the scope of this operation a parachute battalion had been dropped in the immediate vicinity of this headquarters. Members of enemy military missions had been captured during this operation and Hitler had seen in this a reason to order that members of the enemy military missions who were with the bands were to be treated in the same way as members of commando units. This Hitler order, however, only referred to antipartisan fighting and to the theaters of war in the Southeast and the Southwest, that is the Balkans and Italy. As to the Balkans I would like to add that Hungary and Slovakia were not considered part of the southeast theater of war. From this note for an oral report, which was worked out in the Quartiermeister department, it is evident that the British who had been captured during the operation against Tito's headquarters just mentioned, had been treated as prisoners of war. This is stated at the beginning of paragraph 3; however, we could not avoid dealing further with this Hitler order. For this purpose on 22 July, I was for the first time shown a note for an oral report, which I countersigned on 25 July. I objected to various paragraphs of it, and refused to deal further with the matter until it had been changed. If I remember correctly, I wanted to gain time in order to ensure safety for the prisoners who had been captured during the first operation.

The second version of the note for an oral report is the one which is contained first in Prosecution Exhibit 165; it is dated 27 July and was submitted to me on 29 July. Once more I made an attempt to delay further the final drafting of the order, which can be seen from the marginal note at the top right hand corner. That states: "Why this further discussion after the decision has been reached about [paragraph] 1?" With this I meant to say that a further discussion of this kind was not necessary. Seeing that Hitler had given the order orally, it should be left alone unless a better suggestion could be made. I wanted to avoid issuing the order in writing. However, the members of my staff

* Document reproduced in part earlier in this section.

who dealt with this matter, at least that is how I remember it, informed me to the effect that in the meantime the Reich Security Main Office, a police agency, had raised the question of how the British and American soldiers were to be treated who had been captured during these antipartisan operations. The experts suggested to me that the question of military missions, which Hitler had already decided at any rate, would better be submitted in this form as an order now in order thus to avoid an extension of Hitler's instructions to American and British soldiers who might be captured during antipartisan operations. This idea I found reasonable, and thereupon I further submitted the note on it with the corresponding draft order.

Q. Did you see any further possibilities, in spite of the order, to help in this situation?

A. I didn't quite understand the question.

Q. I asked you whether you saw any further possibilities, even after an order had been issued, to formulate the practical execution of the order according to your wishes?

A. Yes. To our knowledge, at that time, military missions had not yet appeared in any other place in the Southeast or Southwest. This had been the only instance. If such a case were to occur again in the future, I could expect with certainty that the command agencies concerned, or their chief of staff would make inquiry with me before any actual steps were taken.

Q. Were you notified of any instances where this order was applied?

A. No. Not as long as I remained in office.

Q. Now, let us discuss Document 537-PS, Prosecution Exhibit 166.*

A. These are various further drafts of the order just discussed, dated 30 July 1944. From this document it becomes evident that Keitel signed the order subsequently. No initial of mine is contained on the order.

* * * * *

Q. Please give us a summary of your attitude towards the Commando Order.

A. I tried to prevent the original Commando Order of Hitler which was attached to the armed forces communique on 7 October without my knowledge, from being changed into a written order. I did this, because I assumed that in the form of an addendum to the armed forces communique, it would very soon be forgotten and therefore would probably have been scarcely applied at all. When this solution proved to be impossible in 1942, I

* Document reproduced earlier in this section.

then drew up the draft which has been very extensively discussed here, and I was, and I am still convinced that the contents of this draft were absolutely admissible within international law. I had no influence at all on the fact that Hitler a few days later himself issued the Commando Order in its well known form, and I also had no influence at all on the fact that this order was distributed and how this order was distributed. Subsequently, I did everything possible, together with other people in the armed forces who thought as I did, in order to prevent the application of the order. I hoped that thereby the Commando Order, which was originally presented to me as a reprisal measure, would not take any effect at all and that, therefore, these reprisals would be rescinded again as occurred with the shackling of the British prisoners of war. My efforts, however, were brought to naught by the British Service Regulation during this period which at that time was known to the German agencies and also to Hitler; this service regulation stated that the commandos were not to act as soldiers but as gangsters. These instructions were never withdrawn, and as a result our efforts with Hitler to rescind the Commando Order had to remain unsuccessful. However, I always held the conviction that the limitations which were made by the Commander in Chief West in summer 1944, led to the Commando Order being limited to a very great extent. For the rest, I am convinced that many or several incidents in these war years since 1942, were treated according to the Commando Order without the actual wording Commando Order justifying this.

* * * * *

EXAMINATION

JUDGE HARDING: What was to happen to these flyers [commandos] if they didn't try to escape, or weren't killed in combat ***?

DEFENDANT WARLIMONT: Then, as the order runs, they were to be killed in battle.

Q. But suppose they weren't killed in battle and didn't try to escape, then according to the order what happened to them?

A. This was not provided in the Commando Order, so that the commander was in a position to act on his own initiative and on his own opinion.

Q. Your contention is that there is nothing in the order that required him to shoot these people even if they weren't escaping?

A. The order demands, Your Honor, that commandos are to be shot in combat or in flight, and that is how the wording runs, as far as I can remember it.

Q. Isn't that merely a subterfuge, this escape, trying to escape, like it was used by the Security Service?

A. No, Your Honor, I never interpreted it in that way; but in another passage it states that such members of enemy commando units who fall into the hands of the armed forces in some other way are to be handed over to the Security Service. These other ways are described as, for example, if the members of the commando units are caught in some way by the police or even by indigenous inhabitants and then handed over to the German armed forces, that is, not in combat.

Q. Hadn't the phrase "trying to escape," "shot while trying to escape," been given a special meaning in Germany just like "special treatment," that was accepted widely, at least accepted by the police as a method of execution?

A. I know that term was used, but I am of the firm conviction that no soldier thought about that when reading this order and neither did I.

* * * * *

CROSS-EXAMINATION

* * * * *

MR. RAPP: Now Witness, on one occasion during your direct testimony, you amended your previous testimony during direct examination and you stated that the German armed forces did, in fact, have commando-like units such as the Brandenburg Division; but you said that units of the Brandenburg Division were employed only in large scale operations as opposed to the British commandos, and they were generally attached to other troops; you did make that statement, did you not?

DEFENDANT WARLIMONT: Yes.

Q. And you further stated, Witness, that this Brandenburg Division, operated under the over-all supervision of the Canaris department?

A. Yes.

Q. The same Canaris that has been mentioned very often in your direct testimony as a rather good acquaintance of yours?

A. Yes.

Q. Furthermore you stated, Witness, that the Brandenburg Division fought along the same lines and with the same methods applicable as to the Geneva Convention, as, in your opinion, at that time the rest of the German armed forces were also fighting; is that correct?

A. Yes. There were no special regulations for them.

Q. Now I would like to show you Document NOKW-069, Prosecution Exhibit 1634,* cross-examination.

* Document not reproduced herein. See testimony of defendant Warlimont below in this section which quotes part of this document.

PRESIDING JUDGE YOUNG: It may be admitted in cross-examination.

MR. RAPP: Witness, before I discuss this document with you, I would like first to ask you a preliminary question. Do you think that reprisals against prisoners of war are permissible?

DEFENDANT WARLIMONT: I know that in general, reprisal against prisoners of war is not allowed.

Q. Here is a document before you signed by, I believe, General von Pfuhlstein, the commander of the Brandenburg Division in the year 1943, and it discusses a contemplated raid against Marshal Tito's headquarters. I would like to ask you to read the paragraph numbered *b*, on page 3, into the record, so as just to get an idea of what these people intended to do—where it says "Two previously killed persons (hostages)".

A. "Two previously killed persons (hostages) are camouflaged as English parachutists and are dropped on a release site with objects necessary to complete the camouflage in such a manner as to make it seem an accident. The parachutists will carry with them a supply shipment consisting of original allied objects, (medical supplies, clothing, rations). The shipment includes a sealed gift package addressed to Tito personally which explodes when opened."

Q. And then the next line.

A. "The following original allied objects are required for that in detail." Shall I read it all?

Q. You see this "(1) Parachutes" there?

A. Yes.

"(1) Parachutes, dropping wrapper, parachute clothing, laundry, etc., for the parachutists.

"(2) Identification, note books, photographs, and articles for use of the parachutists.

"(3) Original rations and original cigarettes.

"(4) Side arms and ammunition for the parachutists.

"(5) Medical supplies, bandages and drugs in fairly large amounts, about 200 pounds.

"(6) Original clothing, in particular, shoes, underclothes, and stockings as supply shipment."

Q. Thank you. Now, Witness, I am sure you would not like to state that the rest of the German army fought like the Brandenburg Division; do you? Would you like to amend your testimony to some extent now?

A. I did not know these measures until now; they must certainly have been exceptions.

JUDGE HALE: I notice in there under Arabic 2, section b, con-

templates an attack with poison and/or explosives. Do you know what poisons were contemplated in such an operation?

DEFENDANT WARLIMONT: No, I don't know, Your Honor. I am only looking at it now for the first time.

Q. You didn't know of any similar operation in any other instance?

A. No, Your Honor.

JUDGE HALE: That is all.

* * * * *

MR. RAPP: Now, Witness, I would like to discuss for a few more minutes Document 1263-PS, Prosecution Exhibit 122.* In connection with that document, Witness, if you please, turn now to the next to the last page of this photostat in front of you, 1263-PS. I would like you to acknowledge to me that the following additions or changes of this draft are in your handwriting, paragraphs 1, 2, and 3, and then the entire paragraph 4, is that correct?

DEFENDANT WARLIMONT: No.

Q. Then please correct me.

A. I made changes in paragraphs 1, 2, and 3. Under paragraph 4 I did not rewrite the whole paragraph, but I added one sentence at the beginning in addition to the one that is already contained there, and in that sentence I also made one change. Therefore, there are only changes contained here and no additions.

Q. Very well. Now, would you please read to the Court the change that you have made in paragraph 4, that is to say, will you read first of what it said in the draft?

A. Yes.

Q. And then how it reads after you changed it.

A. I will. In the original draft it says, "Confinement in prisoner of war camps is prohibited." What I added was the following: "4. If military necessity demands the temporary arrest of individual participants, after military screening they are on principle to be handed over to the Security Service." Apart from that, in the original draft I added the following: "Confinement in the prisoner of war camps is —even temporarily— prohibited." These two words ["even temporarily"] I added.

Q. Now, the handwritten paragraph or change which you just read into the record is preceded by another handwritten note consisting of about four lines.

A. Yes.

* Document reproduced earlier in this section.

Q. Where does that fit in? And after you tell us that, read it to us, too, will you please?

A. These lines belong under paragraph 2.

Q. Then read us 2 as it read originally, and then as it was changed by you.

A. Originally paragraph 2 read like this: "In future an attitude contrary to the rules of war has to be assumed if individual saboteurs commit acts deviating from the basic rules of war, such as murder or the destruction of valuable property, thus placing themselves outside the rules of war." This sentence in German is fairly unintelligible. ***

Q. Now, will you—

A. This paragraph I changed as follows: "In future an attitude on the part of terror and sabotage units contrary to the rules of war"—I added to those words "has always to be assumed." I added the word "always", and now I read the new sentence which I added. "If individual attackers as saboteurs or agents, no matter whether soldiers or in whatever uniform, carry acts of violence or surprise raids, which in the opinion of their captors deviate from the basic rules of warfare, thus placing themselves outside the laws of war."

* * * * *

Q. Now, the burden of your testimony is then, that after you corrected Document 1263-PS, it was then retyped and submitted to Jodl, and that is the second page of Document 523-PS, Prosecution Exhibit 123.¹

A. That is so.

Q. And you initialed it then, too?

A. Before I submitted it to Jodl, I did, yes. How very rough and unfinished this was you can see from the fact there was as yet no distribution list attached.

Q. Now, I would like to show you for a second, 598-PS, Exhibit 124. I did say 498-PS, is that correct? That is what I meant.

JUDGE HALE: You said 598.

MR. RAPP: Document 498-PS, Prosecution Ex. 124² is what it should be. Now, Witness, may I suggest to you that the points as corrected by you were eventually incorporated into the final Commando Order which you have now in front of you, with the exception of some minor changes. Such terminology as, for instance, that they were to be treated as commandos whether they are in uniform or not, does appear in the final Commando Order and was suggested by you originally in your own handwriting on Document 1263-PS, is that correct?

¹ Document reproduced earlier in this section.

² Ibid.

DEFENDANT WARLIMONT: No, that is not correct.

Q. Just a second Witness. Before we go any further I will ask you now, is your testimony going to be to the extent that none of the changes that you have made in your own handwriting, as contained in Document 1263-PS, Prosecution Ex. 122*, was eventually incorporated into the Commando Order as it appears under 498-PS, is that what you want to say?

A. That is exactly what I want to say, because the one had no connection with the other.

Q. You mean they are not connected?

A. Purely externally, the draft which I changed partly in my own handwriting, never came to the hands of Hitler at all. For this very reason alone there can be no coincidence in the terminology, or at least you cannot deduce such a coincidence. The ultimate reason, however, is a different one.

Q. First do I understand you correctly? I am somewhat baffled. Do you mean to say Hitler dictated the Commando Order, is that what you want to say?

A. I haven't understood your question.

Q. Do you mean to say that Hitler dictated or drafted the Commando Order?

A. That is right, quite alone. That is what it says in the documents, too.

Q. If he did it, why did he need Tippelskirch's, Jodl's and your help? Why were you even told about it? Why didn't he just call in his secretary and dictate it? Why waste your time?

A. I wish it had been so, and I did wish at the time that it had been so, but he requested it from his staff, although, of course, he did not know whether Tippelskirch or I had actually added even one letter to it. He never found out anything about that. From this document, 523-PS, it becomes quite obvious to anybody who is interested, that here five to six new drafts were designed by Jodl, and that twice in the course of these days, from 15-18 October, he submitted his own drafts to Hitler personally, and that on two occasions Hitler refused to accept them. Once Jodl added in his own writing "the order is not clear enough for the Fuehrer". Then he sat down and made three new drafts, the last of which he submitted to Hitler again, and Jodl wrote on this one "Refused by the Fuehrer. Please make out your own draft of the order." Now, it could not be set down in the documents clearer than that. Hitler never saw a letter of what I wrote myself. That is what I said recently.

Q. That wasn't really my question, whether he saw what you had written. The point is whether or not he utilized, in some way

* Ibid.

or other, drafts prepared by you? Whether they're in handwriting or in typewriting isn't really material right now.

A. Now we come to the real reason for the coincidence which I was just going to comment upon. The changes in handwriting which I just had to read to you, I did not invent myself, but they had been ordered to me or, at least, ordered to that effect. The only difference between my departmental experts, as it were, and myself in the carrying out of this order was that they tried to shirk complying with it and writing it down. My view was different, namely this: We cannot avoid having to write this because Hitler would never leave such ideas once he had them. Therefore, we have to try in another way to have these regulations included in the same order. This I tried to bring about through the turns of speech which I put in myself, if I may come back to them. You will find among the changes made in handwriting under paragraph 2, the following which I think is the most important: "In the opinion of their captors". With this phrase I wanted to rescind all the other provisions which had been ordered by Hitler himself and which had unavoidably to be put in writing. Then, under paragraph 4, where the handing over to the SD is dealt with, it becomes even clearer. How should I, as an officer of the armed forces who had nothing at all to do with the Security Service suddenly decide to issue an order to the Security Service? That could only be ordered by a higher authority; and through this note made in handwriting I tried to modify it by writing in my own handwriting "After military screening". This was my way out. These two passages you will not find reproduced in Hitler's draft, but you will find his original desire which I could not circumvent in the final drafting of this order.

Q. I didn't ask you this question with reference to the Security Service. I wasn't referring to that. I submit to you that either Hitler must have been a clairvoyant or you must have used the Fuehrer's language. Let's just compare some other words used by you and quoted by Hitler. May I call your attention to Document 523-PS, Prosecution Exhibit 123, and also to Document 498-PS, Prosecution Exhibit 124. Now, in this Document 498-PS, under paragraph 3, you will find, "I therefore order, from now on all enemies on so-called commando missions in Europe or Africa challenged by German troops, even if they are to all appearances soldiers in uniform or demolition troops", and then, under paragraph 4 "If individual members of such commandos, such as agents, saboteurs, etc." Now, if you look under paragraph 2 of 523-PS you will find the identical language. There is not one word different. Now, either you anticipated Hitler's language or

he must have seen that document from a great distance and anticipated it. I would like you to explain that more specifically.

A. Well, first of all, I can't follow you, that here only one word was the same in both documents. For instance, I would like to point out—

Q. Perhaps if I stated it in German you could understand it and we could proceed a little more expeditiously. Let me show it to you. Here it says, "If individuals as agents and saboteurs". You said, and I quote it in German; "Wenn Einzelangreifer und Saboteure". Now then you said, "Gleichgueltig ob Soldaten und gleichgueltig in welcher Uniformierung" and he said in his order "To all appearances soldiers in uniform" which, translated into the German language is just the same unless you engage in a great hairsplitting contest.

A. I am rather inclined to assume the exact opposite because the decisive thing here is not that one or the other word is exactly the same. That can be easily overlooked. I think that the most important thing here is that the word "commando" in my draft does not appear at all, there is only mention of individual attackers or saboteurs. That is, individuals. I particularly avoided the word "commando". Correct is that in my draft the words appear "No matter whether soldiers" but this, as far as I can see, only coincides with the word "commando" in Hitler's draft and that, after all, isn't surprising. This coincidence, however, in paragraph 3, as well as in paragraph 4, does not come from any particular visionary powers which I had, but it arises from the fact, as I stated yesterday, that the first orders telling me to deal with this matter at all were given to me in the same text. Jodl told me all that before I drew up the draft. I think that is a clear enough explanation. Those were Jodl's ideas which he, Jodl, had the first time; and Jodl conveyed them to me. I thought it necessary for them to appear in this draft and then, with corresponding other words which I have just read, I tried at the same time to rescind them. Therefore, it is not astonishing that Hitler, in his draft a few days later, came back again to his original ideas.

Q. I understand it now. I was just under the impression, you see, that you didn't say that before. You said originally that nothing in the final order was based on that order you had submitted, but now you say that order you had submitted was, of course, nothing else but the carrying out of a directive that you had gotten theretofore from Jodl, so that explains it.

A. I already said that yesterday.

Q. Why didn't Jodl write the draft himself?

A. Well, in a military staff that's not generally the custom.

He did it often enough, and I wish he had done it in this case too. He actually did start it, as this whole document shows, after he wasn't satisfied with my draft.

* * * * *

PARTIAL TRANSLATION DOCUMENT WARLIMONT 106
WARLIMONT DEFENSE EXHIBIT 104

EXTRACTS FROM BRITISH SERVICE PUBLICATION "THE HANDBOOK
OF MODERN IRREGULAR WARFARE"

[Handwritten] For use by G (R) Officers

Not to be published

The information given in this document is not to be communicated, either directly or indirectly, to the press or to any person not holding an official position in His Majesty's Service.

THE HANDBOOK OF MODERN IRREGULAR WARFARE

Pamphlet No. 1

The General Principles of Irregular Warfare

This is a security document and must not fall into enemy hands.

* * * * *

Modern Irregular Warfare

Few people appear to understand the meaning of the term "irregular warfare". Broadly speaking, it consists of various kinds of subversive activity which may range from an individual act of sabotage to the organization of a large and well-trained guerrilla force. The personnel engaged in this type of warfare may be as varied as the activities themselves.

* * * * *

(a) The activities of individuals; or small groups working by stealth on acts of sabotage.

(b) The activities of larger groups working as a band under a nominated leader, and employing military tactics, weapons, etc. to assist in the achievement of their object; which is usually of a destructive nature.

(c) The operations of large groups of guerrilla forces such as the Russians are now using, whose strength usually necessitates a certain degree of military organization in order to secure their cohesion and to make and carry out effectively a plan of campaign.

* * * * *

Shooting to live

You have all been taught how to shoot to kill, that is fairly easy. How many of you know how to shoot to live? The whole object of close combat gunplay is to shoot to kill and live? It is of little use you trying to kill a man if you cannot kill him before he kills you. Your value as a corpse is practically nil. Your value to the war effort as a live and efficient killer is great. It is the duty of every soldier to learn not only how to kill, but how to kill in the most efficient manner and at the least possible risk to himself. The only way to achieve this is to never give the enemy a chance, the days when we could practice the rules of sportsmanship are over. For the time being, every soldier must be a potential gangster and must be prepared to adopt their methods whenever necessary. In the past, we as a nation, have not looked upon gangsters and their methods with favor; the time has now come when we are compelled to adopt some of their methods, and the methods used to subdue them to enable us to carry out certain types of operations.

To enable us to understand and use the gangster methods we must become efficient in the use of their weapons. The chief weapons of the gangster are the submachine gun, the pistol, and when silence is necessary, the knife.

It is to be regretted, but unfortunately true, that most people regard a pistol as a weapon of defense. It is not a weapon of defense, it is a weapon of offense and a very effective weapon at that. It is a certain killer up to a range of 400 yards and the bullet will carry a distance of 1,530 yards when the weapon is held at an angle of 35°.

Close Combat

In many circumstances it is necessary to liquidate opposition without noise. This rules out firearms; you must use a knife, a bludgeon, or the weapons nature gave you.

Soldiers are taught unarmed combat mainly in terms of defense. Here we are considering attack and counterattack. Remember, you are not a wrestler trying to render your adversary helpless—you have to kill. Do not bother, therefore, to learn a lot of elaborate holds and locks—concentrate on the killing blows, and the locks and the movements that lead up to them.

Attack

Let us suppose, for example, that you are stalking a sentry, You must dispose of him without noise. How are you going to set about it? Circumstances will dictate whether you should use a knife, a bludgeon or your hands. Let us consider first the use of the hands only—a stranglehold from behind.

Step silently up behind your enemy, throw your right forearm round his throat and grasp your left arm with your right hand just above the elbow. At the same time, place your left hand firmly behind his head, and push it forward, maintaining maximum pressure on his throat with your right arm. This sounds complicated, but it is really very simple, practice it on a dummy—or, with care, on a friend.

If you have a dagger and are skilled in its use you may be able to dispatch the sentry silently by a stab. You must strike to kill immediately and there are two ways of doing this.

(1) An upthrust from below the left shoulderblade into the heart.

(2) A downstroke in the left side of the neck—less certain to cause instant death.

In either case it may be possible to stifle a cry by clapping the disengaged hand over the sentry's mouth. A sentry who is not wearing a helmet can be "coshed" with a bludgeon on any exposed part of his head; the base of the skull is the best place. A man wearing a helmet is better stabbed or strangled. You will notice that these attacks are from behind. To attack from the front means risk of a shout before you can strike. Always remember the most vulnerable parts of a man.

(1) His heart.

(2) The bones of his head.

(3) His windpipe and the veins of his throat.

(4) His privates.

(5) Any part of his spine.

And remember—you are out to kill, not to hold him down until the referee has finished counting.

Counterattack

Consider first an encounter with an unarmed man, you yourself being also unarmed. He jumps into your path facing you: what are you going to do? Four general lines of action are worth learning, practicing and remembering.

(1) Kick him (or knee him) as hard as you can in the fork. While he is doubled up with pain, get him on the ground and stamp his head in.

(2) Give him a quick jab under the chin with the heel of the palm of your open hand, at the same time gouging his eyes with your fingers and bringing your knee up to his fork. As soon as he is on the ground, proceed as before.

(3) Chop ("rabbit punch") with the side of your hand on any vital part of the head or neck, i.e., the temples, chin, "adam's apple", side of throat, back of neck, collarbone. To make the

chop effective, the fingers must be fully extended close together, the hand being braced by the thumb extended at right angles to the fingers. The blow is delivered at lightning speed, the point of impact being the edge of the hand opposite the base of the thumb.

(4) Tackle him low—rugby fashion—round the legs, thus bringing him to the ground to be dealt with as seems best.

Now consider an armed man stepping in front of you. What can you do to overcome him and escape to get on with the business in hand? He may have a rifle, a pistol, or a knife.

(a) He has a rifle and bayonet in the "on guard" position. As he makes his "point", fend it off with your right hand, step forward and trap his left hand with both of yours—your left under his palm grasping his wrist and your right over his fingers. A sharp thrust outwards will throw him or make him release the weapon. Another method is to strike the bayonet off to your right with the palm of your left hand, take a pace forward with your left foot, grasp the rifle with both hands and force it upwards and backwards, at the same time kicking the enemy in the fork.

(b) He has a rifle without bayonet and attempts to knock you out with a butt stroke. Take a step to your left and grasp his butt; cross over with your left foot, grasp the rifle with your left hand, twisting it out of his grasp. Kick him in the fork as you disarm him. Once disarmed, the enemy can be finished off with his own weapon or by any other method which suggests itself.

(c) He has a pistol in his right hand. Get as close to him as you can and raise your hands above your head as wide apart as you can, so that he has to switch his eyes from one to the other. Bring your right hand down suddenly on the wrist of the hand holding the pistol so that the muzzle is deflected past the left side of your body. The pistol will almost certainly be discharged, and before he can recock it you must jab him in the face with your open left hand, at the same time kneeling him in the fork with your left knee.

N.B.—If his pistol is in the left hand, the procedure is exactly the same, with the muzzle deflected past the right side of your body.

(d) He has a dagger. If he rushes towards you with his right hand raised, raise your right hand so that his downstroke is parried by your forearm. Do not parry too near his elbow or the dagger may still get home although its force may be lessened. Once the blow has been stopped, seize his right wrist with your right hand and at the same time apply your left hand force to the back of his upper arm, so forcing him to the ground and making him drop the dagger. If he tries to strike with a dagger from below, using an upward sweep of his right arm, the blow can be

stopped or parried with your left forearm. Then immediately seize his right wrist with your right hand, and pull him toward you, at the same time striking him hard across the throat or chest with your left arm. Force his right arm across your chest, palm of the hand outwards, and break the arm, forcing him to drop the dagger.

But the enemy will not always be in front of you. He may have let you pass and be stalking you. Suppose a voice says "Hands up" or the equivalent, or two hands grasp you from behind—what then?

a. A voice says "Hands up." Fling up your hands, at the same time glancing over your shoulder and measuring the distance to your enemy with your eye. You may also be able to see what weapon he has and in which hand he is holding it. If he has a rifle and bayonet turn about quickly and try to carry out the counter given above for a facing attack with a bayonet. Alternatively, drop to a crouching position, and dive for his legs before he has time to shorten his point to stab you. A low tackle should bring him down. If he has a pistol, turn about on your left heel, deflect the weapon with the left arm at the same time jabbing with your right hand to the face and your right knee to the fork. This process is, naturally, reversed if he is holding his pistol in his left hand.

b. Two hands grasp you by the throat. Seize his thumbs or little fingers and break them back to make him release his grip. Tighten your hold on his hands, and throw him over your head. A vicious backward kick on the shins will help to make him loosen his hold.

c. You are seized around your waist. Reach behind and grab your opponent by his privates. Alternatively, reach between your legs grab one of his legs and pull him off his balance. Follow him as heavily as you can as he comes to the ground.

d. You are seized with your arms pinioned. Sink at the knees and force your elbows outwards. Back-kick his shins, or throw your head back in his face to disengage his hold finally.

Improvised weapons

Do not forget that good weapons are often lying about ready to hand. A bottle with the bottom smashed off is more effective than a naked hand in gouging an opponent's face. A heavy ring on the finger is as good as a knuckle duster. Even a large stone is not to be despised.

In finishing off an opponent, use him as the weapon, as it were, beating his head in on the curb or any convenient stone. In this

connection do not forget that a heavy boot will kill a man on the ground just as well as the butt of a rifle.

The uses of a belt with a heavy buckle are well known; you yourself will be able to think of scores of other homely weapons.

Concealment and care of arms

The most important two things to remember when concealing arms are the following. Firstly, to conceal them in a place where the enemy is not likely to look for them, and secondly to treat them in such a way before hiding them that they will not suffer from the effects of the elements. Places where arms can be concealed are:

In the ground by burying. Choose a place where the earth has already been turned up or else go far into the cultivation. The best place very often would be in a ploughed field.

Replough after burying.

EXTRACT FROM TESTIMONY OF DEFENDANT REINHARDT*

DIRECT EXAMINATION

* * * * *

DR. FROHWEIN (counsel for defendant Reinhardt): Did you receive the Commando Order and Hitler's amendment from the High Command of the Army?

DEFENDANT REINHARDT: Yes.

Q. Did you transmit the Commando Order to the units subordinate to you?

A. Yes.

Q. In what form was the Command Order transmitted to your subordinate units?

A. I can't tell you for certain, but I take it that mimeographed copies were sent to the corps.

Q. Did you have any doubts then as to whether there were any objections to this order arising from considerations of international law?

A. No. The Commando Order was already known to us by the promulgation contained in the armed forces communique. The armed forces communique announced the Commando Order as special reprisal measures. The text ran "against the British and their helpers." I received the order in writing subsequently. The order consists of two parts: the first part, the Commando Order proper, and the second part, the explanation thereto, which ema-

* Complete testimony is recorded in mimeographed transcript, 5-7, 10 May 1948; pp. 3834-3839.

nated from the Fuehrer, from Hitler himself. This explanation to the Commando Order clearly revealed that the measures provided for were directed against the British and their helpers.

Q. Will you briefly tell the Tribunal about the passage which in your opinion shows that? Have you got Document 503-PS, Prosecution Exhibit 125,* Witness?

A. "Great Britain and America will always find volunteers for this kind of warfare as long as these volunteers can be rightly told that their life is not imperiled." That is the principal sentence.

Q. Now, what conclusion did you draw from the fact that only England and America were specifically referred to?

A. It was clear for me that the Commando Order had no validity in the eastern theater of operations.

Q. Now this view, that this order did not apply to the eastern theater, did you express it in any way in transmitting the Commando Order?

A. I told my commanding generals about this order and conveyed my opinion quite clearly on the occasion of my visit to the front lines.

Q. Now, what view did your subordinate commanders have regarding this order?

A. The same.

Q. Do you know of any cases within your army area in which this Commando Order was executed?

A. No.

Q. Can you recall any incidents at all involving the execution of the Commando Order in your area?

A. No.

Q. Why not?

A. The area in which I was committed in the East was completely devoid of industrial installations. There were no objects in which such a sabotage unit might have been interested.

* * * * *

* Document reproduced earlier in this section.

5. THE TERROR FLYER ORDER

TRANSLATION OF DOCUMENT 1676-PS
PROSECUTION EXHIBIT 341

ARTICLE ENTITLED "A WORD ON THE ENEMY AIR TERROR" BY REICH
MINISTER DR. GOEBBELS, PUBLISHED IN THE "VOELKISCHER BEO-
BACHTER" MUNICH, 28 and 29 MAY 1944

A WORD ON THE ENEMY AIR TERROR

by Reich Minister Dr. Goebbels

It is no longer disputed by anyone today that the enemy air terror pursues almost exclusively the aim of breaking the morale of the German civilian population. The enemy wages war against the defenseless, against women and children in particular, in order to compel the men of our country to yield. This intention of his is proved on one hand by the facts themselves, and on the other hand by the abundance of existing statements published by the enemy. As far as the facts are concerned one needs only to visit one of the often bombed towns in the Reich or in the occupied territories to determine without doubt by one's own observation that our war potential is damaged by perhaps at the most only 1 percent by the enemy air terror, and the remaining 99 percent plainly falls upon the civilian sector.

A short time ago the leading representatives of the French and Belgian episcopates, who certainly cannot be suspected of acting according to German orders, published a flaming protest in the international press against the enemy's barbarous methods of aerial warfare, which kills old people, women, and children, as well as destroys churches, venerable cultural monuments, and thickly populated civilian residential sections, without any military objectives being apparent. To this we need to add nothing more.

Our enemies do not try to conceal their intentions in this matter. One does not need to look far in the British or American press to find substantial proof of this. "Lay the great cities in ruins and you will crush the will to fight". Thus wrote the English air expert, I. M. Spaight in his book, "Air Power and the Cities", already in 1930. Nothing in this tendency of the British aerial warfare has changed since then. "It is not possible to draw a boundary line between the civilian population and the combatants". With this cowardly excuse the "Daily Mail" seeks to justify publicly this brutal and mean method of enemy aerial warfare. Much more explicit is an influential British naval

officer who states in the English military periodical, "The Army Quarterly": "Does the concept of noncombatants exist at all? A small child neither in peace nor in war is a useful member of the national community. No one in reality has the right to demand inviolability for himself even though he may attempt to do so in the name of humanity. Germany must become more desolate than the Sahara Desert".

The well known London newspaper, "News Chronicle", is not missing in this choir of hatred. It adds, "We are for wiping out every living being in Germany, man, woman, child, bird, and insect. We would not let even a blade of grass grow". This causes the respected British author, H. G. Wells, to make the following demand: "Treat the German people like a troublesome native tribe." The American publicists are no less rough. One of their leading spokesmen, Raymond Clapper, writes with evident pleasure: "Terror and brutality are the best sides of aerial warfare". One might object, perhaps, that not all influential Americans and Englishmen think this way. Wrong! Even the Anglican High Church declares in its official organ, "Church of England", on 28 May 1943: "It is a perverse view of Christianity to suppose that civilians must not be killed". Even the Archbishop of York, Dr. Cyril L. Garbett, blesses the barbaric methods of the Anglo-American aerial terrorism in his pastoral letter of June 1943, with the words: "It is only a small evil to bomb German civilians."

We have so far desisted from making known to the German people the most despicable of the statements from which we have only given a small selection, and which altogether represent a plain demand for the murder of women and children, because we were afraid that, in the face of this cynicism it would take measures of self-defense and revenge itself with the same measures upon the enemy pilots who bail out of shot-down enemy planes. In the meantime, however, circumstances have arisen which prevent us from continuing to maintain this reserve in the future. The Anglo-American terror flyers in the last few weeks, besides indiscriminately bombarding the residential quarters of our cities, without any even superficial respect for the international rules of warfare, have taken to shooting down German civilians openly and slaughtering them in cold blood. No more excuses can be brought forward in this matter, because the enemy planes sweep low over villages, fields and highways, and direct their machine guns upon harmless groups of people who are going about their business. This has nothing to do with war. This is naked murder. There is no rule of international law which the enemy can invoke in this matter. Through such criminal methods of

warfare, the Anglo-American pilots place themselves outside the pale of every internationally recognized rule of warfare. Last Sunday, for example, to take only one of a thousand examples, in the rural districts of Saxony, groups of playing children were fired on by aircraft and suffered considerable casualties.

No one will be astonished that the amazed population, which, as is known in the whole world, fully understands any soldierly type of warfare, has been filled with rage at these cynical crimes. It is only possible with the aid of arms to secure the lives of enemy pilots shot down during such attacks, for they would otherwise be killed by the sorely tried population. Who is right here? The murderers who after their cowardly misdeeds await humane treatment on the part of their victims, or the victims who wish to defend themselves according to the principle of an eye for an eye, a tooth for a tooth? This question is not hard to answer. In any case it would be demanding too much of us if we were asked to use German soldiers for the defense of murderers of children, and against parents who, seized with blind rage at having just lost their most valuable treasures through the brutal cynicism of the enemy, take measures of self-defense. If the English and Americans, as they themselves say, wish to regard and treat us as troublesome native tribes, then it is our business whether we put up with it. The German people are known over the whole world for giving to war what war demands from them. But too much is too much, and here the limits of what can be borne have been far overstepped.

It seems to us hardly possible or endurable to use German police and soldiers against the German people when they treat murderers of children as they deserve. Even the arbitrary methods of warfare of the Anglo-Americans must have an end somewhere. The pilots cannot say that they as soldiers acted upon orders. It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he blames his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare. Our century has obliterated to a great extent the boundaries between warfare and crime on the part of the enemy. It would be demanding too much of us, however, to expect that we should silently accommodate ourselves as victims to this unlimited barbarity.

We reach these conclusions in a completely objective manner. In these questions our people think much more radically than their government. It has always been our wish that the war should be conducted in a chivalrous manner. The enemy, apparently, does not want this. The whole world is a witness of

that. If this revolting condition continues, it will also be witness of the fact that we can find ways and means to defend ourselves against these criminals. We owe this to our people who bravely defend their lives in a proper manner, and therefore in no way deserve to be declared fair game for enemy man-hunters.

TRANSLATION OF DOCUMENT 735-PS
PROSECUTION EXHIBIT 346

MINUTES OF MEETING, 6 JUNE 1944, CONCERNING TREATMENT OF
ENEMY FLYERS, SIGNED BY WARLIMONT

[Stamp]

Matter for Chiefs
Through Officer only

Fuehrer Headquarters, 6 June 1944

Deputy Chief of the Armed Forces Operations Staff

No. 771793/44, Top Secret, Matter for Chiefs

[Stamp] Top Secret

3 copies—1st Copy

Subject: Treatment of enemy terror flyers

Minutes of a Meeting

1. SS Lieutenant General Kaltenbrunner* informed the Deputy Chief of the Armed Forces Operations Staff in Klessheim on the afternoon of 6 June, that a conference on this question had been held shortly before between the Reich Marshal, the Reich Foreign Minister and the Reich Leader SS. Contrary to the original suggestion made by the Reich Foreign Minister who wished to include every type of terror attack on the German civilian population, that is, also bombing attacks on cities, it was agreed in the above conference that only strafing attacks, aimed directly at the civilian population and their property, should be taken as the standard for the evidence of a criminal action in this sense.

Lynch law would have to be the rule. On the other hand, there would be no question of court-martial procedure or handing over to the police.

2. Deputy Chief of the Armed Forces Operations Staff stated the following:

a. First and foremost, following the lines of the generally dis-

* Defendant before the International Military Tribunal, Trial of the Major War Criminals, *op. cit. supra*, Vols. I-XLII.

tributed declaration made by Reich Minister Dr. Goebbels and numerous press notices written in the same vein, it is essential to announce any definitely established incident of this kind giving the names and units of the airmen, the place the incident occurred and any other relevant facts. The purpose of this would be to make clear the serious intentions of the Germans in the face of disbelieving enemy propaganda, and especially to discourage effectively any further murderous action against our civilian population. Therefore, the question is whether the Security Service knows of such a case, or whether the necessary proof is available with which to construct a case like this with the required particulars.

SS Lieutenant General Kaltenbrunner replied to both in the negative.

b. Deputy Chief of the Armed Forces Operations Staff mentioned that, apart from lynch law, a procedure must be worked out for segregating those enemy airmen, who are suspected of criminal action of this kind, when they are received into the reception [PW] camp for airmen at Oberursel; and if the suspicion was confirmed, they should be handed over to the Security Service for special treatment.

For this purpose the Armed Forces Operations Staff would cooperate with the High Command of the Air Force to lay down the necessary regulations for the use of the chief of the camp at Oberursel.

SS Lieutenant General Kaltenbrunner expressed his complete agreement with this view and that the Security Service should take charge of the airmen thus segregated.

c. On the question of making announcements, it is settled that, for the present, agreement should be reached in every case between OKW/Armed Forces Operations Staff, High Command of the Air Force, and the Reich Leader SS, to decide the form that the announcement should take. The participation of the Foreign Office is to be assured by the Armed Forces Operations Staff.

3. At a conference with Colonel von Brauchitsch (Air Force High Command) on 6 June, it was settled that the following actions were to be regarded as terror actions, justifying lynch law:

a. Low level strafing attacks from aircraft on the civilian population, individuals as well as crowds.

b. Firing at our own (German) shot-down air crews parachuting in the air.

c. Strafing attacks from aircraft on passenger trains in the public service.

d. Strafing attacks from aircraft on military hospitals, civilian

hospitals, and hospital trains which are clearly marked with the Red Cross.

The chief of the reception camp for airmen at Oberursel will be informed of the facts given under paragraph 3, above. If the facts of any case of this kind are established through examinations, the prisoners are to be handed over to the Security Service. Colonel von Brauchitsch declared in conclusion that another verbal report to the Reich Marshal on this subject would be superfluous.

[Signed] WARLIMONT

Distribution :

Chief OKW via Chief Armed Forces Operations Staff, 1st copy
Deputy Chief Armed Forces Operations Staff/War Diary, 2d copy
Quartiermeister (draft), 3d copy

Remarks* by the Chief of OKW on the minutes dated 6 June 1944 No. 771793/44 Top Secret, Matter for Chiefs

If one allows the people to carry out lynch law, it is difficult to enforce rules.

[Initial] K [Keitel]

Min. Dir. Berndt got out and then shot the enemy flyers on the road!

[Initial] K [Keitel]

I am against *legal* procedure! It doesn't work out!

Signed: K [Keitel]

Remarks by Chief of Armed Forces Operations Staff:

To 3.—This conference is insufficient. The following points must be decided quite definitely in conjunction with the Foreign Office:

1. What do we consider as murder?
Is *RR* in agreement with point 3b?

[Handwritten] A.A.?

[Foreign Office]

2. How should the procedure be carried out?
 - a. By the people?
 - b. By the authorities?
3. How can we guarantee that the procedure is not also carried out against other enemy flyers?
4. Should some legal procedure be arranged or not?

Signed: J. [Jodl]

* These remarks by Keitel and Jodl were originally handwritten. Cf. Warlimont's testimony above in this section.

TRANSLATION OF DOCUMENT NOKW-009
PROSECUTION EXHIBIT 347

TWO LETTERS FROM OKW/ARMED FORCES OPERATIONS STAFF TO
COMMANDER IN CHIEF AIR FORCE, 14 JUNE 1944 AND 23 JUNE
1944, CONCERNING TREATMENT OF ENEMY "TERROR" FLYERS

[Stamp] Draft

High Command of the Armed Forces

No. 771793/44 Top Secret, Matter for Chiefs, II Supplement

Armed Forces Operations Staff/Quartiermeister

(Administration 1)

Fuehrer Headquarters, 14 June 1944

3 copies—2d copy

[Stamp] Top Secret

[Stamp]

Matter for Chiefs

Through officer only

Subject: Treatment of enemy terror flyers

To: Commander in Chief of the Air Force

Attention: Colonel v. Brauchitsch, GSC

1. On the basis of preliminary discussions and pursuant to an agreement with the Reich Minister for Foreign Affairs and the Chief of the Security Police and Security Service the following are to be regarded as acts of terror *when a case of lynching is made public, and/or to justify the handing over of captured enemy airmen from the receiving camp for airmen at Oberursel to the Security Service for special treatment.**

(1) Strafing from aircraft of the civilian population, individuals as well as crowds.

(2) Firing at our own (German) shot-down air crews parachuting in the air.

(3) Strafing from aircraft on passenger trains in the public service.

(4) Strafing from aircraft on military hospitals, civilian hospitals, and hospital trains which are clearly marked with the Red Cross.

It is requested that the assent of the Reich Marshal for the precise wording of this matter be obtained, and that the commandant of the receiving camp for airmen at Oberursel be instructed verbally as to the appropriate procedure.

* All words in italic in this document represent handwritten corrections made on the original document.

It is further requested that the assent of the Reich Marshal be obtained also to the proposed procedure for the handling of public announcements, as shown in the attached copy of a letter to the Reich Minister for Foreign Affairs.

Written confirmation, if possible by the 20th of this month, is requested.

The Chief of the High Command of the Armed Forces

1 Enclosure

Draft

High Command of the Armed Forces

No. 771793/44 Top Secret, Matter for Chiefs, 3d Supplement
Armed Forces Operations Staff/Quartiermeister
(Administration 1)

Fuehrer Headquarters, 23 June 1944

[Stamp] Top Secret

2 copies—2d copy

[Stamp]

Matter for Chiefs
Through officer only

Subject: Treatment of enemy terror flyers

Reference: High Command of the Armed Forces/Armed Forces
Operations Staff/Quartiermeister (Administration
1) No. 771793/44 Top Secret Matter for Chiefs II,
15 June 1944, and your letter Adjutant No. 1605/44
Top Secret, dated 19 June 1944

To: Commander in Chief of the Air Force

Attention: Colonel v. Brauchitsch, GSC

Unfortunately it is not clear from your letter whether the Reich Marshal has given his assent to the facts as communicated, which are to be regarded as an act of terror for the public announcement of a case of lynching, and is willing to give verbal instructions to the commandant of the receiving camp for airmen at Oberursel as to the appropriate procedure.

It is again requested that the assent of the Reich Marshal be obtained and that we are informed if possible by the 27th of this month.

The Chief of the High Command of the Armed Forces

[Handwritten] By Order:
[Initial] W. [Warlimont]

24 June

TRANSLATION OF DOCUMENT 734-PS
PROSECUTION EXHIBIT 348

DRAFT OF LETTER FROM OKW/ARMED FORCES OPERATIONS STAFF
TO THE FOREIGN OFFICE, 14 JUNE 1944, CONCERNING TREATMENT
OF ENEMY "TERROR" FLYERS

[Stamp] Draft

The Chief of the High Command of the Armed Forces
Armed Forces Operations Staff/Quartiermeister
(Administration 1)/No. 771793/44 Top Secret
Matter for Chiefs, II Supplement

Fuehrer Headquarters, 14 June 1944

[Stamp] Top Secret

3 copies—2d copy

[Stamp]

Matter for Chiefs
Through officer only

Subject: Treatment of enemy terror flyers

To: Foreign Office [Initial] W [Warlimont]

Attention: Ambassador Ritter, Salzburg

In connection with the press reports at home and abroad, about the treatment of terror flyers who fall into the hands of the population, an unequivocal definition of the facts which characterize a criminal action in this sense is called for. At the same time the procedure has to be determined which should be adopted for the publication of those cases which have led either to lynching by the population, or—in the case of a terror flyer being picked up by the armed forces or by the police—to special treatment by the Security Service.

[Handwritten] This is not quite the point. W. [Warlimont]

But only for publication! W. [Warlimont]

In agreement with the High Command of the Air Force I intend that the memorandum enclosed herewith in draft form should serve a directive for the commandant of the reception camp for airmen in Oberursel. It relates to those cases in which an investigation conducted in this camp confirms a previous suspicion and justifies the segregation of the culprits, and their transfer to the Security Service.

Prior to publication of each case in the press, radio, etc., it must be made certain that the name, the unit concerned, the place of the act, and other related circumstances, give a picture that leaves no doubt, the publication of which would achieve the desired deterrent

effect from future acts of murder. In the formulation of the notice for publication it has to be borne in mind that protests of every kind on the part of the enemy will have to be reckoned with. Until further notice and before anything is published it is therefore intended, in agreement with the Chief of the Security Police and the Security Service, and the High Command of the Air Force, that an agreement should be reached between the High Command of the Air Force, the Armed Forces Operations Staff, the Foreign Office, and the Security Service to determine the facts, time, and the form of the publication.

Kindly do your best to let me have your confirmation by the 18th instant that you are in agreement with the above formulation, as well as with the procedure to be adopted for publication.

1 Enclosure

TRANSLATION OF DOCUMENT 728-PS
PROSECUTION EXHIBIT 1638

DRAFT OF LETTER FROM THE FOREIGN OFFICE TO CHIEF OKW,
20 JUNE 1944, CONCERNING TREATMENT OF ENEMY "TERROR"
FLYERS

[Stamp] Top Secret

[Handwritten] Draft

Salzburg, 20 June 1944

Ambassador Ritter, No. 444

To Chief of the High Command of the Armed Forces

Reference: Letter of 15 June 1944 No. Armed Forces Operations
Staff/Quartiermeister (Admin.) No. 771793/44
Top Secret, Matter for Chiefs, II Supplement, con-
cerning treatment of enemy Terror Flyers

In spite of the obvious objections founded on international law and foreign politics, the Foreign Office is basically in agreement with the proposed measures.

In the examination of the individual cases a distinction must be made between the cases of lynching and the cases of special treatment by the Security Service.

I. In the cases of *lynch law* the precise definition of the criminal acts, as given in numbers 1 to 4 of the letter of 15 June, is not very important. First of all no German official agency is directly concerned; death has already occurred before a German

official agency is concerned with the case. Furthermore the accompanying circumstances will, as a rule, be such that it will not be difficult to present the case in an appropriate manner when it is published. In the cases of lynch law it will therefore be mainly a question of correctly dealing with the individual case when it is published.

[Handwritten] That was the whole point of our letter. W. [Warlimont]

II. The proposed procedure for *special treatment* by the SD with subsequent publication would be tenable only if Germany took this opportunity to declare herself free from the obligations imposed by the agreements of international law, which are valid and still recognized by Germany. When an enemy airman has been captured by the armed forces or by the police and has been delivered to the air corps reception camp at Oberursel, he thereby has already acquired the legal status of a prisoner of war. In the Convention on Prisoners of War, of 27 July 1929, certain rules have been laid down for the criminal prosecution and sentencing of prisoners of war and for the execution of death sentences on prisoners of war. For instance Article 66 provides that a death sentence may be executed only three months after the *protecting power* has been informed of the death sentence; Article 63, provides that a prisoner of war can be sentenced only by the same courts and under the same procedure as members of the German armed forces. These rules are so precise that any attempt to disguise their violation by clever wording in the publication of an individual case would be futile. On the other hand, the Foreign Office is unable to recommend a formal repudiation of the Prisoners of War Convention on this occasion.

[Handwritten] Precisely this will be prevented by the proposed segregation. W. [Warlimont]

[Handwritten] No,—through the segregation and immediately following special treatment. W. [Warlimont]

An emergency solution would be to prevent suspected flyers from ever attaining a legal prisoner of war status; that is, that immediately upon seizure they be told that they are regarded not as prisoners of war, but as criminals, and that they will be delivered not to the authorities competent for prisoners of war, i.e., not to a prisoner of war camp, but to the authorities competent for the prosecution of criminal acts; and that they will then be tried in special summary proceedings established *ad hoc*. If interrogations during those proceedings should reveal circumstances which show that this special procedure is not applicable to the particular case, then the airmen concerned might in individual cases be subsequently transferred to the legal status of prisoners of war by being sent to the reception camp at Oberursel. Naturally

even this expedient would not prevent Germany being accused of violating existing treaties, nor would it necessarily be a safeguard against reprisal measures being taken against German prisoners of war. But at least this expedient would make it possible to follow a clear line, thus relieving us of the necessity of openly renouncing the present agreements, or, upon publication of each individual case, using excuses which no one will believe.

[Handwritten] Yes, that is also possible. W. [Warlimont]

[Handwritten] Yes.

Of the acts deemed crimes listed under numbers 1 to 4 of the letter of 15 June, those listed under 1 and 4 are legally unobjectionable. Those under 2 and 3 are not legally unobjectionable. The Foreign Office, however, would be willing to disregard this. Perhaps it would be advisable to combine the acts under numbers 1, 3, and 4 to the effect that all shooting attacks by a flyer on the civilian population will be dealt with as crimes. The various facts under 1, 3, and 4 would then be significant only as especially outstanding examples. The Foreign Office sees no reason why such attacks should not be expiated when they are directed against the civilian population in ordinary homes, in automobiles, on river boats, etc.

[Handwritten] Yes. W. [Warlimont]

The Foreign Office bases its opinion on the fact that it is generally prohibited for German flyers to fire on the civilian population during the raids on England. According to information received by the Foreign Office an order to that effect was issued some time ago by the Supreme Commander of the Air Force. In case of a general publication the existence of such an order might be pointed out.

III. It follows from the above that the main weight of the action will have to be placed on lynchings. Should the campaign be carried out to such an extent that the purpose, namely, the deterrence of enemy flyers, is actually achieved, which purpose is endorsed by the Foreign Office, then the shooting attacks by enemy flyers on the civilian population must be exploited for propaganda purposes in a more definite manner than heretofore; if not for publicity at home, then certainly for propaganda directed to foreign countries. The competent local German authorities concerned, presumably the police authorities, would have to be instructed to transmit to a central agency in Berlin a short truthful report on each such attack giving details as to place, time and number of dead and wounded. This central agency would have to forward this report at once to the Foreign Office for exploitation.

[Handwritten] Yes.

Since such shooting attacks on the civilian population have taken place also in other countries, for instance, in France, Belgium, Croatia, and Rumania, the competent German authorities or governments in those countries would have to be instructed to collect such instances of attacks on the civilian population in the same manner and to exploit them for propaganda for foreign countries in collaboration with the German authorities.

[Handwritten] Yes.

IV. In the letter of 15 June, the intention was communicated that until further notice an understanding with, among others, the Foreign Office is to be reached prior to any publications. The Foreign Office attaches particular importance to this point and also to the further point that this understanding should be reached not only until further notice, but for the entire duration of the campaign.

BY ORDER:

Signed: RITTER [Crossed out]

TRANSLATION OF DOCUMENT NOKW-548
PROSECUTION EXHIBIT 355

EXTRACT FROM WAR DIARY OF OPERATIONS STAFF I_c FOREIGN
AIR FORCES WEST, 2 OCTOBER 1944, CONCERNING CONDUCT OF
SOLDIERS IN CASES OF LYNCHINGS OF ALLIED AIRMEN BY THE
POPULATION

Headquarters, 2 October 1944

Air Force Operations Staff I_c

Foreign Air Forces West

[Handwritten] War Diary

File Note

Subject: Conduct of soldiers in cases of lynching by the population of shot-down terror flyers

On 2 October, 0920 [hours], Lieutenant Colonel Hohl telephoned to communicate the following decision of the Reich Marshal which was transmitted to him over the telephone by Major Breuer of the adjutant's office of the Reich Marshal.

The Reich Marshal agrees that the order OKW/Armed Forces Operations Staff/Quartiermeister (Admin. 1) No. 05119/44,*

* The file reference number identifying this order (No. 05119/44) differs from the file reference number (NO. 01 119/44) in the exhibit reproducing the order itself (NOKW-3060, Pros. Ex. 1462, which appears immediately below). The prosecution took the position that this was merely a typographical error. It will be noted that the other parts of file reference and the date are the same.

Secret, of 9 July 1944, concerning the conduct of soldiers in cases of lynching by the population of shot-down terror flyers, may be issued within the air force as an order of the *High Command of the Armed Forces*, but *not* as an order of the Air Force High Command.

[Signed] MAULBEHRE

First Lieutenant

TRANSLATION OF DOCUMENT NOKW-3060
PROSECUTION EXHIBIT 1462

ORDER BY GENERAL SCHMIDT, 11 DECEMBER 1944, TRANSMITTING ORDER OF CHIEF OKW OF 9 JULY 1944, CONCERNING ORAL INSTRUCTIONS TO BE GIVEN TO SOLDIERS NOT TO PROTECT ENEMY "TERROR" FLYERS FROM THE GERMAN POPULACE

Copy of Copy

Air Force Administrative Command VI
Operations Section Ia
No. 12 857/44 secret

Headquarters, 11 December 1944

Reference: Teletype Air Fleet Command Reich, Chief of General Staff No. 013082/44 secret, dated 30 November 1944

Subject: Conduct of soldiers in cases where the civilian population takes matters in its own hands with regard to shot-down terror flyers

To the—

Divisional Commanders,
Commanders of airport areas,
The Commander of the Antiaircraft Group Kurhessen
The Luftgau Forces and Antiaircraft Regiment 112/(E)

1. The Chief OKW has issued order, OKW/Armed Forces Operational Staff/Quartiermeister (Admin. 1) No. 01 119/44 secret, dated 9 July 1944—concerning the conduct of soldiers in cases where the civilian population takes matters into its own hands [Selbsthilfe—"self-aid"] with regard to shot-down terror flyers.

"Recently, it has happened that soldiers have actively protected Anglo-American terror flyers from the civilian population, thus causing justified resentment. You will take immediate steps to ensure by oral instruction of all subordinate units

and authorities that soldiers do not oppose the civilian population in *such* cases by demanding that the enemy flyers be handed over to them as prisoners, and by protecting, and thus ostensibly siding with, the enemy terror flyers.

“No fellow German can understand such an attitude on the part of our armed forces. The inhabitants of the occupied territories, too, must not be restrained from taking matters into their own hands because of their justified indignation against the Anglo-American terror flyers, or from giving other expressions of their justified resentment against captured members of the enemy forces. In addition, I refer to the article by Reich Minister Dr. Goebbels published in the *Voelkischer Beobachter*, Berlin edition, dated 27 May 1944, No. 148, and entitled: ‘A Word on the Enemy Air Terror’.”

2. *This order* and all pursuant official correspondence will be *destroyed* after having been brought to the cognizance of the divisional commanders, the commanders of the airport areas, the commander of the Antiaircraft Group Kurhessen, of the Luftgau Forces and of the Antiaircraft Regiment 112 (E). Completion will be reported to Air Force Administrative Command VI, Operations Section Ia.

3. Instructions concerning this order will be given to all levels down to the regimental commanders and airfield commanders; as far as is practicable in the local conditions this will be done orally, otherwise by personal letter.

The order will not be transmitted in writing to subordinate units from battalions downward. The troops will be instructed orally in an appropriate way.

The Commanding General

Signed: SCHMIDT

Lieutenant General, Antiaircraft Artillery

Cologne, 16 December 1944

Command Airfield Area 4/VI (Cologne)
Ia Diary No. 2051/44 secret

Personal

To the Commander of Air Base Wahn.

1. The directive contained on the other side will, in accordance with the order, be made known to the units orally in an appropriate way.

2. After notification, the directive will be destroyed in accordance with Air Force Regulation 99.

3. The notification of the directive to the subordinate units and the destruction of the directive will be reported to Command Airfield Area 4/VI (Cologne), section Ia, by 21 December 1944.

FOR THE COMMANDER OF THE AIRFIELD AREA

As Deputy
Signed Signature
Major

Certified true copy:

Sergeant

COPY OF DOCUMENT 2557-PS
PROSECUTION EXHIBIT 360

SWORN STATEMENT OF MAJOR THOMAS R. SEALY, 2 NOVEMBER
1945, CONCERNING ILL-TREATMENT AND KILLING OF AMERICAN
AIRMEN BY GERMAN CIVILIANS

Deputy Theater Judge Advocate's Office
War Crimes Branch
United States Forces, European Theater

APO 633

Before me, the undersigned authority, on this day personally appeared THOMAS R. SEALY, Major, AC, Executive Officer of the Trial Section, War Crimes Branch, United States Forces, European Theater, who being by me duly sworn upon his oath deposed and said:

From my familiarity with the records of the War Crimes Branch and in my official capacity as executive officer of the Trial Section of that branch, I know that the War Crimes Branch has referred for trial by a Military Commission or a Military Government Court in either the Eastern Military District or the Western Military District of the American Zone of Occupation in Germany, 33 cases involving 84 accused, virtually all of whom are German civilians charged with killing or beating American airmen who were surrendered unarmed prisoners of war in the custody of the then German Reich, at least 70 percent of such offenses being murder as distinguished from beating.

Sixteen of these cases involving 44 accused have been tried, and 17 cases involving 40 accused are now awaiting trial.

In addition 33 cases involving substantially the same offenses in like proportions are now ready for trial and will be tried as soon as one or more of the perpetrators involved in the cases can be apprehended.

A study of these cases discloses that the incidents involved therein were not limited to any one section or geographical locality of Germany, but occurred generally throughout all Germany.

[Signed] THOMAS R. SEALY
Major, AC

Subscribed and sworn to before me this 2d day of November 1945.

[Signed] ARDELL M. YOUNG
Lt. Colonel, JAGD

EXTRACTS FROM THE TESTIMONY OF DEFENDANT WARLIMONT*

DIRECT EXAMINATION

* * * * *
DR. LEVERKUEHN (counsel for the defendant Warlimont): I shall now turn to a new topic, the so-called "Terror Flyers". * * * Now, before making any comments, would you please explain what the term "Terror Flieger" denoted in German?

DEFENDANT WARLIMONT: I heard this term for the first time during the situation conferences held at Hitler's Headquarters, some time before 22 May [1944] which is the date of the first telegram. The term was applied for enemy airmen who, with their guns, shot at the German civilian population completely outside any combat area and quite apart from any combat action. As far as I could gather from these situation conferences, they were fighters who had escorted bombers to Germany or who were flying by themselves over Germany. At any rate, they penetrated into central Germany, and when they had discharged the duty allotted to them, and a new wave of fighters had taken over the escort of the bombers, then these enemy fighter planes swooped down on any Germans they encountered anywhere in Germany. They fired on peasants in the field, and persons in motor cars. They fired on railroad trains which could be identified as passenger trains beyond any doubt. They shot at persons who were descending from the trains to seek cover when the trains were forced to stop. They shot at children who were playing, and they fired—and this is the most drastic case which I recall—on a funeral procession. These questions were discussed again and again in the situation conferences and Hitler demanded of the representatives of the German Air Force that they should seek a remedy against this terror. At about the time the first document

* Complete testimony is recorded in mimeographed transcript, 21-25, 28-30 June; 1-2 July, 1948, pp. 6312-7103.

originated, the matter had reached such a pitch that Hitler asked the air force representatives for reports about the daily number of casualties caused in this way. I recall that figures of 20-30 persons a day were given as the casualty figures. That was the reason which had led to these orders.

* * * * *

Q. I will now put to you Document 735-PS, Prosecution Exhibit 346.*

A. This again is a note for a report, that is, a communication which was to be submitted to the superior officers in place of an oral report. This note was drafted by me and I directed it to Keitel via Jodl, as is stated in the distribution list. It refers to the treatment of enemy terror flyers.

In the first part, paragraphs 1 and 2, I reproduced the gist of a conversation which I had had with SS Lieutenant General Kaltenbrunner, regarding this question, on the same morning or the same afternoon. It was the day after invasion of France, that is the Allied landing in France, and on this day Hitler received the Hungarian Prime Minister. The military situation conference therefore took place in the Castle of Klessheim near Salzburg, which I have mentioned before. I had been ordered to Klessheim for that purpose, and on this occasion I saw Kaltenbrunner whom I had never talked to and whom I did not personally know until that date. This opportunity seemed expedient, as discussions had to be had with the police in this question, to discuss this matter personally with Kaltenbrunner. I asked Kaltenbrunner what the police knew of all these orders of Hitler, and whether any orders had been issued by the police in this field. Kaltenbrunner told me that, shortly before, a conference had taken place between Goering, Ribbentrop, and Himmler concerning this matter, and all three of them had agreed that only the kind of shooting attacks from aircraft which I previously described were to be considered criminal offenses. I went on to ask Kaltenbrunner what measures were to be taken on such occasions. Thereupon he told me, and this may be seen in the second paragraph, that lynch law was to be applied as a rule; courts martial proceedings and turning over to the police had not been referred to. That was diametrically opposed to what I had heard from my superior officers. Therefore—and that is contained in paragraph 2—I pointed out that on the part of the armed forces a different procedure had been suggested, the procedure which I have previously described.

I went on, in paragraph 2*b*, to ask whether cases—I beg your pardon, it is in paragraph 2*a*—whether cases of this type had become known to the Security Service and he said no.

* Document reproduced above in this section.

Finally, under paragraph 2c, it is mentioned that in any case which might occur in this field, prior to any publication, contact should be established between the authorities involved, that is, the OKW, and the High Command of the Air Force, and Himmler's office. That was the substance of this interview between Kaltenbrunner and myself which was not attended by anybody else. We were standing talking in a corner of the room, and our talk lasted for about five or six minutes.

Q. Then you go on to report about a conference with Colonel von Brauchitsch.

A. Yes. On the same afternoon, after I had returned to my office, Colonel von Brauchitsch called upon me as the representative of the Commander in Chief of the Air Force, and he made some more specific suggestions as to what acts of enemy airmen were to be considered as crimes. After that, these acts, as compared with the original definition, were considerably restricted. The point which Jodl had objected to in the first version was dropped, and in its place only shooting attacks from aircraft by enemy flyers on the civilian population, attacks on parachuting shot-down German air crews, attacks on passenger trains, attacks on hospitals and hospital trains, were described as being criminal. In addition, along the lines which we had discussed before, it was once again stated that all prisoners were to be removed from the population's so-called lynch justice, and that they were to be turned over to the Oberursel camp for enemy airmen to be interrogated, and as a result of such interrogation further measures were to be taken. Thus, these were discussions in connection with the execution of the missions which I had received from Jodl concerning this matter.

Q. Now what were Jodl's and Keitel's comments on this?

A. The comments are evident from the handwritten notes which both made on page 3 of the original.

* * * * *

Q. I was just going to show you the next Document NOKW-009, Prosecution Exhibit 347.*

A. This document contains two communications from the OKW to the High Command of the Air Force. The first is dated 14 June, and the second is dated 23 June. Both are drafts. The first communication tells the Commander in Chief of the Luftwaffe, what the results were of the conferences held on the question of terror flyers up to then. The four cases are particularly mentioned which henceforward were to be the conditions for the treatment of enemy flyers as terror flyers; and it discusses once again, briefly, the further treatment of such terror flyers as described by

* Ibid.

me before. This communication therefore was issued eight days after the discussion previously mentioned; it had been postponed for so long. The photostat copy here is not signed, but I assume that it was issued because the second part of this document apparently refers to an answer which Goering had given in the meantime. This answer, however, is regarded as unsatisfactory and therefore information is again requested. I signed this last communication "by order". This is another nine days after the previously mentioned communication.

Q. Does the document reveal anything about your participation?

A. I have already said that I signed the second communication "by order"; and, there are handwritten alterations by me on the first one.

Q. And what do they show?

A. In these alterations I tried to express with great clarity that the armed forces had nothing to do with lynch law and could have nothing to do with it, and that there could be no case at all which would justify lynch law.

Q. In this connection we will offer an affidavit as Warlimont Document 46, [Warlimont Defense Exhibit 48].¹

Now, I will show you Document 734-PS, Prosecution Exhibit 348.²

A. This again is a draft with no signature. The draft contains some general ideas for a communication to be sent to the Foreign Office; and, here, too, it is in pursuance to the directive which Jodl had given at the beginning of the whole development. In the contents the Foreign Office is told what intentions the OKW had for the treatment of further cases of terror flyers.

Q. Are there any comments in your own handwriting which reveal anything about your own attitude?

A. Yes. I sent the first draft of this communication once again to the Quartiermeister division in order, here again, to express quite clearly that the OKW was only interested in the publication of cases of this kind if lynch law should take place anywhere.

* * * * *

Q. I will now show you Document NOKW-548, Prosecution Exhibit 355.³

A. This is a file note belonging to the Air Force Operations Staff, dated 2 October 1944. That is a period in which I had already left office for more than a month. According to this file note, a certain 1st Lieutenant Maul [Maulbehre], unknown to me, called up another office of the air force, and told them about a

¹ Document reproduced below in this section.

² Document reproduced above in this section.

³ Ibid. Testimony is in contradiction to document to extent that Lieutenant Maulbehre was receiver of call, rather than the originator.

decision of Goering's. He said that this decision had been given to him by telephone by an adjutant of Goering's. The purport of this message was that which is contained in a second paragraph of this note. Goering here refers to an alleged order of the OKW, dated 9 July 1944, and he states that he was in agreement with this order of the OKW being issued within the air force as an order of the OKW but not as an order of the Air Force High Command. The contents of this order is designated as, "The conduct of soldiers in cases where the population takes matters into its own hands with regard to shot-down terror flyers." This is a paraphrase of the term "lynch law" previously used.

JUDGE HARDING: I have a question for you. This order that was issued on 9 July, that was issued apparently by the Quartermaster section, Administration 1. Was that section under you at that time?

DEFENDANT WARLIMONT: Yes. Your Honor.

Q. Are you familiar with that order?

A. No, Your Honor, not at all. I was just going to add that.

DR. LEVERKUEHN: Might I refer to this order? It's the next document. Witness, would you please wait with your answer until I have submitted this document. It is NOKW-3060, Prosecution Exhibit 1462.¹

DEFENDANT WARLIMONT: This is a copy of a copy, as it states at the top, and again it is an event which took place within the air force. But the first paragraph of this document mentions the order of 9 July again, and it gives the text of the order. It starts with the words "Recently, it has happened" and finishes on page 1 of the original with an allusion to the article written by Goebbels in the *Voelkischer Beobachter*.

Q. I would like to ask you, did you know this article by Goebbels which is mentioned here? (1676-PS, Pros. Ex. 341.)²

A. I never read the *Voelkischer Beobachter*. It never came to my house or to my office; but it is not quite out of the question that this article was officially shown to me at that time by somebody, but I can't remember it.

Q. According to your recollection, was such an order from the Chief of the OKW ever worked on in your division?

A. No. But I do know that Hitler repeatedly talked about it. If I am not mistaken it was even the basis for the whole matter even before May 1944. At that time another Party agency reported to him that members of the armed forces had intervened against members of the German population who had seized, or wanted to seize, an enemy flyer who had been shot down. Hitler

¹ Document reproduced above in this section.

² Ibid.

brought this case up during the situation conference and reproached Keitel for such a thing being possible. He said it was typical of the training of the armed forces. But at that time, and even later on too, Keitel, as far as I know, drew no conclusions from it.

Q. Assuming that such an order was issued, to whom was it addressed?

A. It could only have been addressed to the Replacement Army because it had to do with incidents within Germany itself. If one wanted to keep soldiers from intervening in such cases on behalf of the enemy flyers, it could only apply to soldiers of the Replacement Army.

Q. Were matters concerning the Replacement Army dealt with in your division?

A. No.

Q. To whom was the Replacement Army subordinate?

A. The Replacement Army was subordinate directly to Hitler after Field Marshal von Brauchitsch had resigned. The questions, however, were generally handled by Hitler via Keitel. Hitler had a poor opinion of the Commander of the Replacement Army, General Fromm.

Q. If Keitel dealt with such a matter, the matter of the Replacement Army, did he call in your division?

A. No. I can't remember such a case, and particularly here, where a disciplinary matter is concerned, which didn't belong at all to the sphere of the Armed Forces Operations Staff.

Q. Well, how does it happen that in the reference number your division is mentioned?

A. Such cases always arose because this staff was the only military staff which was present at all, at headquarters. As a result, Keitel issued all his orders from there via this staff, and it is possible that he did that in this case in the same way.

Q. Were you at the headquarters on 9 July 1944, the date of this order?

A. Most probably not, because of the following reason: The meeting discussed here with Reich Minister Lammers, about the allocation of labor, took place on 11 July, and I have calculated that that was on a Tuesday. The previous day, in the early morning, I had already flown to Berlin, that was at 10 o'clock. At that time, one could only fly in the early hours of the morning in Germany as an air passenger. Now my house was on the way from Berchtesgaden—where the headquarters was at that time—to Munich. Consequently I am almost 99 percent certain that I went home for the weekend, that is, I went home on 8 July in the evening so that I could spend Sunday, the 9th at home. But

I haven't got any notes about it, and I can only explain it to myself that I didn't even know anything at all about the existence of this order.

JUDGE HARDING: I have another question here, if I may interrupt. Do you know where the files of this office were kept?

DEFENDANT WARLIMONT: The files were generally kept temporarily at the office working on them, and then after a few weeks they were handed over to some archives. But I am not quite sure about that; I never troubled myself about it.

Q. You mean that within 2 weeks after an order of this kind, it would be sent to the archives?

A. Not 2 weeks, but a few weeks, because we had very limited accommodation at the time.

Q. In a matter of this kind, it wasn't closed? Do you contend that those files would have been sent from that office to the archives within a period of a few weeks?

A. Yes. That is how it was generally done.

Q. Well, then, how did you keep up to date on these matters?

A. Well, they were entered in a register, as far as they were secret, with the date, the contents, the sender, and the distribution list, etc.

Q. Now this register, that they were entered into, what was the nature of that? Did that show what had been done with a matter of this kind?

A. I never saw such a register, Your Honor, but I assume that in the last column they entered: "sent on such and such a date to such and such an office".

Q. When you were in your office, didn't you check back on a matter of this importance, or check back on those matters to see what had been done in these offices over which you exercised control—the section under you—to see what had been done, when you came back from a trip, if you had been on a trip?

A. It was an order by me that all the most important things should be submitted to me on my return; but during the period 1942–1943 this could no longer be done because the correspondence had so increased. As a result, I altered the order to the effect that the important matters should be orally reported to me, but even that was not always possible. That is particularly the case here. After the discussion, on 11 or 12 July, I came again to Berchtesgaden. Around about that time, the collapse in the East had reached its climax with Army Group Center, and the news reports poured in. For that reason, on 14 July—that is two days later—Hitler decided to go back to the headquarters, in East Prussia. That may be a further reason why I didn't hear about these things at that time.

DR. LEVERKUEHN: Does the wording of this order correspond to the wording which you had ordered to be used among your staff?

DEFENDANT WARLIMONT: I have checked the order on these lines too, and I think I can state in this respect too that there is proof that I did not see the order. I was always particularly feared by my staff because I rejected certain German terms, and always struck them out and sent them back. For instance, the sentence which is down here, in the second line "Beschleunigt Sicherzustellen" (to take "immediate steps to ensure")—the word "beschleunigt" as well as the word "sicherzustellen" were words which I always removed from the wording used by the staff in orders. There is another expression here which strikes me. It is at the end of the fourth line from the bottom in the second paragraph. It states, "by demanding that the enemy flyers be handed over to them as prisoners". That is in such bad German that I certainly could not have read it. Then we come to two more rather important objections. The term "Volksgenosse" [fellow German] which is contained on the top of the second paragraph was a typical Party expression and was never used by me in an order. In the same way it seems to me to be completely contrary to military correspondence as a whole to refer in an order to an article by Goebbels in the *Voelkischer Beobachter*, as is stated here in the conclusion.

* * * * *

CROSS EXAMINATION

* * * * *

MR. RAPP: Now, Witness, furthermore during direct examination you stated you could not recall ever having read or seen Goebbels' article in the "Voelkischer Beobachter" (1676-PS, Pros. Ex. 341)* dealing with terror flyers; that is correct, is it not? That is what you said according to the record.

DEFENDANT WARLIMONT: I heard about it, but I cannot recall whether I read about it in the documents.

Q. Now, look at paragraph 2a of Document 735-PS, Prosecution Exhibit 346, and I quote, "First and foremost, following the lines of the generally distributed declaration made by Reich Minister Dr. Goebbels and numerous press notices written in the same vein, it is essential to announce any definitely established incident of this kind, giving the names and units of the airmen, the place the incident occurred, and any other relevant facts."

Now this doesn't indicate that you hadn't read or heard of Goebbels' article at that time quite in detail.

* Ibid.

A. No. I had not. All it shows is that the general announcement of Reich Minister Goebbels played a certain part in this matter. I don't say that I had read this declaration.

Q. Maybe if I refresh your memory, you will be able to then tell us whether you read it or not. Let us look at Document 1676-PS, Prosecution Exhibit 341. Now to refresh your memory, Witness, as to the details of Goebbels' article, it was stated therein, "No one will be astonished at the fact that the population concerned which, as is known to the whole world, can understand any soldierly type of warfare has been seized with a terrible rage on account of these cynical crimes. It is only possible with the aid of arms to secure the lives of enemy pilots who were shot down during such attacks, for they would otherwise be killed by the sorely tried population." And then the last paragraph, "It seems to us hardly possible and tolerable to use German police and soldiers against the German people when it treats murderers of children as they deserve. Even the arbitrary methods of warfare of the Anglo-Americans must end somewhere. The pilots cannot say that they as soldiers acted upon orders. It is not provided in any military law that a soldier in the case of a despicable crime is exempt from punishment because he passed the responsibility to his superiors, especially if the orders of the latter are in evident contradiction to all humane morality and every international usage of warfare. Our century has obliterated to a great extent the boundaries between warfare and crime on the part of the enemy. It would be demanding too much of us to expect that we should silently accommodate ourselves as victims to this unlimited barbarity."

Now, Witness, you will agree with me, will you not, that this was a rather plain incitement to murder Allied airmen?

A. Today I cannot pass judgment on an article which I didn't even read at the time according to my recollection. Even your reading it does not refresh my memory.

Q. But you did make reference to it in this note to Jodl, and you did discuss it with Kaltenbrunner, didn't you?

A. It was known that such an article had been published.

Q. Now, may I ask you if you are in full accord with the ideas enunciated by Dr. Goebbels?

A. Certainly not. Here again I endeavored, just as in the case of the Commando Order, to reduce necessary reprisals to such measures as appeared to me to be absolutely necessary.

Q. Well, I would like to ask you a personal question, Witness. I assume you identify yourself today with Goebbels' statements that it is not provided in any military law that the soldier, in the

case of a despicable crime, is exempt from punishment because he passes the responsibility to his superior.

A. I do not know whether Goebbels had the necessary legal information as to international law in this sphere.

Q. That is a wrong answer to my question. I just asked whether you agree with him, or whether you didn't agree with him?

A. If a soldier commits a crime, as was the case in this instance, then in my view a reprisal is warranted. Whether that is within the scope of what Goebbels wrote here, I cannot state at this time. It was not assumed by us that these soldiers acted on order of their superiors.

* * * * *

Q. Witness, on 20 June 1944, the reply from Ambassador Ritter from the Foreign Office reached you. It is cross-examination Document 728-PS, Prosecution Exhibit 1638.* I would like to discuss that a little bit with you, Witness. Now in the introduction to this letter Ritter stated, and I quote, "In spite of the obvious objections founded on international law and foreign politics, the Foreign Office is basically in agreement with the proposed measures. In the examination of the individual case a distinction must be made between the cases of lynching and the cases of special treatment by the Security Service." And, under [paragraph] I of that letter he discusses the cases of lynch law. Will you read this paragraph I to the Court, please?

A. "In the cases of lynch law the sharp definition of the criminal acts, as given in numbers 1 to 4 of the letter of 15 June, is not very important. First of all, no German official agency is directly responsible; death has already occurred before a German agency is concerned with the case. Furthermore, the accompanying circumstances will, as a rule, be such that it will not be difficult to present the case in a most suitable manner when it is published. In the cases of lynch law it will therefore be mainly a question of correctly dealing with the individual case when it is published."

Q. Now, will you tell the Court your handwritten comments on the left margin to this paragraph I?

A. "That was the whole point of our letter." That is what I wrote in the margin.

Q. Now, I would like you to read paragraph II which deals with the proposed procedure for special treatment by the SD [Security Service] and I would like you again to read the first two sentences of paragraph II.

* Ibid.

A. "The proposed procedure for *special treatment* by the SD with subsequent publication would be only tenable if Germany took this opportunity to declare herself free from the obligations imposed by the agreements of international law, which are valid and still recognized by Germany. When an enemy airman has been captured by the armed forces or by the police and has been delivered to the air corps reception camp at Oberursel, he thereby has already acquired the legal status of a prisoner of war."

Q. And then you wrote again something on the left margin of that document.

A. Yes.

Q. It says, "precisely"—what does it say?

A. "Precisely this will be prevented by the proposed segregation."

Q. Will you continue now please reading.

A. "In the Convention on Prisoners of War of 27 July 1929, certain rules have been laid down for the criminal prosecution and sentencing of prisoners of war, and for the execution of death sentences on prisoners of war. For instance Article 66 provides that a death sentence may be executed only 3 months after the protecting power has been informed of the death sentence; Article 63 provides that a prisoner of war can be sentenced only by the same courts and in the same procedure as members of the German armed forces. These rules are so precise that any attempt to disguise an individual case of violation by a clever wording of publication would be hopeless."

Q. What did you say to that on the left margin?

A. I wrote, "No, through the segregation and immediately following special treatment."

Q. Now, I put it to you, Witness, that in these two paragraphs Ritter deals solely with a case of the turning over of Allied airmen to the SD for special treatment.

A. Yes.

Q. And it is still the burden of your testimony, is it not, that you did not know, did not ask, and were not told, what the real true meaning of special treatment was, and that you believed it was some special kind of confinement?

A. Not even that it was a special kind of confinement, but that the special treatment consisted in the person not being treated as a prisoner of war. He was treated differently—to wit, he was put into prison.

Q. I submit to you, Witness, that Ritter does not mention any other punishment to be carried out by the SD except death sen-

tences, because his references to the conventions in this particular paragraph deal with that particular issue?

A. He hadn't been asked about it, nor did he know what was meant or intended by this. This is evidenced from my first marginal comment; and by these statements once again he endangered this whole procedure which we had so painfully built up with the air force, and he put matters back to lynch law, because he didn't know any better. That's why I made my remarks to the contrary in the margin; I believe that you can understand it in this light.

Q. Now, Witness, if you had intended turning over prisoners of war to the SD for confinement only, any argument as to how to disguise an individual case of violation by clever wording for publication would have been absolutely unnecessary, would it not?

A. No. The impression was to be conveyed that these people, on account of their terror action, had been punished by death. Hence, this publication could only fulfill its purpose if it was in accordance with this intention.

Q. Now, Witness, as I understand it, it is neither customary nor provided for by international law that the detaining power is required publicly to announce that a prisoner of war was sentenced to a prison term; so that you would have no need to worry about publications in such a case. Isn't that correct?

A. The publication was to be of a quite different nature. It was to convey the impression that this person had been killed, so that the others would not follow his example, and to that end it had to be worded properly.

* * * * *

**PARTIAL TRANSLATION OF DOCUMENT WARLIMONT 46
WARLIMONT DEFENSE EXHIBIT 48**

AFFIDAVIT OF HERBERT BUECHS, 27 APRIL 1948

I, Herbert Buechs, was born on 20 November 1913, in Beuthen, Upper Silesia and reside in Neustadt in the district of Marburg, Camp Steimbel.

* * * * *

My statements refer to my position as general staff officer of the air force with the Chief of the Armed Forces Operations Staff for the period of 1 November 1943, until 8 May 1945.

Beginning about May 1944, reports accumulated at headquarters telling of attacks contrary to international law, which

were increasingly carried out by enemy airmen with their aircraft armament—machine guns and automatic cannons.

* * * * *

These attacks at that time occurred above all within the western area of Germany, partly, however, they also extended into central Germany, at a time when no Allied front existed on the West European continent.

The number of victims varied considerably. The highest number in a single case, in an attack on a local train which I remember, must have been between 15 and 20 dead.

The unlawfulness under international law of these almost daily repeated attacks, even more than the considerable losses suffered by the civilian population, was the cause for Hitler's order to provide special countermeasures against these "terror flyers" whenever they should fall into German hands. Then, beginning May 1944, a voluminous exchange of letters between the various authorities took place, also within the Armed Forces Operations Staff, regarding this order, more and more pursuing the unmistakable purpose of putting off the matter until it would be forgotten.

Indeed in the summer of 1944, Hitler temporarily forgot to follow up his order through the armed forces, probably because of the military situation on the invasion front, that early in June completely occupied him, and later because of the events of 20 July. But even when new violations of international law by Allied airmen led to the renewal of Hitler's demands for immediate attention to his order, it was possible again and again to prevent the issuance of such an order on the part of OKW or the air force.

Here I wish to refer particularly to the excited argument between the last Chief of the General Staff of the Air Force, General Koller, and Hitler regarding these questions, that took place in March or April 1945, and was recorded by Koller in an affidavit before the International Military Tribunal. During this argument Hitler directly reproached the OKW and the air force that their resistance against his order had sabotaged its promulgation and had contributed to the continuance of such unlawful attacks.

Neustadt, 27 April 1948.

[Signed] HERBERT BUECHS

* * * * *

D. The "Night and Fog" Decree and the Terror and Sabotage Decrees

I. INTRODUCTION

Only the defendants Lehmann and Warlimont were specifically named in the charges of the indictment concerning these decrees (par. 81). The "Justice Case" (*United States vs. Josef Altstoetter, et al.*, Case No. 3) likewise contained charges of criminal conduct in the execution and implementation of the Night and Fog Decree. See volume III of this series. The Night and Fog Decree and the later decrees or regulations implementing it were principally applied to inhabitants of France, the Low Countries, and Norway.

Pursuant to article V of the Night and Fog Decree (*Doc. 1733-PS, Pros. Ex. 797*), a first implementation decree was issued on 12 December 1941. This implementation decree was introduced in evidence, but it is not reproduced here, since it was expressly revoked by the second implementation decree (*Doc. 836-PS, Pros. Ex. 804*). Although the document concerning the second implementation decree introduced in evidence and as reproduced here is marked "draft", it contains the text which was actually issued and used as a "working basis". This was made plain by the cross-examination of the defendant Lehmann (*Tr. pp. 8552-8554*), the pertinent parts of which are hereinafter reproduced.

The Night and Fog Decree, issued in December 1941, and the later implementary decrees or regulations thereto, were superseded at least to some extent by the so-called *Terror* and *Sabotage* Decrees issued in 1944. In this section the materials on the Night and Fog Decree (section 2) are followed directly by the materials on the *Terror* and *Sabotage* Decrees (section 3).

The closing statement for the defendant Lehmann, Section IX E, and parts of the closing brief for the defendant Lehmann, Section IX F 6, both contain argument concerning these charges.

2. THE "NIGHT AND FOG" DECREE

PARTIAL TRANSLATION OF DOCUMENT 1733-PS
PROSECUTION EXHIBIT 797

"NIGHT AND FOG" DECREE OF HITLER, SIGNED BY KEITEL, 7 DECEMBER 1941, CONCERNING MEASURES TO BE TAKEN AGAINST PERSONS OFFERING RESISTANCE TO GERMAN OCCUPATION

Copy of Copy

[Stamp] SECRET

The Fuehrer and Supreme Commander of the Armed Forces

Directives for the Prosecution of Criminal Acts against the Reich
or the Occupying Power in the Occupied Territories,
dated 7 December 1941

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

I

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

II

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

III

Offenders who are taken to Germany, are only subject to court martial procedure there if special military interests should require this. German and foreign agencies are to be informed upon inquiries about such offenders that they were arrested and the state of the proceedings did not allow further information.

IV

The commanders in the occupied territories and the judicial authorities, within their competency will be held personally responsible for the execution of this regulation.

V

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

BY ORDER:

The Chief of the OKW

Signed: Keitel

Distribution

Foreign Office
Reich Minister and Chief of the Reich Chancellery
Reich Leader SS and Chief of the German Police in the Reich
Ministry of the Interior
High Command Army (Chief Army Armament and Commander
of the Replacement Army, Army Legal Department) with
7 numbered copies
High Command Navy (Navy Legal Department) with 1 num-
bered copy
Reich Minister for Air and Commander in Chief of the Air
Force with 1 numbered copy
President of the Reich Military Court
Commander Armed Forces Southeast with 4 numbered copies
Norway
Netherlands
Ostland
Ukraine
Plenipotentiary for the Armed Forces with the Reich Protector
in Bohemia and Moravia
Armistice Commission Wiesbaden
High Command Armed Forces:
Chief Armed Forces Operations Staff
Dept. L with 8 numbered copies
Armed Forces Propaganda
Office Foreign Counterintelligence
Dept. Foreign Countries
Branch III
General Armed Forces Office

PARTIAL TRANSLATION OF DOCUMENT 669-PS
PROSECUTION EXHIBIT 798

KEITEL LETTER OF 12 DECEMBER 1941, TRANSMITTING THE FIRST
IMPLEMENTATION DECREE TO THE "NIGHT AND FOG" DECREE

[Stamp] Secret

12 December 1941

The Chief of the High Command of the Armed Forces

14 n 16 Armed Forces Legal Department (I 3/4)

No. 165/41 secret

Subject: Prosecution of criminal acts against the Reich or the
occupying power in the occupied territories

1 Enclosure*

It is the Fuehrer's long considered will, that while attacking the Reich or the occupation force in the occupied territories, offenders are to be treated with other measures than they have been before. The Fuehrer is of this opinion. While committing such acts, imprisonment, life imprisonment, too, are considered as signs of weakness. An efficient and lasting intimidation can only be obtained by death penalties or by measures keeping the relatives and the population in uncertainty about the offender's fate. The transfer to Germany serves this end.

The enclosed directives for the prosecution of criminal acts are in accordance with this conception of the Fuehrer. They have been examined and approved by him.

[Signed] KEITEL

* * * * *

* The enclosure was the first implementation decree of 12 December 1941. It is not reproduced herein since it was superseded shortly by the second implementation decree, Document 836-PS, Prosecution Exhibit 804, reproduced later in this section. The first implementation decree is reproduced in the volume of this series concerned with the Justice Case (vol. III, section V D 3), where it is designated as Document 669-PS, Prosecution Exhibit 805. Section V D 3 of volume III contains considerable evidence concerning the execution of the "Night and Fog" Decree which is not contained herein.

PARTIAL TRANSLATION OF DOCUMENT 671-PS
PROSECUTION EXHIBIT 799

LETTER FROM KEITEL TO REICH MINISTER OF JUSTICE, 12 DECEMBER
1941, TRANSMITTING "NIGHT AND FOG" DECREE

Chief of the High Command of the Armed Forces

14 n 16 Armed Forces Legal Dept. (13/4) no. 165/41 secret

Berlin W 35, 12 December 1941

Tirpitzufer 72-76

Telephone local: 218191

Long distance: 218091

[Stamp] Secret

To: Reich Minister of Justice

Attention: State Secretary Dr. Freisler

Subject: Prosecution of criminal acts against the Reich or the
occupying power in the occupied territories

3 Enclosures

With reference to the oral conversation between State Secretary Dr. Freisler and the chief of my legal section, I enclose herewith a decree of the Fuehrer and Supreme Commander of the Armed Forces dated 7 December 1941, and an implementation order of the same date. I agree with the opinion of the State Secretary that the execution of the Fuehrer decree necessitates a close cooperation between the Reich Ministry of Justice and the High Command of the Armed Forces.

I have instructed my officials to assist your agencies in every respect. I ask you to settle the question regarding the manner of imprisonment in your implementation order.

[Signed] KEITEL

[Handwritten] Action taken by II a 118 and 119/42 secret

[Handwritten] II a 116/42 Secret—3 enclosures

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NG-077/665-PS
PROSECUTION EXHIBIT 800

DRAFT OF IMPLEMENTATION ORDER FOR "NIGHT AND FOG"
DECREE WITH COVERING LETTER FROM REICH MINISTRY OF JUSTICE TO THE DEFENDANT LEHMANN, 16 DECEMBER 1941, REQUESTING APPROVAL; AND HANDWRITTEN NOTE ON LEHMANN'S APPROVAL, 24 DECEMBER 1941

Secret

Order for the implementation of the directives of the Fuehrer and Commander in Chief dated 7 December 1941, for the Prosecution of Criminal Acts against the Reich or the Occupying Power in the Occupied Territories dated December 1941

Regarding the execution of the afore-mentioned order I decree:

1. I reserve to myself the decision on which court is materially and locally competent to deal with a case.
 2. The public prosecutor shall base his decision for an indictment on his conception of duty.
 3. The order for detention [Untersuchungshaft], its implementation, and termination are at the discretion of the public prosecutor.
 4. The main hearing will be conducted behind closed doors.
 5. The admittance of evidence of foreign origin needs the previous consent of the public prosecutor.
 6. Prior to the verdict, the public prosecutor may revoke the indictment, or move for a temporary stalling of the proceedings. The motion of the public prosecutor to stall proceedings temporarily must be granted by the court.
- The public prosecutor must be given an opportunity to state his opinion, should the court dissent [from the motion].

Priv. II
v. Ha/La

[Handwritten] Officially dispatched 16 December

[Handwritten] Secret

To Ministerialdirektor Dr. Lehmann
Chief of the Armed Forces Legal Department in the OKW

Berlin W, 16 December 1941
Bendlerstr. 14

Dear Herr Ministerialdirektor!

Dear Party Comrade Lehmann!

I have received your letter of the 12th instant and I am sending

you attached hereto the draft of an implementation directive. If you consent to it, the Reich Minister of Justice intends to issue it. I should be grateful if we could discuss it at the beginning of next week. (Until then I shall be on an official trip.) In the meantime, Ministerialdirektor Schaefer would also be pleased to discuss this matter with you. Herr Ministerialdirektor Schaefer will prepare the necessary administrative regulations on the basis of the directives issued or proposed.

Heil Hitler
[Signed] FREISLER

[Handwritten] 22.12. to IIa 116/42 secret

[Handwritten] Secret

[Handwritten] Note

I had a verbal discussion in this matter on 19 December, and on 24 December, I had a discussion by telephone with Ministerialdirektor Lehmann. He informed me that the OKW had agreed in principle to the draft submitted to it concerning the implementation order, but that, nevertheless, [he] would reply in writing. The question has not been decided whether the OKW within its jurisdiction, will hand the cases over to the High Military Court or to the military courts. There is also the necessity of settling some other questions, which presumably will be attempted in a conference of delegates at the beginning of January. It would be advisable for the Reich Minister of Justice to await further information from the OKW. Transfers of the cases to the regular courts should not be expected before the second half of January.

Specialists with the OKW are—

OKGR [Oberstkriegsgerichtsrat] Huelle

KGR Schulz

Ministerialrat Sack

Furthermore with the Counterintelligence Office Colonel Bentivegni, Chief of Counterintelligence III—

Ministerialrat Herzlieb

OKGR von Gramatzki

* * * * *

[Signed] SCHAEFER

24 December 1941

TRANSLATION OF DOCUMENT 836-PS
PROSECUTION EXHIBIT 804

DRAFT, UNDATED, BY ARMED FORCES LEGAL DEPARTMENT OF A
SECOND ORDER* FOR THE EXECUTION OF THE "NIGHT AND FOG"
DECREE

The Chief of the High Command of the Armed Forces
14 n 16.18 Armed Forces Legal Dept. (I 3/4)
No. 242/42 Secret

[Stamp] SECRET

Draft of a second decree for the execution of the directives of the Fuehrer and Supreme Commander of the Armed Forces for the Prosecution of Criminal Acts against the Reich or the Occupying Power in the Occupied Territories

Based on article V of the directives dated 7 December 1941, of the Fuehrer and Supreme Commander of the Armed Forces for the prosecution of criminal acts against Germany or the occupation force in the occupied territories I decree:

I. Directive Concerning Appropriate Punishment

1. In the occupied territories, for criminal acts committed by non-German civilians against the Reich or the occupying force and jeopardizing their safety or striking power, the death penalty is indicated on principle.

2. These prerequisites as a rule will be found to be fulfilled in—

- (1) Felonious assaults.
- (2) Espionage.
- (3) Sabotage.
- (4) Offenses likely to cause unrest.
- (5) Aiding and abetting the enemy by
 - a. Smuggling of persons.
 - b. Attempting to join the armed forces of an enemy.
 - c. Aiding enemy soldiers (parachutists, etc.).
 - d. Communist activities.

(6) Unauthorized possession of arms (on principle also the possession of usable hunting arms).

II. Prerequisites for the Pronouncement of Judgment in the Occupied Territories

1. Armed Forces Courts in the occupied territories will try offenses in article I under the following conditions only:

* First implementation order not reproduced herein. See introduction above in this section.

(1) Special military interests must require judgment by an armed forces court.

(2) It must be likely that death sentences will be pronounced against the offenders, at least against the main offender.

(3) It must be possible to conduct the trial and to execute the death sentences *as speedily as possible* (on principle within one week after the judicial authority or his superior commander has ordered the pronouncement of judgment in the occupied territories, Article III, sections 1 and 2).

(4) There must be no *special* political considerations against the immediate execution of the death sentence.

III. Decision of Judicial Authority and the Superior Commander

1. In offenses outlined in article I, *the [military] judicial authority is to examine* whether the prerequisites for a pronouncement of judgment in the occupied territories exist. If so, he orders it. If not, he is to submit the files to the superior commander who would have to decide on disapproval of the sentence. (Art. 89, Sect. 1, [German] Wartime Rules of Court Martial Procedure). The latter may reserve to himself the right of examination in accordance with section 1.

2. If the superior commander considers the prerequisites for a pronouncement of judgment in the occupied territories fulfilled, he will order this and appoint one of the judicial authorities in his sphere of command to take charge of it. If, in his opinion, the prerequisites are not fulfilled, the offender is to be brought to Germany.

3. If, due to insufficient police inquiries, the prerequisites for a judgment in the occupied territories are not fulfilled, the judicial authority and the superior commander may ask the police to complete the investigations before they decide according to Sections 1 and 2.

IV. Judgment and Execution in the Occupied Territories

1. If a sentence pronounced in the occupied territories is disapproved, the proceedings may be continued, provided that the provisions of Article II, sections 1, 2, and 4 are still applicable. If the proceedings are to be discontinued and the offender is to be brought to Germany, the charge is to be withdrawn.

2. Offenders who are lawfully sentenced to penal servitude by Wehrmacht courts in the occupied territories in accordance with article I are in future to be brought to Germany.

3. Women who are lawfully sentenced to death by armed forces courts in occupied territories according to article I are on principle to be brought to Germany, except in cases where the death sentence was pronounced for murder or guerrilla activity. Other

death sentences against women may be executed only in specially justified exceptional cases, after the Fuehrer has been given the opportunity to exercise his clemency prerogative.

V. Taking of Hostages

In the case of offenses outlined in article I the superior commander may order, in suitable instances, that instead of being transferred to Germany, the offender be detained, and/or be made available as a hostage. As a rule, he is to do so only if the offender has been lawfully sentenced to a prison term in accordance with article I. In exceptional cases he may order this even when there is no basis for pronouncement of judgment in the occupied territories.

VI. Transfer to Germany

Transfer to Germany is regulated by an OKW directive dated 2 February 1942, issued to the counterintelligence units. (Office Foreign Counterintelligence, Section III No. 5707/1. 42 secret ZR III C 2).

VII. Transfer to Civil Courts—Venue in Germany

1. Offenders taken to Germany are subject to court martial proceedings there only if the OKW or the superior commander in their decision in accordance with article III have stated that special military interests call for judgment by an armed forces court. If such a statement is not made prior to shipment to Germany, then the order to transfer the offender to Germany is to be regarded as valid in the sense of Article 3, Section 2, sentence 2, Wartime Rules of Court Martial Procedure.

2. Offenders subject to court martial in Germany (section 1) or who are taken to Germany after having been sentenced (art. IV, secs. 2 and 3) are to be designated, "prisoners of the armed forces."

3. The OKW determines the venue for offenders subject to court martial in accordance with paragraph 1 [above]. It can waive the competency of armed forces courts. Furthermore it may suspend the proceedings until further notice.

VIII. Handling of Files

1. Files concerning "prisoners of the armed forces" (article VII, section 2) are to be submitted through official channels to the OKW.

2. Files concerning other offenders brought to Germany are until further notice to be forwarded along with the offenders themselves.

3. All files submitted to the superior commander prior to pronouncement of judgment must contain a brief report and an opinion as to whether judgment by armed forces court in Germany is indicated. On submitting files to the OKW the superior commander expresses his opinion on this question.

IX. Information concerning Offenders and the Proceedings— Communication with the Outside World

1. All inquiries by civilians and Germans or foreign agencies about offenders brought to Germany are to be answered: "The offender has been arrested. No further information can be given".

2. All inquiries and information concerning "prisoners of the armed forces" (Art. VII, sec. 2) must on principle be answered in the sense of section 2 by the superior commander or by one of the judicial authorities designated by him. Inquiries concerning other offenders brought to Germany will be passed on, until further notice, through the same channels as the offender.

3. Petitions for clemency on behalf of offenders brought to Germany are to be passed on, until further notice, through the same channels as the files concerning them. (Art. VIII, secs. 1 and 2.) In inquiries concerning petitions for clemency on behalf of "prisoners of the armed forces", the superior commander or the judicial authority designated by him (sec. 2) answers the petitioners: "The petition for clemency has been forwarded. No further information can be given."

4. Offenders brought to Germany are not allowed to have any communication with the outside world; hence they are not permitted to write, and may not receive letters, parcels, or visitors. These are to be refused with the explanation that the offender is forbidden to have any communication whatsoever with the outside world.

5. Information with regard to offenders who were executed or who have died must comply with sections 1 to 4.

X. Defense

The defense attorneys must not contact any German or foreign agencies or persons with regard to offenders brought to Germany. Investigations which they consider necessary must be requested from the court.

XI. Trials in Germany

In view of the danger they constitute to the security of the State, the public is to be strictly excluded from the trials con-

ducted in Germany. In the main trial, foreign witnesses may only be heard with the approval of the OKW.

XII. Responsibility of the Commander and the Judicial Authorities

The commanders in the occupied territories and the judicial authorities are, within their competency, personally responsible for the enforcement of this regulation.

XIII. Relation to other Decrees

1. Insofar as military court proceedings are concerned, these directives and this implementation regulation hereby supersede the decree of the Chief of the OKW of 13 September 1941, concerning the situation in Norway (Armed Forces Operations Staff/Dept. National Defense (IV/Qu) No. 002034/41 top secret) and decree of 16 September 1941, concerning Communist resistance movements in the occupied territories (Armed Forces Operations Staff/Dept. National Defense (IV/Qu) No. 002060/41 top secret).

2. Article II of the decree of the Chief of the OKW dated 24 November 1941, (Ref. no. 2 f 1 e Beih, IV-No. 711/41 secret) concerning the treatment of de Gaulle supporters becomes superfluous due to the provisions of this regulation.

XIV. Territorial Applicability—Temporary Regulations

1. The directives of the Fuehrer and Supreme Commander of the Armed Forces dated 7 December 1941, became effective as of 29 December 1941. Until further notice they are valid in Norway, the Netherlands, Belgium, and in the occupied French territory.

2. Article I applies to trials in progress. The judicial authority and the superior commander in such proceedings may apply article III accordingly. Article VI ff. apply in the event that the superior commander decrees the transfer of the offender to Germany. The OKW may proceed according to Article VII, Section 3 in the case of offenders brought to Germany prior to the date when these directives became effective; it may decree that the provisions of articles IX, X, and XI be applied.

XV. Summary of Provisions in Force Up to Now

To facilitate better understanding the directives of the Fuehrer and Supreme Commander of the Armed Forces have been incorporated in this decree. The initial implementation regulation is rescinded.

PARTIAL TRANSLATION OF DOCUMENT NOKW-2573
PROSECUTION EXHIBIT 806

REGULATION FROM ARMED FORCES LEGAL DEPARTMENT, 24 SEP-
TEMBER 1942, SIGNED BY DEFENDANT LEHMANN, CONCERNING
EXECUTION OF "NIGHT AND FOG" DECREE

Berlin, 24 September 1942

High Command of the Armed Forces

14 n 16.18 Armed Forces Legal Department (I 3/4)

No. 841/42 secret II d Supplement

Subject: Prosecution of criminal acts against the Reich or the
occupying power in the occupied territories

According to the point of view of the Chief of the OKW, death sentences for men of 70 and over and fathers of many children under age are as a rule to be carried out only if serious reasons demand it. If, accordingly, the decision relative to the execution is suspended, the perpetrator is to be brought to Germany and to be kept in custody there; section IX of the draft of the 2d implementation order (information about the perpetrators and the proceedings, contact with the outside) is to be applied. Reference is made to section II of the OKW decree dated 27 August 1942, (14 n 16.18 Armed Forces Legal Department I 3/4 No. 242 secret).

These principles do not apply to death sentences for murder or such crimes which are connected with combat activities such as, for instance, guerrilla activity.

The Chief of the OKW

As Deputy

Signed: DR. LEHMANN

* * * * *

TRANSLATION OF DOCUMENT 1932-PS
PROSECUTION EXHIBIT 811

DECREE FROM SS ECONOMIC AND ADMINISTRATIVE MAIN OFFICE
TO COMMANDERS OF CONCENTRATION CAMPS, 7 JUNE 1943,
CONCERNING "NIGHT AND FOG" PRISONERS

SS Economic and Administrative Main office*

Oranienburg, 7 June 1943

Office Group [division] D, Concentration Camps

D I/1 File No. 14 c 2 / Ot / S. Secret Diary No. 743/43

Subject: Treatment of prisoners who fall under the Night and
Fog Decree

Reference: Reich Security Main Office IV c 2 General No. 103/42
Secret, 31 May 1943

Enclosures: None

[Stamp] Secret

To the Camp Commanders of the Concentration Camps Dachau, Sachsenhausen, Buchenwald, Mauthausen, Flossenbuerg, Neuengamme, Auschwitz, Gross-Rosen, Natzweiler, Stutthof, Ravensbrueck, Hertogenbosch, Riga, Lublin, and the Civilian Camp Bergen-Belsen.

I send the following decree of the Reich Security Main Office regarding treatment of Night and Fog prisoners for your information and strictest observation:

"The purpose of the Night and Fog Decree is the elimination of all anti-German forces in the occupied territories and their transport into the Reich.

"The relatives and the population are to be kept in uncertainty about the fate of these persons. In order to achieve this, the Night and Fog Decree further provides that prisoners of this kind should be forbidden to write, to receive mail and parcels, and to talk, and no information should be given about them. In this regard it is irrelevant whether it is a question of a Night and Fog prisoner of the old or new type. Night and Fog prisoners of the old type are those whom the military courts have handed over to the transferring agencies for shipment to the Reich, while the so-called new type Night and Fog prisoners have to be taken directly to the arresting agencies of the

* A number of officials of the SS Economic and Administrative Main Office, including its chief SS General Pohl, were tried in the Pohl Case, *United States vs. Oswald Pohl, et al.* (Case No. 4), Vol. V, this series.

Security Police and the Security Service in the concentration camps in the Reich without the participation of military courts.

“The agencies of the Security Police and the Security Service in question are instructed to submit to the Reich Security Main Office and to the concentration camp concerned, questionnaires on all prisoners who fall under the Night and Fog Decree. This questionnaire should contain detailed personal data, data on racial origin, reason for arrest, former place of custody, and other incriminating facts. These questionnaires are to be rubber stamped ‘Night and Fog’.

“Upon the reports of the agencies of the Security Police and the Security Service, a collective order for protective custody will be issued here with the questionnaires attached, and the agencies will be further instructed to transfer the prisoners to a concentration camp.

“Insofar as Germanic Night and Fog prisoners are concerned, they will be transferred from here exclusively to the concentration camp of Natzweiler; in all other cases the *Night and Fog prisoners* will be shipped to a concentration camp depending on the location of the transferring agency of the Security Police and the Security Service, taking into consideration the classification [type] and the capacity of the concentration camp.”

The camp commanders of concentration camps which already contain Night and Fog prisoners, have to order immediately that the prisoners should be screened according to racial points of view, and that the *Germanic* Night and Fog prisoners should be transferred to the concentration camp of Natzweiler. Compliance with this order is to be reported on individual questionnaires for each prisoner. The camp commander of the concentration camp of Natzweiler has to take care that the Night and Fog prisoners are kept separate from the other prisoners.

In other respects reference is made to the directives of the Reich Security Main Office Branch IV D 4—which have been sent together with the secret letter No. 551/42, 18 August 1942.

Furthermore it is pointed out again, as has been ordered already in the circular decree issued 2 February 1943, secret Diary No. 111/43, that death notices of Night and Fog prisoners are to be submitted *exclusively* to the particular transferring agency of the Security Police and the Security Service, to the Reich Security Main Office and to this agency, in order to exclude divulgence of the place of custody of a Night and Fog prisoner. Hereby the decrees regulating the procedure in cases of death, particularly any notification of the relatives, are canceled. The effects of deceased Night and Fog prisoners are to be sent in their entirety

to the competent transferring agency, which will keep them in custody until further notice.

The Chief of the Central Office
[Signed] LIEBEHENSCHER
SS Lt. Colonel

TRANSLATION OF DOCUMENT NOKW-2579
PROSECUTION EXHIBIT 815

COVERING LETTER, 10 NOVEMBER 1943, AND DIRECTIVE FROM
ARMED FORCES LEGAL DEPARTMENT, 6 NOVEMBER 1943, CONCERN-
ING TREATMENT OF "NIGHT AND FOG" PRISONERS

Copy

High Command Armed Forces

14 n 16.18 Armed Forces Legal Department (1/3)

129/43 secret

Berlin, 10 November 1943

Extension 2031

Secret

To

Subject: Prosecution of criminal acts against the Reich or the
occupying power in the occupied territories
Particulars—Ban on contact with the outside world

1 Enclosure

Enclosed a copy of the decree by the Chief of the OKW, dated
6 November 1943, is forwarded for your information and further
action.

Prisoners against whom proceedings have been dismissed or
who have served their sentence, are always transferred to the
mildest category of protective custody, category No. I.

BY ORDER:
The Chief of the OKW
Signed: DR. HUELLE

Berlin, 6 November 1943

High Command Armed Forces
14 n 16.18 Armed Forces Legal Dept. (1/3)

Secret

129/43 secret

Subject: Prosecution of criminal acts against the Reich or the occupying power in the occupied territories

Particulars—Ban on contact with the outside world

Pursuant to section V of the Fuehrer's Directives on the Prosecution of Criminal Acts against the Reich or the Occupation Force in the Occupied Territories, dated 7 December 1941, the following directives are issued on the treatment of perpetrators who are not permitted contact with the outside world in Germany (see article IX of the draft of a second implementation instruction, serving as a basis for work, and the OKW decree, dated 27 August 1942, file No. 14 n 16.18 Armed Forces Legal Dept. I/3/4 No. 242/42 secret).

I

If during armed forces court proceedings in Germany it is found, prior to the trial, that a perpetrator is innocent or not sufficiently under suspicion, he is to be turned over to the Gestapo; the latter will decide whether he can be released to the occupied territories or whether he must remain in detention.

[Handwritten] not possible?

II

Perpetrators who were acquitted, or whose case was dismissed by an armed forces court, or who served during the war their full sentence passed by an armed forces court, are to be handed over to the Gestapo to be detained for the duration of the war.

III

The OKW can deviate from paragraphs I and II. It also decides about the treatment of perpetrators who for other reasons are to be released from arrest while awaiting trial or from prisoners while serving their term.

IV

The OKW decrees dated 22 June 1942, and 24 September 1942—File No. 14 n 16.18 Armed Forces Legal Dept. (I/3/4) No. 242/42 secret, are hereby rescinded.

The Chief of the OKW

Signed: KEITEL

TRANSLATION OF DOCUMENT NOKW-2581¹
PROSECUTION EXHIBIT 819

LETTER FROM MINISTRY OF JUSTICE TO ARMED FORCES LEGAL
DEPARTMENT, 26 APRIL 1944, CONCERNING ASHES OF EXECUTED
"NIGHT AND FOG" PRISONERS

[Stamp] 02/360

1. Enter in a 3.
2. The Reich Minister of Justice IV a 173/44 secret

Berlin, 26 April 1944

Secret

[Stamp]

Dispatched 28 April 1944, [Illegible initial]

To: The OKW-Armed Forces Legal Department

Attention: Ministerialrat Dr. Huelle

Subject: Prosecution of criminal acts against the Reich or the
occupation force in the occupied territories

According to the regulations which I issued concerning the handling of Night and Fog cases pending with the general judicial authorities, the corpses of Night and Fog prisoners who were executed or who died from other causes are to be handed over to the Gestapo for burial.

The district attorney in Katowice has drawn attention to the fact that the corpses of Night and Fog prisoners who were sentenced to death by the special court in Oppeln and executed were burned by the Gestapo. He expresses his doubts as to whether, because of the large number of cremations performed in the district of Katowice on account of the numerous deaths occurring in Auschwitz concentration camp,² and on account of the numerous executions of Polish members of bands, the separation of the ashes of the individual dead is guaranteed.

If—according to your experiences—you consider it necessary to ensure that the urns of convicted Night and Fog prisoners are available in the future, I take the privilege of leaving it to you to contact the Reich Leader SS and Chief of the German Police.

I should be grateful if I could be informed of any steps taken by you.

BY ORDER:

[Stamp]

Secretary's Office

April 1944

Entered by: [Initial] B, 27 April

¹ Document consists of typed material with several handwritten corrections.

² Auschwitz [Oswiecim] is situated in the district of Katowice.

3. To the District Attorney in Katowice

Subject: As in item 2

With reference to the conference with Judge Dr. Reichelt on 18 April 1944.

I contacted the OKW concerning the Gestapo's procedure of cremating deceased Night and Fog prisoners.

I reserve to myself the right to give additional information.

BY ORDER:

4. To Ministerialdirigent Dr. Mettgenberg

With request for comment.

5. After 1 month

[Initial] M 26 April [Handwritten]

[Stamp] 02/361

[Handwritten] IV a 257/44 secret

[Illegible initial] 25 April [Handwritten]

TRANSLATION OF DOCUMENT RF-388
PROSECUTION EXHIBIT 802

LETTER FROM ARMED FORCES LEGAL DEPARTMENT TO FOREIGN
OFFICE, 17 FEBRUARY 1942, SIGNED BY DEFENDANT LEHMANN,
CONCERNING BELGIAN "NIGHT AND FOG" PRISONERS

High Command of the Armed Forces

14 n 16.18 Armed Forces Legal Department (I 3/4)

82/42 Secret

Berlin W 35, 17 February 1942

[Stamp]

German Armistice Commission Group

We/Ib Nr 27

Received: 21 February 1942

[Stamp] Secret

[Illegible initial] 21 February

[Stamp]

German Armistice Commission Wiesbaden, 20 February 1942

No. 676/16 Group We/Ib 42 secret

To the Foreign Office

Berlin W8, Wilhelmstrasse 74/76

For information: Armistice Commission

Subject: Prosecution of criminal acts against the Reich or the occupying power in the occupied territories

Reference: (1) letters of 9 and 31 January 1942 No. R 185 and R 1169

(2) OKW of 31 January 1942, 14 n 16.18 Armed Forces Legal Department (I 3/4) No. 2857/41 and of 2 February 1942, 14 n 16 Armed Forces Legal Department (I 3/4) No. 165/41 Secret

1 Enclosure

The High Command has pointed out in its reference letter dated 31 January 1942, that it is incompatible with the Fuehrer decree of 7 December 1941 (announced in letter of Chief OKW dated 12 December 1941, File No. 14 n 16 Armed Forces Legal Department (I 3/4) No. 165/41 Secret) that perpetrators brought to Germany should be looked after by the *Comité de Patronage*, the Belgian Red Cross, or by civilians. In reference letter dated 2 February 1942, the High Command informed the Foreign Office of a directive to the armed forces prisons, which reads as follows:

“Perpetrators who have been brought to Germany in accordance with the Fuehrer decree may not have any kind of intercourse with the outside world; they may, therefore, neither write nor receive letters, parcels, and visits. Letters, parcels, or visitors are to be sent back with the information that it is forbidden for the perpetrator to have any intercourse with the outside world”.

The High Command shares that opinion in the letter dated 31 January 1942, that there is no question of procuring Belgian defense counsel for Belgian prisoners.

The result of the trials may not be communicated to the relatives of the perpetrators who have been brought to Germany. According to a letter of the Chief of the OKW dated 12 December 1941, the main purpose of these transfers to Germany, in accordance with the Fuehrer's wish, is to leave the relatives and the population in uncertainty as to the fate of the perpetrator.

The relatives, likewise the German offices and offices abroad may only be told that the perpetrator has been apprehended and that the status of the proceedings permits no further giving of information.

Special provisions regarding the defense of the perpetrators who have been brought to Germany do not seem to be necessary. The armed forces courts intend to judge only criminal acts which are punishable by death. In accordance with Article 49, section 1 of the Wartime Rules of Court Martial Procedure the presiding judge always has to provide a defense counsel for such penal acts.

Subsequent to the reference letter of 31 January 1942, a copy of the translation of a further letter of the Secretary General of the Belgian Ministry of Justice dated 22 December 1941, is transmitted. The Reich Minister of Justice has informed the High Command of this, for further disposition.

The Chief of the OKW

BY ORDER:

Signed: DR. LEHMANN

Certified:

[Signed] BUHRKE

Amtsrat

TRANSLATION OF DOCUMENT LEHMANN 316
LEHMANN DEFENSE EXHIBIT 283

LETTER FROM FRENCH DELEGATION TO THE GERMAN ARMISTICE
COMMISSION, 3 AUGUST 1944, CONCERNING INVESTIGATION OF
THE CONDITIONS OF FRENCH "POLITICAL PRISONERS"

IV

French Delegation to the German
Armistice Commission

The Chairman

No. 48335 /AE.

Wiesbaden, 3 August 1944
630/44

The Chairman of the French Delegation to the German Armistice
Commission Army Corps [Lt.] General Berard

To the Chairman of the German Armistice Commission
Lieutenant General (Arty.) Vogl

Subject: Fate of the political prisoners

Sir:

My government has instructed me to draw your attention to the fate of numerous Frenchmen who were arrested by the German authorities in France and have been either imprisoned in France or Germany, or committed to concentration camps in Germany.

According to the information received, which could not be checked in all the cases, the number of Frenchmen thus arrested or interned is said to be about 150,000.

Except for a few among them who are serving prison sentences

passed by German military courts, they have not been brought to trial and were arrested solely either to be taken into protective custody, or as suspects or even as hostages; hence, they are in the main, "political prisoners".

It is true that some of them have been authorized to write to their families or even to receive parcels from them, but this privilege is by no means customary in all the prisons, to judge from the numerous steps taken with French agencies by families who complain about not having received any news from persons who were arrested many months or years ago.

Up to June of this year the Chief of the German Police in France accepted petitions for information and release transmitted by the French Ambassador, State Secretary with the Government Chief and Plenipotentiary General for the Occupied Territory, but recently he had given notice that he was no longer in a position to accept such petitions during the military operations which have developed as a result of the landing of Anglo-American forces.

It is hardly necessary to stress the moral sufferings caused by the absence of any news both to the families and the prisoners and, what must be added in the case of the latter, to the physically depressing effect of prolonged imprisonment; consequently it appears to me unnecessary to emphasize that all "political prisoners", no matter to what category they may belong, should be accorded every material and moral support compatible with their situation.

So far all steps taken in this direction have failed.

The French Government, without intending thereby to pass judgment on the legality of the arrests made and acting solely in consciousness of its obligation to protect its nationals, has therefore instructed me to inform you that it is prepared—

1. Either to designate or create a French agency whose representatives might be authorized by the Reich government to visit the "political prisoners";
2. Or to instruct the French Red Cross in cooperation with the German Red Cross to grant these prisoners the necessary aid;
3. Or, in agreement with the Reich government, to ask the International Committee of the Red Cross in Geneva to assume that role.

I have, therefore, the honor to ask you to examine, together with the competent Senior Reich authorities, the measures which might be taken to improve the moral and material conditions under which the French citizens who are "political prisoners" are living.

I have the honor to be, sir

Yours faithfully

FOR ARMY CORPS [LT] GENERAL BERARD (absent)

Brigadier General Vignol

Signed: VIGNOL

PARTIAL TRANSLATION OF DOCUMENT NG-262
PROSECUTION EXHIBIT 820

EXTRACT FROM SURVEY OF THE DISPOSITION OF NIGHT AND FOG
PROCEEDINGS COMPILED BY MINISTRY OF JUSTICE
ON 30 APRIL 1944

Copy

IV n 313/42 secret

Survey of the Disposition of Night and Fog Proceedings
as of 30 April 1944

I. The following cases were transferred by the armed forces
authorities to—

- a. Office of the District Attorney Kiel—12 proceedings with
442 defendants.
- b. Office of the District Attorney Oppeln—729 proceedings with
4048 defendants.
- c. Office of the District Attorney Breslau:*—1273 proceedings
with 2149 defendants.

Total:— 2014 proceedings with 6639 defendants.

* In the case of Breslau, as of 31 March 1944.

* * * * *

EXTRACTS FROM THE TESTIMONY OF DEFENDANT LEHMANN*

DIRECT EXAMINATION

* * * * *

DR. VON KELLER (counsel for defendant Lehmann): I will now
turn to a new sphere, that is, to the Night and Fog Decree, the
"Nacht und Nebel" Decree. I would first like to deal with its
origin. Witness, what do you know about the origin of the Night
and Fog Decree, the underlying reasons and the actual cause which
prompted its issuance?

DEFENDANT LEHMANN: I have already told the Tribunal that
the distrust of Hitler against our administration of justice had
manifested itself in different forms. Sometimes on one occasion
and sometimes on another. And this distrust is also the root of
this decree. The immediate reason, as far as I recall, was as
follows: Hitler had reserved to himself the right generally to
confirm death sentences against women from the occupied terri-
tories, that is, to confirm the petitions for clemency. In summer

* Complete testimony is recorded in mimeographed transcript, 15-16, 19-20, 26-27 July 1948,
pp. 7909-8180; 8481-8582.

1941 he had commuted the sentence of a French woman who had been active in the resistance movement. She was a very brave woman who had helped many prisoners of war to escape across the boundary into unoccupied France. She had been sentenced to death in France, and Hitler did not confirm the sentence but ordered it to be commuted into a prison term, and on this occasion, without any suggestion from outside, he added that this woman was to be taken to Germany and was to be excluded from the outside world in Germany. This decision rather took us by surprise at the time, and this decision was generalized subsequently by Hitler. In September, as I stated today, I was usually on official trips and at the end of September and beginning of October, I spent my leave in the Tyrol. Upon my return I found a lengthy communication from Field Marshal Keitel directed to the Chief of the Armed Forces Legal Department. In the communication it was stated that Hitler had generalized his decision which he had made in this case of the French woman, which I have just related. The Communist subversive activities in the occupied countries were getting worse, and sentences by the courts, which were imposed after quite a long time—one didn't know how long it took—and which might even be prison sentences, had no effect at all. Hitler had ordered that in the occupied territories only such matters were to be brought before the courts in which an immediate death sentence could be pronounced. All other persons, and now the literal expression followed: "were to be taken across the frontier under cover of night and fog, and to be excluded from the outside world in Germany." That would have a deterrent effect, but the imposition of sentences in the occupied territories did not have such a deterrent effect.

Q. And did this order contain any further details, that is, Keitel's order?

A. Yes, it did. It was a lengthy communication written by himself, but I no longer recall further details. What I stated was the basic outline.

Q. What were you to do on the strength of this communication?

A. We were to formulate an order pursuant to this directive.

Q. Did other persons also read this communication?

A. Yes. It was read by my deputy, Dr. Sack, and my experts; subsequently, however, I showed it to a wider circle of persons.

Q. Did you discuss the matter with other people?

A. Yes. I did.

Q. Now, what happened in this matter, particularly as it relates to Keitel?

A. I left the matter in my desk until Keitel came to Berlin. Then I called upon Keitel to have a long discussion with him alone

without any witnesses, and thrashed out this whole matter in great detail with him. I put forward all the arguments I could think of, and I had the feeling that my objections made some impression on the Field Marshal. Our discussion revolved in a circle because he kept harping on the danger of the French resistance movement, saying that in the opinion of Hitler it was a means of safeguarding the security of the occupation troops—

DR. VON KELLER: Your Honor, the topic of the French resistance movement will be discussed by me at another stage, if it please the Tribunal.

A. [Continuing]—From this talk with Keitel I had the feeling that at this time he himself had contradicted Hitler, but that he had been unsuccessful with his objections. After listening to me, Keitel said, “Well, leave the working out of this order for the time being. I will talk once more with Hitler”. Then he called me once again, and one sentence stuck in my memory from this second discussion. I have often quoted this sentence, and I have also stated it once before this Court. Keitel said to me, “The Fuehrer said, ‘Nobody can contest that I, Hitler, am a great revolutionary. If so, then I know best how to suppress revolutions and insurrections, and I know more of this than generals or lawyers.’” I have quoted this significant sentence so often that, as I stated before, I know it by heart.

Q. Did you deal with this matter by yourself after these discussions with Field Marshal Keitel?

A. No, because many agencies were interested in this matter, above all the High Commands of the three branches of the armed forces, the Legal Department, and in the OKW the office of Admiral Canaris, the Office for Foreign Counterintelligence. Our Legal Department played a more passive part in this because something was to be taken away from them, and the reasons adduced for this measure were military considerations. They were measures for the security of the troops. For that reason, other agencies had to be included.

Q. How was the order appraised by these people who got to know of it?

A. Generally speaking, very adversely, particularly so by Admiral Canaris who was one of the most annoyed and who even before my return from my leave must have talked about it with Keitel. I recall having myself talked to Canaris when he said, “If a Nazi Party rally were to be held this year, then it would be called the Nazi Party Rally of Folly.”

Q. Can you explain why the Nazi Party rally of this year was to be called the Nazi Party Rally of Folly?

A. Because all the stupidities that could possibly be perpetrated in the conduct of the war were perpetrated in 1941.

Q. I mean something else, Witness.

A. Yes. I see what you mean, because all Nazi Party rallies received a special name.

Q. What was the principal tendency in the drafting of this order which was to be forthcoming?

A. As with all these Hitler orders, the main thing was first to gain some time and to see whether this decision was irrevocable. The latter had been ascertained by an inquiry of Keitel's with Hitler, and then as with all orders of this type, it was important to deprive Hitler's order of its sting as far as one could.

Q. Now, how did you envisage that as being possible?

A. The main point of our line of attack, as my talk with Keitel showed, was the secrecy, the seclusion of people from the outside world, and that had been described by Keitel again and again as the core of the whole matter. That was the essential thing for Hitler, and at any rate, for the time being, no change could be effected in this. But another main question remained. In the communication of Keitel to me, the question had been left open as to who was to take over these people from France inside Germany, that is, into whose hands they were to be committed. Thereupon, of course, I questioned the Field Marshal immediately and he told me, "it would be best in keeping with Hitler's tendency if these inhabitants were to be committed to the police inside Germany." Thereupon I said that could not possibly be done, and there appeared to me a chance of getting somewhere at this point.

Q. How did you think you could proceed further?

A. If the reason for this decree was to be sought in Hitler's hostility against the Wehrmacht justice, then one way out remained. One could try to hand over the suspects from France to the civil judiciary in Germany, that is, not the Wehrmacht judiciary. Then at any rate, their committal to the police was prevented. The difficult thing for me was that if we took this path, then the discrimination of the Wehrmacht justice as against the civil judiciary became quite manifest. But this was merely an objection inspired by prestige considerations and that had to be overcome, although it wasn't easy for us. Admiral Canaris, as the main person concerned, shared the opinion and exerted strong influence upon Keitel along these lines.

Q. You just said that Admiral Canaris was the main person concerned?

A. I did because his office included the Abwehr which also included the prevention of Communist resistance movements.

Q. Do you mean only Communist resistance movements?

A. Resistance movements of all types.

Q. Did you discuss this idea with the chiefs of the legal departments of the three Wehrmacht services and with the other people interested, that is, this very special idea?

A. I did. As always I informed the chiefs of the departments and talked the problems over with them in order to ascertain if a better idea than the one I had thought of had occurred to anybody else, or whether anybody could suggest a different way out, but nothing materialized.

Q. Now, what became of your endeavor to leave this matter to a judicial authority? What steps did you take?

A. After some difficulties, I finally got Field Marshal Keitel's consent to negotiate with the Ministry of Justice—which I did. I called upon State Secretary Freisler in the Ministry of Justice, under whom I myself had served.* I expounded the position to him, and he was intelligent enough to realize what I said, and he promised that he would assert his influence for a solution along the lines that the Ministry of Justice was to take over these matters with their own courts. He didn't do it willingly, but he conceded that that was better than turning matters over to the police.

Q. Did you also discuss a more practical treatment with State Secretary Freisler?

A. Yes. Naturally I couldn't guess what numbers of perpetrators might be involved. Therefore, I asked him as one of my very first questions whether the justice administration could billet the inhabitants from occupied countries at all, whether they had room for them, and he replied that that would cause no trouble whatsoever. That was a most important point for me.

Q. You said the inhabitants of the occupied countries. You mean by this term such persons from the occupied territories who were to be indicted?

A. Yes, who were to be indicted.

Q. Did the Ministry of Justice grant its consent?

A. Yes.

Q. And after this consent had been given, what happened in the matter?

A. When the basic consent had been given, Field Marshal Keitel made no more difficulties. The services of the Wehrmacht had previously agreed to this solution and we could now start formulating Hitler's order in a draft.

Q. Now how was this draft arrived at?

A. The whole execution of this order was in the hands of the three branches of the armed forces and of the office of Canaris,

* A number of Freisler's associates in the Reich Ministry of Justice were charged with criminal participation in the execution of the "Night and Fog" decree in the so-called "Justice Case", *United States vs. Josef Altstoetter, et al.* (Case No. 3), Vol. III, this series.

the counterintelligence service. Hence we made the draft jointly with these agencies. As was customary in such a piece of work, suggestions and proposals came from all sources. We compiled them and submitted them in a draft; this draft was discussed and after agreement was reached about technical details, the draft was sent to Field Marshal Keitel with a notation to this effect. The Armed Forces Legal Department was only negatively concerned in this affair because something had been taken from our sphere.

Q. Which was the department most affected by this decree in the OKW?

A. That was the counterintelligence service under Canaris.

Q. Did the counterintelligence believe at the time that more could have been attained than was actually achieved?

A. No, because Canaris had made all efforts with Keitel just as I had.

Q. What was the evaluation of the people of the legal departments of the three branches of the armed forces regarding this decree?

A. Their appraisal had become a little more friendly for a practical reason. They suggested that if Hitler insisted upon it, then of course he can force many death sentences in the occupied territories in the case of resistance movements; but if instead, the participants in illegal resistance movements were to be shipped to Germany by Hitler, then it was probably possible that in Germany the penalties might be less severe, because when the sentences were passed, as was ordered, under strict secrecy with the public excluded, then the sentence itself has no deterrent effect. Hence, it was not necessary to pronounce death sentences, as in France. Then the core of the measure lay in what Hitler had in mind, namely, the seclusion from the outside world, and that was a substitute for the death sentences. To this extent, therefore, the appraisal of this whole project became a little more friendly.

Q. Now, after this idea had been treated technically in the different departments of the OKW, was it approved by Hitler?

A. Yes. Keitel submitted the draft to Hitler and he approved, and we were very pleased that Hitler conceded the inclusion of the civil judiciary.

Q. I will now like you to turn to the documents and to explain which document contains the first directives which were drafts issued as a result of Hitler's instructions?

A. It is rather mixed up in this book 9-J, and I will have to make matters clear from the outset. The decree proper, by Hitler, is contained in book 9-J, on page 118 of the English and 204 of the German. It is Document 1733-PS, Prosecution Exhibit 797. It bears the heading, the Fuehrer and Supreme Commander of the

Armed Forces. It is entitled, Directives for the Prosecution of Criminal Acts against the Reich or the Occupying Power in the Occupied Territories of 7 December 1941. It is signed, "by order", (Ia) Keitel. That is the decree proper. The decree was distributed with a communication dated 12 December, it is Document 669-PS, Prosecution Exhibit 798. This communication dated 12 December, is the cover letter of the Chief of the OKW, which was appended to the decree, which I mentioned before, upon its distribution. The Tribunal will find on the next page—

Q. May I ask you to quote the passage from which it is evident that Prosecution Exhibit 797, that is, the directives of 7 December, was distributed along with Exhibit 798?

A. Yes. The cover letter, dated 12 December 1941, bears the notation "one enclosure", and the last paragraph of the cover letter states, "attached directives for the prosecution of criminal acts," from which it is evident that the directives previously described by me in Prosecution Exhibit 797 were the enclosures to this cover letter, dated 12 December 1941. That is important because in the document book, the next page, 122 of the English and 202 of the German, contains an implementation order. The first ordinance is undated; that is a self-contained piece and not the enclosure to the communication dated 12 December.

Q. Will you please turn once again to Document 669-PS, Prosecution Exhibit 798?

A. That is the cover letter by Keitel, and in this cover letter it is expressed in a particularly clear manner that this was a personal idea of Hitler's from which we wished to keep aloof. The communication refers three times to the fact that it all emanated from the Fuehrer. It starts, and I quote: "It is the long considered will of the Fuehrer * * *." It then goes on to say: "the Fuehrer is of the opinion",—and at the end it states: "the directives accord with the opinion of the Fuehrer". We couldn't state any more clearly whence it all emanated.

Q. The decree itself and the implementation ordinances will be discussed by me subsequently in a systematic matter. Witness, will you briefly state the developments as a result of this first order?

A. We had distributed the first order to all agencies concerned. The Tribunal will find the distribution list on the last page of the Document 1733-PS to the Foreign Office and to all agencies which might be considered. That is including the services of the armed forces and the armed forces commanders. The effect of this new idea of Hitler's was such as we had anticipated and the Gerichtsherren [Armed Forces judge advocates] and the judges in the occupied territories were equally indignant; mainly about this

eternal suspicion with which their activity was viewed. Hence they did all they could in order to sabotage this decree.

Q. Were you afraid of any repercussions on the population?

A. Yes. I had told Keitel about everything particularly with respect to France. Before the First War I had been to France. As a soldier I was in France during the First World War. Between the First World War and the Second World War I had frequently been to France and I thought that I knew France well, and I told the field marshal that it was unintelligible to me that one wanted to stage such a matter in France, in a country with the most strongly developed national pride and particularly developed feeling for justice. I told him it would have the very opposite effect of what Hitler thought but it was all in vain.

Q. You said that the agencies which received a copy of the decree delayed it or else tried, as far as possible, to sabotage it. Can you describe it in more detail?

A. Certainly. First the implementation to this decree was set in motion very hesitantly and then in many ways we tried to circumvent the decree. I think I'd like to discuss the particulars in discussing the decree itself.

Q. Since the transfer of persons arrested from the Wehrmacht judiciary had been ordered to the civil judiciary, did discussions take place between Wehrmacht judges and civilian judges?

A. Yes. The implementation of the order was handled by the Wehrmacht judiciary in the occupied territories and it was handled by the civil judiciary in Germany, and those two agencies met for conferences. Representatives of the civil judiciary were in France and in Belgium and they discussed it with the agencies of the army judiciary on the spot, but I didn't take part in these conferences nor did my agency participate.

Q. Now, how was the decree subsequently appraised by members of the Wehrmacht courts?

A. The atmosphere turned completely in favor of the decree. After the commanders in France and in the other occupied territories had seen that sentences in Germany were much more lenient than would have been possible in the occupied countries they most willingly turned over these persons. Subsequently reports were made to us along these lines.

Q. What matters did they turn over?

A. They only turned over such matters in which an urgent suspicion existed as to a crime having been committed, that is investigations in France, the country which was most concerned, had established a very strong suspicion against the person concerned. That was actually against the meaning of this decree because Hitler didn't want any investigations to be carried out

in the occupied territories. Hitler's main opinion was that in cases where an immediate death sentence could be imposed, sentence should take place in France. All other matters, even in the case of the shadow of a suspicion, were to entail the transfer to Germany and that was converted to its opposite by the subsequent handling of the matter in France and Belgium.

JUDGE HARDING: May I interrupt to ask a question? You say the military authorities were impressed by the leniency of the sentence imposed in Germany and became favorable to this decree? Now, just what reports were made to the military authorities regarding those sentences imposed? I thought they were supposed to be secret?

DEFENDANT LEHMANN: Yes. Secret, Your Honor, as regards other agencies but not as regards the Wehrmacht agencies which had transferred these persons. The courts of the civil judiciary sent copies of their sentences to the agencies of the military commander in France and in Belgium, so that the military agencies in France and Belgium could follow the fate of these matters, that is the persons whom they themselves had turned over. That was due to the direct negotiations between the military agencies in France and the agencies of the Ministry of Justice which I mentioned briefly before, in which I had no direct share.

JUDGE HARDING: And they made these reports regularly as to these people?

DEFENDANT LEHMANN: Reports were regularly made, Your Honor.

DR. VON KELLER: Now, after the appraisal accorded to the Night and Fog Decree underwent a change in practical respects, did you attempt subsequently to modify the Night and Fog Decree and, if so, along what lines?

A. Yes. We did make attempts along the line which seemed to me the stumbling block. That was in the line of its secrecy. This became all the more a nuisance to me the longer the war lasted. We tried in this respect to secure a relaxation, because we received a series of communications as to what difficulties this strict secrecy entailed and the severities involved. Such communications were submitted by us to Field Marshal Keitel with, I can only say a tiresome regularity, but things remained the same. Hitler was completely adamant on this point. I had descriptions given to me from persons in his entourage, and heard again and again that if Hitler once had an idea fixed in his mind then it was not possible for any power in the world to dissuade him, and on this very point I have had sufficient evidence. Field Marshal Keitel, in talking to me, invoked the fact that the resistance movement became

ever more dangerous and that therefore this order had to remain in force.

Q. You talked about the French resistance movement which was the reason for this whole procedure. What did you know about the French resistance movement?

A. I knew what I had been told by Keitel in the course of my negotiations, and what I had heard from other sources, and from France itself, and even as early as 1941, it was a very menacing thing. Assaults were regularly repeated on German soldiers, on cinemas, on soldiers' hostels, on hostels of our female personnel in the occupied territories, very many attempts to blow up railroads, many cuttings of cables, and other matters of this type.

* * * * *

Q. And how was the French resistance movement generally appraised in those manifestations which you just described? I mean, what was the legal evaluation given to these acts.

A. It was an illegal insurrection against an occupying power.

* * * * *

Q. Now, the indictment shows that the prisoners under the Night and Fog Decree, at any rate in the view of the prosecution, were cruelly treated by the police and killed on the strength of the Night and Fog Decree. Can you make any statements regarding this assertion?

A. I hope that I shall succeed in clarifying this point. In the two preceding trials it played a decisive part. I think that I will be successful in submitting new data to the Court for their appraisal of the context. I would first emphasize again that in the decree dated 7 December 1941, and in the implementation ordinance, the term "secret state police" is not mentioned at all, and it was our objective, as I stated, the objective of our endeavors, to eliminate the police and to get the courts to deal with it, and that was the decisive improvement which in my opinion had been secured through my efforts.

Q. Was the term "concentration camp" mentioned in the decree?

A. No. This term wasn't used either, and it is bitter for me personally that after I had made all these efforts I am to be held responsible for this development as the sole individual responsible. I have aimed at and even secured the very opposite. That the development subsequently followed other paths and that Hitler later once again intervened was not my fault. It was not within the power of a higher civil servant, holding the rank of Ministerialdirektor, to change the instructions of the State in the Third Reich or to impose his own will upon the dictator.

Q. Now, the prosecution contend that through the Night and Fog Decree thousands were sent into concentration camps.

A. Well, now, I only ask myself where evidence is to be found showing that they got into the concentration camps by virtue of this decree. I hope that we shall be able to enlighten the Court about this. In the prosecution documents, in book 9-K, there is Document 2521-PS, Prosecution Exhibit 805. This document was already submitted in the trial of the Nazi lawyers*. It is a decree by the Main Administration Office of the SS, dated 18 August 1942. The enclosure to this decree reveals that the police went their own ways of which we knew nothing. It is first stated, and that is quite correct, that the suspected perpetrators were to be put before a special court, and this is followed by the sentence that, in the event that such a transfer was not possible for some reason or other, they will be assigned to a concentration camp, being subjected to protective custody. It is quite unintelligible to me what reasons could have prevented the transfer of persons to judicial authorities. Essentially stronger proof for what I wish to set forth is contained in [document] book 9-K of the prosecution, page 57 of the English, Exhibit 811 of the prosecution. [Doc. 1932-PS]

Q. Doctor Lehmann, in the case of Exhibit 805, [2521-PS, Pros. Ex. 805] you wish to demonstrate, I take it, that the SS went their own ways?

A. That is what I wish to demonstrate.

Q. Without the decree?

A. Yes, without the decree, and I wish to prove it by the next document, Prosecution Exhibit 811, which I have just mentioned. As far as I have been able to ascertain this was neither introduced before the IMT nor in the Justice Case; and this document by itself furnishes proof that the police did what they wished to do without any regard to the decree. It is stated in the communication, in the middle of the first paragraph, laying down how the prisoners were to be treated: "It is irrelevant whether it concerned a Night and Fog prisoner of the old type or of the new type." Night and Fog prisoners of the old type denotes those whom the military courts had handed over to the assigning agencies for transfer to Germany, whereas, and this is the crucial passage: "* * * the so-called new type Night and Fog prisoners have to be taken directly to the arresting agencies of the Security Police and the Security Service in the concentration camps in Germany without the participation of the military courts." That is the point by which it can be proved in the light of these docu-

* See the "Justice Case" (United States vs. Josef Altstoetter, et al.) Case No. 3, vol. III, Section VD 3, Document 2521-PS, Prosecution Exhibit 810.

ments, and we shall corroborate this proof by other evidence that the police acted on its own initiative, irrespective of the decree. That the police clandestinely, without bothering about the decree, brought people to Germany who had had nothing to do with the military courts in France, and that they kept those people in their own custody behind our backs.

* * * * *

Q. Can you perhaps explain whether you knew this communication, reproduced in Prosecution Exhibit 811, before?

A. Of course not, because the police were interested in keeping this secret from us.

Q. Did you hear anything at all that the police, acting on their own authority, carried out such arrests during the war?

A. Yes. I heard this at a much later stage. That was when the whole decree had already been rescinded.

Q. Which decree?

A. The decree dated 7 December 1941.

Q. That is the Night and Fog Decree proper?

A. Yes. I find evidence for this in Document 834-PS, Prosecution Exhibit 827. It is a communication of the Armistice Commission, dated August 1944. At that time this decree had already been rescinded. The communication refers to a note by the French Government which reveals that the number of political prisoners in France had tremendously increased during the last months, and a number of statements are attached to this communication. Thus, it became known to what extent the Higher SS and Police Leaders in the occupied territories acted on their own authority in arresting persons and shipping them to Germany. It must have involved very large numbers. The French note is not contained in the documents of the prosecution. We have, however, found it, and it is evident from this note that the French Government had estimated the numbers of persons arrested in France at 150,000. They are not figures which could have had any connection with the Night and Fog Decree.

DR. VON KELLER: Your Honor, may I call your attention to the fact that this note of the French Government will be submitted by us in document book 6 of the defense as Document Lehmann 316, Lehmann Exhibit 283.*

A. (Continuing) This morning I put before the Court the figures of the Ministry of Justice which, until 30 April 1944, amounted to not even 7,000 and these figures mentioned here in the French note reveal to what extent the police had availed themselves of their powers.

* Document reproduced earlier in this section.

Q. Did you reply to this communication of the Armistice Commission?

A. Yes. We did reply to this communication and we set forth the new legal position such as it had been created at that time but I'd like to discuss this at a later stage.

* * * * *

CROSS-EXAMINATION

* * * * *

MR. FULKERSON: Now, then, on 6 February, 4 days after Canaris issued his regulations your office promulgated the final, definitive set of the implementation regulations, the one of 6 February.

DEFENDANT LEHMANN: No. That is a mistake. These implementation regulations of 6 February, come from the Reich Minister of Justice. It is Exhibit 801.

Q. You have book 9-K before you?

A. Yes. I have it.

Q. I am referring to 836-PS, which is Exhibit 801—no, I am sorry, it is Exhibit 804, at page 18 of the English and 16 of the German.

A. I think, Mr. Prosecutor, you are under a misapprehension. Document 836-PS, Prosecution Exhibit 804, page 18 of the English, page 16 of the German, is the draft of a second implementation order which, at the end of August 1942, was issued as a basis for work.

Q. You say this was dated in August?

A. Yes. This can be seen. On the communication there is no date, but one can establish it from Exhibit 815, on page 64 of the German and 64 of the English. Here two communications are set down. In the first one, on the second half of the page, dated 6 November 1943, it quotes in brackets, the draft to serve as the basis of work of a second implementation order, dated 27 August 1942, and it has the same file number as the draft about which the prosecutor has just been speaking in Exhibit 804 on page 18 of the English, and that is how one can reconstruct the date.

PRESIDING JUDGE YOUNG: Well, what is the date of this—27 August—this 804?

DEFENDANT LEHMANN: Yes, Your Honor, 27 August 1942.

MR. FULKERSON: If Your Honors please, I don't want to go into a detailed argument about these documents. The only reason I asked him about the date on this is that, as you see, it has no date. It is our contention that it was dated 6 February, but—but there is no possibility that this decree, that this second implementation decree then could have been dated 6 February; that is out of the question?

DEFENDANT LEHMANN: Yes. I think it is improbable.

Q. At any rate, this draft, whatever the date of it is, was the definitive regulations for the carrying out of the Night and Fog Decree, was it not?

A. It was a further implementation decree.

Q. Well, it completely supplanted your first decree, did it not, your first implementation decree?

A. Yes, yes.

Q. So it was the definitive regulation governing the carrying out of the Night and Fog Decree?

A. Yes.

Q. And it, too, was drawn up in your office?

A. Yes. In the same way and after the same negotiations as in all such regulations, namely, discussions with all the agencies participating and on the basis of the contributions and desires which these people expressed.

Q. Did you have those conversations personally?

A. Yes, certainly.

Q. So I take it that you also personally supervised the composition of this regulation?

A. Well, I don't know details about it any longer, but of course the whole thing was in front of me.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT LEHMANN 301
LEHMANN DEFENSE EXHIBIT 268

AFFIDAVIT OF DR. WERNER HUELLE DATED 29 FEBRUARY 1948

I, Dr. Werner Huelle, born on 30 April 1903, in Stettin, residing in Oldenburg, Hermann Almersweg 10, was first of all warned that I render myself liable to punishment if I make a false affidavit. I declare upon oath that my statement corresponds to the truth and was made in order to be submitted as evidence to the Military Tribunal in the Palace of Justice, Nuernberg, Germany.

From November 1937 until April 1945, I worked in the Armed Forces Legal Department. My work with that department during the above stated period was interrupted only in the summer or autumn of 1940 and 1941 when, in each case, I was assigned to the army in the field as judge advocate for a period of about 3 months.

My knowledge of the so-called "Night and Fog Decree" is based on the fact that I had access to the significant documents.

* * * * *

No other decree in the field of criminal jurisprudence existed in which Keitel took a personal part to such an extent as in this case. Dr. Lehmann, and in his absence Dr. Sack, did not and was not allowed to make a single independent move in this field. The most important questions repeatedly concerned the crimes which were under consideration and the treatment of the innocent parties who, through accidental and never totally avoidable circumstances, became involved in the proceedings. These questions were clarified by means of a thorough exchange of opinion by all participating agencies, and Keitel always made the decisions personally and by no means along the lines of Dr. Lehmann's opinion.

* * * * *

The decree came at first as a shock to the military courts. Finally, however, the [military] judicial authorities withdrew, quite relieved, because they were hoping that the sentences imposed by the civil special courts, copies of which were submitted to the [military] chief justices, would be milder than could have been the case abroad. The branches of the armed forces and the Ministry of Justice, therefore, did not submit any *basic* alteration requests to the OKW, with the exception of one which was forwarded in spring 1943, from Holland and advocated a complete exclusion of the courts.

Dr. Lehmann gave his full attention to this suggestion and, through me, made it the object of an unofficial exchange of ideas in July 1943, in correspondence with the Ministry of Justice; he dropped it again, however, for the same reasons which had previously moved him to bring in the civil court system.

Instead, Dr. Lehmann, in accordance with his ideas on the matter, tried to strengthen the power of the military courts as far as was in his power to do so. Obviously in contradiction to the decree, he always demanded of the military courts that documents be examined thoroughly right on the spot, and even that the police investigations be supplemented by the military judges so that innocent persons would not be taken to Germany. The legal advisers to the higher military commanders were also given instructions to examine the documents very carefully, so as to complete the investigations before submission to the civil courts. The counterintelligence offices, which directed the police investigations, were given instructions to the same effect.

Also the week's respite was later on no longer counted from the [date of] arrest of the perpetrator but from the [date of] conclusion of the investigations. With this practice, Hitler's main idea was secretly frustrated. Dr. Lehmann even succeeded in the fall of 1943, in getting through a supplementary decree to the effect that even this deadline no longer had to be adhered to in

individual cases. When, in accordance with the regulation of civilian administration of justice, Keitel decided upon Canaris' demand that the persons acquitted in the main trial were not allowed to return to their homes because they might give information about the fate of their accomplices, that order was not passed on until the police had ordered these prisoners to be put in the best category of treatment:¹ at first they were in no way willing to make this concession. It is solely due to the efforts of the Armed Forces Legal Department that this order finally went through.

To the outsider who has not himself experienced Keitel's stubbornness in regard to these problems and the vigilant distrust of the police, these successes may seem small. To us, they were a repeated stimulus not to give up the guerrilla warfare [kleinkrieg] and to continue to sap the foundations of the decree. With their transfer to the civilian administration of justice the perpetrators left the armed forces domain of responsibility. The chief judges with the military commanders merely received a copy of the judicial decision which closed the proceedings. Dr. Lehmann always held that these verdicts were arrived at in a criminal procedure which took place according to the rules which were binding for everybody.

An exception existed only insofar as a large number of witnesses had to be heard by way of written depositions because the long distance and the secrecy enjoined did not allow of their personal appearance at the main trial. Important witnesses were examined by the public prosecutors who went to the occupied territories for this purpose or, upon their request, by the military judge. The armed forces had no right of control over the civilian administration of justice and Thierack, who took over the ministry as early as the summer of 1942, was not a person who would allow himself to be guided, let alone supervised, by Dr. Lehmann. The general idea prevailing in the legal departments of the armed forces was that the prisoners under investigation as well as those convicted were to be treated according to the rules applying to Germans, unless the secrecy order prescribed deviations for contact with the outer world. Accordingly, any danger to the lives of the prisoners in the prisons of the Department of Justice could not be expected.²

One Sunday early in July 1944, one of Keitel's adjutants called

¹ The reference appears to be to the letter of the Armed Forces Legal Department signed by the affiant Huelle, 10 November 1943. Document NOKW-2579, Prosecution Exhibit 815 reproduced earlier in this section.

² The balance of this affidavit deals mainly with so-called "Terror and Sabotage Decrees" which is the subject of the materials immediately following this section. However, since the affiant Huelle dealt with both matters in his affidavit, and related events concerning both topics, the affidavit has been reproduced here in its entirety.

me up in my Berlin apartment and asked for Generalrichter [Military Judge] Thissen, who as usual substituted for Dr. Lehmann during his illness, to come immediately to receive an important order. As I was unable to reach my deputy chief [Thissen], I drove to the adjutant's office.

There they handed me the copy of a teletype to the military commanders in the occupied territories and the competent police agency. The contents were approximately the following: "The Fuehrer has ordered that the police no longer transfer indigenous persons who have committed offenses against the occupation forces to the courts, but retain them in its sole custody."

The teletype contained the abandonment of the Night and Fog procedure. I immediately asked whether it had already been dispatched; after calling back the central office, they answered in the negative. Through his adjutant I asked Keitel who happened to be present, to stop the teletype so as to have a chance to inform my chief at the Buehlerhoehe Hospital by telephone about the situation. Keitel then ordered me to come in and told me in a great hurry that even Dr. Lehmann could not bring about a change in the order any more and that the teletype had to go out that very day. I pointed out that the order was also interfering with the competence of the civil special courts. In doing so I quite intentionally alluded to Minister Thierack because I knew from my chief that Keitel did not want to incur the latter's enmity. At the same time I suggested that the following sentence be added to the teletype: "Implementation regulations will follow". After a short consideration Keitel approved of this. The whole discussion—the only one I had with Keitel—lasted less than a minute.

The sole purpose of my remonstrance was this—I wanted to offer Dr. Lehmann a lever for his later use.

On that very same evening I informed my chief in Buehlerhoehe by phone about the new situation. He had the documents forwarded to him at Buehlerhoehe.

The final stage of the fight for the Night and Fog [Decree] was then, in its first phase, conducted from Buehlerhoehe. Since I was in Berlin, I am not familiar with details. All I know is that Lehmann suggested that the decree be restricted—contrary to Hitler's unequivocal order—to acts of terror and sabotage, and that it be mitigated. While my chief was busy with his endeavors, the attempt on Hitler's life came like a bombshell, considerably strengthening Himmler's position by making him commander in chief of the home forces. Before his time was up, and still ailing, Lehmann returned to Berlin to resume personally the management of the Armed Forces Legal Department. Himmler was quick to note that somebody had succeeded in partly offsetting his influ-

ence, because the Fuehrer order had included *all* punishable acts committed by indigenous persons. No sooner had his legal adviser sent a letter of protest to the OKW referring to the clearly defined will of the Fuehrer, than Keitel gave in and—throwing justice to the winds—on his own initiative issued the supplementary order of 18 August 1944, which fell completely in line with the tenor of the teletype. However, Himmler was still not satisfied. He now also demanded of the Ministry of Justice the surrender for labor allocation of those already sentenced. The latter were serving their terms in the prisons operated by the Administration of Justice. Despite the fact that Thierack alone was authorized to dispose of the convicts, Dr. Lehmann made an attempt to prevent this. He, therefore, invited the representatives of many offices to a conference in Berlin at the beginning of September. As Dr. Lehmann was unexpectedly compelled to go to Baden-Baden for a medical re-examination because of a relapse and Military Judge Thissen could not be on the spot so quickly from Jueterbog, my chief asked me to take the chair in the conference. On Dr. Lehmann's instructions I gave the participants the cue, "organizational difficulties"; such difficulties did actually exist, due to the fact that the Russians in the East and the British and the Americans in the West stood at the Reich frontiers, a desperate position which necessitated a large scale regrouping of troops and shifting of material along the Reich railroads. To be sure, my cue was readily picked up by the people of the Ministry of Justice and by others. But our hope that this would result in a postponement of the problem was frustrated by the fact that the representative of the police, referring to unequivocal directives of Hitler emphatically insisted on the demand that these detainees be also handed over to him by the Minister of Justice for allocation to labor. But by stressing the organizational difficulties we succeeded in preventing the prompt handing over by making arrangements according to which the time for transfers was to be dependent on later agreements between the police and the legal authorities. As the end of the war seemed to be immediately imminent at that time, this respite was of considerable importance on account of possible further procrastinations. I do not know to what extent the Ministry of Justice then actually handed over the convicted people.

One thing must not be overlooked at any rate—only a fraction of the Night and Fog prisoners registered in the camps of the police were those who came under the decree of 7 December 1941; because, as far as I remember, only approximately 7,000 persons in total were handed over by the military courts to and tried by civil courts within the 3 years. Part of them were sentenced to

death and executed on the basis of clear proof of guilt. The persons sentenced to prison terms were handed over to the police in compliance with orders in the fall of 1944. Obviously and without the knowledge of the armed forces and of the judicial authorities, in particular without the knowledge of Dr. Lehmann, the police "spirited away" also other persons for purely political reasons, and did not hand them over to military or civil courts, but transferred them directly to their camps. Only the police had a "Night and Fog" program, and the OKW had no knowledge of it. Only in the fall of 1944, i.e., at the time when the Night and Fog proceedings were already in the stage of liquidation, did the Armistice Commission indicate in a letter that the police seemed to be acting arbitrarily.

Dr. Lehmann is not responsible for these arbitrary acts which deliberately transgressed the narrow prerequisites of the decree.
Oldenburg, 29 February 1948

[Signed] DR. WERNER HUELLE

* * * * *

3. THE TERROR AND SABOTAGE DECREES

TRANSLATION OF DOCUMENT NOKW-2576
PROSECUTION EXHIBIT 823

TELETYPE, 1 JULY 1944, FROM ARMED FORCES OPERATIONS STAFF/
QU. 2 TO ARMED FORCES LEGAL DEPARTMENT, SIGNED BY DEFENDANT
WARLIMONT, REQUESTING DRAFT OF ORDER CONCERNING
TREATMENT OF "ENEMY TERRORISTS"

Fuehrer Headquarters, 1 July 1944

Armed Forces Operations Staff/
Quartiermeister 2/(Administration 1)

[Stamp] TOP SECRET

One copy

PRIORITY-TELETYPE

To: Chief of Armed Forces Legal Department

Subject: Combating of enemy terrorists in the occupied territories

On account of events in Copenhagen, the Fuehrer has decreed that court martial proceedings against civilians in the occupied

territories must be discontinued, with immediate effect. Armed Forces Legal Department is requested to submit by 2 July, 2000 hours, suggestions for the draft of an order concerning the treatment of enemy terrorists and saboteurs among the civilian population in the occupied territories.

Guiding principles—Terror can be countered only by terror; court martial sentences, on the other hand, only create martyrs and national heroes.

If German units or individual soldiers are attacked in any manner, the commander of the unit, or the individual soldier, is to take countermeasures independently, and, in particular, to exterminate terrorists. Terrorists or saboteurs who are arrested later must be turned over to the Security Service.

The Fuehrer Decree on the treatment of enemy commandos,* dated 18 October 1942 (The Fuehrer No. 008830/42 Top Secret/OKW/Armed Forces Operational Staff), will remain in force as it does not apply to the civil population.

BY ORDER:

[Initial] W [Warlimont]

OKW/Armed Forces Operations Staff/Quartiermeister 2
(Admin. 1) No. 006973/44 Top Secret

[Handwritten] Armed Forces/Legal Department IV R (Oberstabsrichter [Military Judge] Dr. Reger) informs Organization (F)—Lieutenant Colonel Moll—at 1210 hours that the deadline expiring at 2000 hours cannot be met as the sending of the teletype to Jueterbog was countermanded, and the teletype will be taken to Berlin—Oberstrichter [Military Judge] Dr. Huelle—by special courier this morning and will not arrive there before noon,
1230 hours [Initials illegible]

TRANSLATION OF DOCUMENT 711-PS
PROSECUTION EXHIBIT 824

MEMORANDUM BY DEFENDANT WARLIMONT, 1 JULY 1944, CONCERNING EXECUTION OF TERRORISTS IN DENMARK

Armed Forces Operations Staff 2 Quartiermeister 2 (North)

No. 884/44

1 July 1944

Subject: Execution of death sentences against terrorists in Denmark

Notes for an oral Report

According to a report by the Armed Forces Commander Denmark, the present strike movement in Copenhagen was caused by the execution of the death sentences against 8 terrorists.

* See section C 4 above, concerning the "Commando Order".

All the sentences were pronounced by the Higher SS and Police Court in Copenhagen.

[Initial] W [Warlimont]

[Handwritten] By telephone to chief OKW (Major von Szimonski) and ante-chamber by dictation on 2 July 1944, 1120 hrs.

[Illegible signature]

Captain

Distribution:

Chief OKW via Deputy Chief Armed Forces Operations Staff
Quartiermeister 2 (North) Draft

TRANSLATION OF DOCUMENT NOKW-2577
PROSECUTION EXHIBIT 825

MEMORANDUM BY THE DEFENDANT WARLIMONT, 30 JULY 1944,
CONCERNING DRAFT OF TERROR AND SABOTAGE DECREE SUB-
MITTED BY ARMED FORCES LEGAL DEPARTMENT

30 July 1944

4 copies—1st copy

[Initial] K [Keitel] 1 August

Armed Forces Operations Staff/
Quartiermeister 2/Admin.1
No. 009169/44 Top Secret

[Stamp] TOP SECRET

Subject: Combating of terrorists and saboteurs in the occupied
territories
Jurisdiction over non-German civilians

[Handwritten] Admin. 1, [Illegible initials] 2 August

Notes for Oral Report

I. According to the directive issued by Chief OKW in the notes for an oral report of 19 July 1944 (encl. 2)*, Armed Forces Legal Department submits the draft of a Fuehrer order (enclosure 1) with the following comment: "The Foreign Office and the Chief of the Security Police and Security Service have agreed to the draft."

At the request of the Foreign Office, the provision stating that the order does not apply to Finland, Rumania, Hungary, Bulgaria,

* Enclosures (1-3) referred to in the text were not submitted in evidence.

Croatia, and Slovakia, nor to the citizens of these states, has been taken out. It is to be included in the appendix.

Armed Forces Legal Department has no objections to this proposal. Since the order refers only to the occupied territories, it is plain that it does not apply to the states named. However, it is of importance that the decree is not intended to have effect on the citizens of these states. But this concerns principally only the Security Service; for the troops who are to suppress terrorists and saboteurs on the spot are not in a position to check nationality.

The Chief of the Security Police and Security Service likewise has agreed to this. Armed Forces Legal Department shares the opinion of the Foreign Office that it will suffice to issue the Fuehrer decree as matter "for official use only".

II. *Opinion of Armed Forces Operations Staff*—The proposal corresponds to the draft that was submitted originally (encl. 3), with the following exception:

Deviating from Article II, Section 1 of the draft, the new proposal, in accordance with the directive given by the Chief OKW, on page 2 of the notes for an oral report (encl. 2), provides for the carrying out of the death sentences, already valid, passed by courts martial pursuant to the provisions hitherto in force. The Armed Forces Operations Staff points out this deviation explicitly because the Chief OKW has designated the draft (encl. 3) as the correct solution. That draft still contains the provision renouncing the carrying out of the death sentences. Reason—to avoid any consequences similar to those experienced in Denmark.

[Handwritten] are still being carried out daily without any repercussions [initial] K. [Keitel]

III. *Suggestion*—Armed Forces Operations Staff suggests that the present version (encl. 1) be approved, the more so as the Security Service too has agreed to it; furthermore, that Sections 1 and 2 of Article II be dropped. These concern implementation regulations which are to be submitted by Armed Forces Legal Department in the subsidiary decree to Chief OKW separately. At the same time provision will be made for the distribution of the order to be limited to a close circle of receivers and for the troops to be informed only orally.

[Signed] WARLIMONT

Distribution:

Chief OKW via Deputy Chief Armed Forces Operations Staff,

1st copy

Armed Forces Legal Department, 2d copy

War Diary, 3d copy

Quartiermeister (draft), 4th copy

TRANSLATION OF DOCUMENT D-762
PROSECUTION EXHIBIT 826

HITLER ORDER, 30 JULY 1944, CONCERNING COMBATING OF
TERRORISTS AND SABOTEURS IN ENEMY COUNTRIES

Copy

[Stamp] TOP SECRET

Fuehrer Headquarters, 30 July 1944

The Fuehrer
OKW/Armed Forces Operations Staff/
Quartiermeister 2/Admin.1 No. 009169/44
Top Secret

30 copies—[illegible] copy

Subject: Combating terrorists and saboteurs in the occupied territories—jurisdiction

The constantly increasing acts of terror and sabotage which are to an ever greater extent perpetrated by uniformly led bands in the occupied territories, force us to take the most severe countermeasures, which correspond to the rigors of the war forced upon us. Whoever stabs us in the back in the decisive battle for our existence, deserves no consideration.

Therefore I order—

I. All acts of violence committed by non-German civilians in the occupied territories against the German armed forces, the SS and the Police, and against installations which serve their purposes, are to be combated as acts of terror and of sabotage in the following manner:

1. The troops and every individual member of the armed forces, the SS, and the Police are to overpower on the spot terrorists and saboteurs caught in the act.

2. Anyone apprehended later is to be handed over to the nearest local office of the Security Police and Security Service.

3. Followers [Mitlaeuffer], and especially women who do not directly participate in combat activities, are to be assigned to work. Children are to be spared.

II. The necessary implementing regulations will be issued by the Chief of the High Command of the Armed Forces. He is entitled to make alterations and additions, insofar as they are required by the necessities of war.

Signed: ADOLF HITLER

Certified:

[Signed] SCHOELZ

Oberfeldrichter [Military Judge]

TRANSLATION OF DOCUMENT D-764
PROSECUTION EXHIBIT 829

KEITEL DIRECTIVE, 18 AUGUST 1944, DISTRIBUTING THE TERROR AND
SABOTAGE DECREE OF 30 JULY 1944 AND THE FIRST IMPLEMENTING
DECREE OF 18 AUGUST 1944, CONCERNING THE TERROR AND
SABOTAGE DECREE

Fuehrer Headquarters, 18 August 1944

High Command of the Armed Forces
Armed Forces Operations Staff/Quartiermeister 2/Admin.1
No. 009169/44 Top Secret
Armed Forces Legal Department (I/3) No. 70/44 Top Secret

[Stamp] TOP SECRET

30 copies—24th copy

Subject: 1. Combating of terrorists and saboteurs in the occu-
pied territories
2. Jurisdiction over non-German civilians in the occu-
pied territories

2 Enclosures

1. Enclosed are copies of the Fuehrer's decree of 30 July 1944,¹
and of the 1st implementing decree of 18 August 1944.²

2. The Fuehrer's decree and the implementing decree do not
apply to Finland, Rumania, Hungary, Croatia, Slovakia, and
Bulgaria, nor to the subjects of these countries.

3. The Fuehrer's decree is to be made known at once orally
to all personnel of the armed forces, SS and Police and must
form the subject of regular emphatic instruction. It must only
be distributed in writing down to divisions and similarly ranking
units.

4. Current legal proceeding for all acts of terrorism and sabo-
tage, and all other crimes by non-German civilians in the occupied
territories, which imperil the security or war readiness of the
occupying power, are to be suspended. Charges must be with-
drawn. The execution of sentences is no longer to be ordered.
The culprits are to be handed over with a report of the occur-
rences to the nearest local office of the Security Police and
Security Service. In the case of death sentences which already
have legal force, the present instructions are to remain valid.

¹ Hitler's Terror and Sabotage Decree of 30 July 1944, (*Doc. D-762, Pros. Ex. 826*) repro-
duced immediately above.

² Keitel's order of 18 August 1944, (*Doc. D-763, Pros. Ex. 828*) reproduced immediately below.
(See testimony of the defendant Lehmann, below in this section, for discussion of Keitel's
order.)

5. Crimes which affect German interests but do not imperil the security or war readiness of the occupying power, do not justify the retention of jurisdiction against non-German civilians in the occupied territories. I authorize the commanders of the occupied territories to draw up new regulations in agreement with the Higher SS and Police Leaders. The following measures, *inter alia*, are to be considered:

- a. Handing over to the Security Service for forced labor.
- b. Settlement by police administrative criminal proceedings.
- c. Handing over to any existing local German civil courts.
- d. Handing over to the courts of the country itself.

I reserve my decision with regard to Denmark.

The Chief of the High Command of the Armed Forces

Signed: KEITEL

Certified:

[Signed] SCHOELZ

Oberfeldrichter [Military Judge]

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- 16th copy, The SS Judge attached to the Reich Leader—SS, for the attention of SS Colonel Bender
- 17th copy, Reich Leader SS, Chief SS Court
- 18th copy, President of the Reich Military Tribunal
- 19th copy, Foreign Office—for the attention of Ambassador Dr. Albrecht

20th copy, Reich Minister of Justice—for the attention of Ministerialrat von Ammon
21st copy, Party Chancellery—for the attention of Reichsamtsleiter Kapp
22d copy, Reich Chancellery—for the attention of Judge Sommer
23d copy, Office Group [Division] Foreign Countries
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25th—30th copies, Armed Forces Legal Department (Draft and spare copies.)

TRANSLATION OF DOCUMENT D-763
PROSECUTION EXHIBIT 828

KEITEL ORDER, 18 AUGUST 1944, EXTENDING THE SCOPE OF THE
TERROR AND SABOTAGE DECREE OF 30 JULY 1944

Copy

Fuehrer Headquarters, 18 August 1944

30 copies—[illegible] copy

High Command of the Armed Forces:
Armed Forces Operations Staff/Quartiermeister 2
Administration I No. 009169/44 Top Secret
Armed Forces Legal Department I/3 No. 72/44 Top Secret

Subject: Crimes committed by non-German civilians in the occupied territories against the security or war readiness of the occupying power

Pursuant to Article II of Fuehrer Order of 30 July 1944 (OKW/Armed Forces Operations Staff/Quartiermeister 2/Administration I No. 003169/44 Top Secret) it is ordered:

Non-German civilians of occupied territories endangering the security or war readiness of the occupying power by other means than by acts of terror and sabotage are to be turned over to the Security Service.* Article I, section 3, of the Fuehrer Order also applies to them.

Chief of the High Command of the Armed Forces

Signed: KEITEL

Certified:

[Signed] SCHOELZ

* See defendant Lehmann's testimony, later in this section, for discussion of Keitel's order.

TRANSLATION OF DOCUMENT 835-PS
PROSECUTION EXHIBIT 831

LETTER FROM THE DEFENDANT LEHMANN TO THE GERMAN ARMISTICE COMMISSION, 2 SEPTEMBER 1944, CONCERNING THE HANDING OVER OF ALLEGED SABOTEURS AND POLITICAL PRISONERS TO THE SECURITY POLICE AND SECURITY SERVICE

Berlin W 35, 2 September 1944
Tirpitzufer 72-76
Telephone: Local 21891
Long distance 218091

High Command of the Armed Forces
14 n 16.18 Armed Forces Legal Department (I/3) 446/44 Secret
[Stamp] Secret

To: German Armistice Commission

Re: letter of 10 August 44 File Index No. 630/44

For information: OKW/Armed Forces Operations Staff/Quartiermeister/Admin.1, Armed Forces Operations Staff, Department Foreign Countries

Subject: Status of political prisoners

Reference: Fuehrer Decree of 30 July 44 (OKW/Armed Forces Operations Staff/Quartiermeister 2/Admin.1 No. 009169 Top Secret) and OKW Decree of 18 August 44 (Armed Forces Operations Staff/Quartiermeister 2/Admin.1 No. 009169 Top Secret Armed Forces/Legal Department I/3 No. 79/44 Top Secret)

Conforming to the decrees, all non-German civilians in occupied territories who have endangered the security and war readiness of the occupying power by acts of terror and sabotage, or in other ways, are to be surrendered to the Security Police and to the Security Service. Only those prisoners are excepted who were legally sentenced to death, or were serving a sentence of confinement prior to the announcement of these decrees. Included in the punishable acts which endanger the security or war readiness of the occupying power are those also of a political nature. The declaration of the Higher SS and Police Leader with the military commander in France, that he cannot answer questions about political prisoners during Anglo-American operations in France, includes therefore all political prisoners in the occupied French territories seized recently, or to be seized in the near future.

The future treatment of prisoners who are condemned according to the directions of the Fuehrer Order of 7 December 1941 (OKW/Armed Forces Legal Department I/3/4 14 n 16 Nr.165/41 Secret), and who have no communication with the outer world, will soon be discussed with all interested authorities.

BY ORDER:

Signed: DR. LEHMANN

Certified:

[Signed] SCHOELZ

Oberfeldrichter [Military Judge]

TRANSLATION OF DOCUMENT D-765
PROSECUTION EXHIBIT 830

INVITATION, 2 SEPTEMBER 1944, BY HIGH COMMAND OF THE ARMED FORCES, SIGNED BY DEFENDANT LEHMANN, TO CONFERENCE ON TREATMENT OF ENEMY CIVILIANS IN OCCUPIED TERRITORY

Berlin W 35, 2 September 1944
Tirpitzufer 72-76

High Command of the Armed Forces
14 n 16.18 Armed Forces Legal Department (I/3) 446/44 Secret

[Stamp] Secret

Express Letter

To:

1. The Foreign Office, for Consul General Speiser.
2. The Reich Minister of Justice, for Ministerialrat von Ammon.
3. The Reich Security Main Office, for SS Lieutenant Colonel Huppenkoten.
4. The Reich Minister and Head of the Reich Chancellery, for Appeal Court Judge Sommer.
5. The Head of the Party Chancellery, for Reichsamtsleiter Kapp.
6. The Reich Leader SS, Central Office SS Court.
7. OKW/Armed Forces Operations Staff/Quartiermeister/Admin. 1.
8. OKW/Armed Forces Operations Staff/Department Foreign Countries.
9. Army High Command/Legal Department.
10. Navy High Command/Navy Legal Department.
11. Air Force High Command/Air Force Legal Department.

Subject: Criminal acts by non-German civilians in the occupied territories against the security or war readiness of the occupying power

Reference: Fuehrer Decree of 30 July 44 (OKW/Armed Forces Operations Staff/Quartiermeister 2/Admin. 1 No. 009169 Top Secret) and OKW Decree of 18 August 44 (Armed Forces Operations Staff/Quartiermeister 2/Admin. 1 No. 009169 Top Secret) Armed Forces Legal Department I/3 No. 79/44 Top Secret

According to the decrees referred to above all non-German civilians in the occupied territories who have endangered the security or war readiness of the occupying power by acts of terrorism or sabotage, or by any other means, are to be handed over to the Security Police and Security Service.

The question is whether it is necessary to issue a corresponding regulation in respect of non-German civilians who were legally sentenced before the publication of this order and have begun to serve a term of imprisonment.

The High Command invites you to a conference on this question on Friday, 8 September 1944, at 10 a.m., in the building of the Reich Military Court, Berlin-Charlottenburg 5, Witzlebenstrasse 4/10, Room 106.

BY ORDER:

Signed: DR. LEHMANN

Certified:

[Signed] SCHOELZ

Oberfeldrichter [Military Judge]

TRANSLATION OF DOCUMENT D-767
PROSECUTION EXHIBIT 832

MEMORANDUM, 13 SEPTEMBER 1944, ON CONFERENCE CONCERN-
ING TREATMENT OF NON-GERMAN CIVILIANS IN OCCUPIED
TERRITORY

[Stamp] TOP SECRET

Local Headquarters, 13 September 1944

1 copy

Quartiermeister (Admin.2)

To 79/44 Top Secret

Subject: Criminal acts by non-German civilians in the occupied
territories against the security or war readiness of
the occupying power

Memorandum

I participated in the discussion for the purpose of gaining information. After it had been ascertained that the "Nacht und Nebel" (Night and Fog) Decree had become superfluous as a result of the Terror and Sabotage Decree, the Armed Forces Legal Department presented the attached draft No. 009169/44* Top Secret—Armed Forces Legal Department (I/3) No. 79/44 Top Secret—of September 1944, for discussion. There were no important differences of opinion. Mere technical questions regarding practical application were discussed immediately afterwards by the people directly concerned.

According to the letter of the Reich Leader SS, it is a question of approximately 24,000 non-German civilians who are detained or under arrest for examination, and whose speediest transfer to the Security Service he demands. The question that came up during the discussion as to why this transfer to the Security Service had become necessary at the present time, although no inconsiderable administrative work was involved, remained unanswered.

It was agreed that section I of the draft decree refers also to those prisoners who have been turned over to the civil courts.

As OKW does not set any great value on passing sentence on the trifling matters still remaining for the military courts, they have been left for settlement by decrees to be agreed on locally.

The representative of the Foreign Office pointed out that members of neutral countries also had been submitted to the "fog"

* Keitel's order of 4 September 1944 (*Doc. D-766, Pros. Ex. 884*) reproduced immediately below.

decree by mistake, or intentionally (i.e., as accomplices), who, according to the basic decree, should not have been affected. The question as to what is to be done with the foreigners, and what information is to be given to the neutral countries can, as was stated by the representative of the Security Service, only be answered in each individual case according to the state of affairs existing at the time. The Foreign Office's objections have not been entirely removed by this.

[Signed] WESTERKAMP

TRANSLATION OF DOCUMENT D-766*
PROSECUTION EXHIBIT 834

KEITEL ORDER, 4 SEPTEMBER 1944, FURTHER IMPLEMENTING THE
TERROR AND SABOTAGE DECREE OF 30 JULY 1944, WITH INSTRU-
CTIONS CONCERNING "NIGHT AND FOG" PRISONERS

TOP SECRET

4 September 1944
30 copies—*** copy

High Command of the Armed Forces
Armed Forces/Legal Department I/3 No. 79/44 Top Secret
Armed Forces Operations Staff/Quartiermeister 2/Admin. 1,
No. 009169/44 Top Secret

Subject: Criminal actions by non-German civilians in the occu-
pied territories against the security or war readi-
ness of the occupying power

On the strength of section II of the Fuehrer's decree of 30 July 1944, (OKW/Armed Forces Operations Staff Quartiermeister 2/Admin. 1, No. 009169/44, Top Secret) (*D-762, Pros. Ex. 826*)* it is decreed in agreement with the Reich Leader SS and the Chief of the German Police, the Reich Minister of Justice and the Reich Minister and Chief of the Reich Chancellery—

I

Non-German civilians in the occupied territories who have been legally sentenced by a German court for a criminal act against the security or war readiness of the occupying power, and who are in custody in the occupied territories or in the home area, are to be handed over with a report of the facts to the nearest local office of the Security Police and Security Service. Excepted

* Document reproduced earlier in this section.

are persons who have been legally sentenced to death for whom the execution of the punishment has been ordered.

II

Sentenced persons, who, according to the directives of the Fuehrer for the prosecution of criminal acts against the Reich or the occupying power in the occupied territories, dated 7 December 1941 [Night and Fog Decree], are not allowed to have any contact with the outer world, are to be specially identified.

III

The Chief of the Security Police and Security Service will agree on the time for the transfer with the High Command of the Armed Forces, the Reich Minister of Justice or the Reich Minister and head of the Reich Chancellery, for their spheres of competence.

The Chief of the High Command of the Armed Forces

Signed: KEITEL

Certified:

[Signed] SCHOELZ

Oberfeldrichter [Military Judge]

Distribution:

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- Reich Minister of Justice, for Ministerialrat von Ammon, 2d copy
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Commander in Chief Southeast, 16th copy
Military Commander Southeast, 17th copy
Armed Forces Commander Denmark, 18th copy
Armed Forces Commander Norway, 19th copy
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EXTRACTS FROM THE TESTIMONY OF DEFENDANT LEHMANN*

DIRECT EXAMINATION

* * * * *

DR. VON KELLER (counsel for the defendant Lehmann): I will now turn to a new topic, the decree which was subsequently designated as the "Terrorist Decree". Can you explain what you knew about the origin of this terrorist decree?

DEFENDANT LEHMANN: I am afraid my knowledge of this case is rather sketchy. That is due to the fact that this decree originated during the period in which I was still hospitalized. According to the documents, it originated at the beginning of the month of July 1944, and it was only in August that I returned. Nor do I know very much about the subsequent development of this matter, because I had not fully recovered when I returned, and I could only perform my duties with half my strength, and only dealt with newly incoming matters which had resulted from the plot of 20 July 1944, and other major political events. Matters which were pending were dealt with by my deputy and my officials; of course, always under my responsibility. I merely state this to make matters plain. I know the following facts about this development:

In the hospital I was telephoned by one of my officials, at the beginning of July 1944, and he told me that Hitler had aimed a new blow at the judiciary of the armed forces. He had ordered that the jurisdiction of the armed forces over inhabitants in occupied territories was finally to cease. Thereupon, I asked whether that was already finished, and I was told that the decree had already been issued. I requested the official to call upon me in my hospital in Baden-Baden because that was such an important matter that I wished to get further particulars, and that was

* Complete testimony is recorded in mimeographed transcript, 15-16, 19-20, 26-27 July 1948; pp. 7909-8180, 8481-8582.

not possible by telephone without disturbances. The official called upon me and told me that Field Marshal Keitel, too, had called this matter irrevocable.

We now considered whether it was possible at all to attain anything. There was only a small starting point for us. Upon the instigation of my official, or my deputy—I don't know who—Field Marshal Keitel had agreed that in the decree which had already been issued—

JUDGE HALE: May I interrupt? Counsel, I wish you would let us in on the secret of what document you are speaking about.

DR. VON KELLER: Your Honor, the document has not been dealt with as yet. It will subsequently be introduced as Exhibit 823. The first document in this complex will be 823.

A. (Continuing) I had been told that the Field Marshal had conceded an addition to the decree already issued, to the effect that implementation regulations were to follow.¹ It was now possible, perhaps, by way of these implementation regulations, to effect some improvement. From the hospital I telephoned Field Marshal Keitel. He didn't like it, but the matter was important enough. Keitel confirmed on the telephone that it was a firm decision of Hitler. We have only been able to find out now, in part, how this decision had been arrived at. It will be proved to the Court by documents.

Q. May I now ask you to comment on Document NOKW-2576, Prosecution Exhibit 823, book 9-K, page 79 of the English and 81 of the German?

A. It is a communication, according to the contents of which, Hitler had ordered, on the basis of events in Copenhagen, "that court martial proceedings against civilians in the occupied territories must be discontinued with immediate effect." The order was to be drafted along these lines. How this happened in particular I don't know myself. The crucial point at any rate was that judicial proceedings against civilians in occupied territories was abolished by this order of Hitler.

Q. You just quoted a sentence from Exhibit 823. Will you please now turn to page 81 of the English and 83 of the German? That is Document 711-PS, Prosecution Exhibit 824².

A. That is a memorandum dated 1 July 1944. According to a report by the armed forces commander in Denmark, the strike wave in Copenhagen at the time was caused by the execution of death sentences. We now heard that was the immediate reason

¹ See Document Lehmann 301, Lehmann Exhibit 268, (Dr. Huelle's affidavit), above in section D 2, for further discussion of this subject.

² Document reproduced above in this section.

for Hitler to issue the order that the jurisdiction of the armed forces was to be completely abolished.

Here again it can be seen how such orders originated. If it had been an armed forces court which had imposed these death sentences, I could have understood it, but they were sentences passed by an SS and Police court in Copenhagen. Nonetheless, our jurisdiction was prohibited for this reason. It was only an excuse, and not the intrinsic reason; the intrinsic reason was to be found in the distrust of our justice.

Q. Now, how did this matter of the order itself develop?

A. I cannot state this from memory, nor do I find in the documents any sufficient aid to my own memory. I was not in Berlin at the time. All I know is that we endeavored, by way of implementation regulations, to mitigate Hitler's original order. How this happened in detail I do not know any longer, or didn't know at all. A certain success must have been attained because the original order of Hitler, as I have related to the Tribunal, was to the effect that the jurisdiction of the armed forces was to be completely eliminated, that is jurisdiction over indigenous population. Hitler's order which I find here as the conclusion of this matter, Document D-762, Prosecution Exhibit 826,* is an order dated 30 July 1944. It contains a modification of the original order because it excludes jurisdiction only in cases of criminal acts against the German armed forces, SS and Police, but not in the case of other offenses committed by the inhabitants of the country.

A further regulation provides that followers, women and children are to be spared. These apparently are the mitigations and modifications of the original decree which had been secured in the course of further negotiations in Berlin. To what extent this was due to our suggestions, I cannot state, because I had not returned to office when this order was signed.

Q. Now, when did you return to Berlin and what happened thereafter?

A. I returned to my office after the plot of 20 July, although I had not been completely restored, because I anticipated that new consequences would flow from this for Wehrmacht jurisdiction.

Q. You mean the plot?

A. I mean the plot on Hitler's life.

Q. You mean the one on 20 July?

A. That is right, the anti-Hitler plot on 20 July 1944 and my anticipations were fully confirmed. I will revert to this. The

* *Ibid.*

atmosphere in Berlin was an atmosphere of lunacy and I can well imagine that nothing could be done against Hitler's will in this atmosphere in such a matter.

Q. To what extent had the atmosphere and the position changed as regards the powers of command?

A. In Berlin I found a completely changed situation. Himmler had become Commander in Chief of the Replacement Army subsequent to the anti-Hitler plot, and Hitler had charged him with the detection of all matters in connection with the plot. That had vested Himmler with such power as he had not possessed before in spite of his very strong position and he was the very man to exploit it.

Q. What demands did Himmler make?

A. With respect to this decree, he made various kinds of demands. Some office under Himmler must have noticed that the decree dated 30 July 1944, that is, Prosecution Exhibit 826, was not identical with the original directive by Hitler because parts of the armed forces jurisdiction had been preserved. Himmler now addressed a communication to Field Marshal Keitel in which he categorically asked for Hitler's original will to be expressed in a supplementary decree, and that was the reason for the decree which will be found by the Tribunal in Document D-763, Prosecution Exhibit 828. It is a decree of Keitel dated 18 August 1944. This decree restores the original order of Hitler dated 1 July 1944; even if an offense by a national of an occupied country did not constitute an act of violence against the occupying power, armed forces jurisdiction was to be abolished.

I can approximately recall this, because I still remember that Field Marshal Keitel was most excited about this letter of protest by Himmler, and he ordered this matter to be settled on the same day. In this connection I would like to point out that the implementation of Hitler's original order had been delayed until the middle of August, because Hitler's order about the final transfer of the matters to the police was only distributed with a covering letter dated 18 August. Thus, we had succeeded in delaying this decree for a long time, and as this whole development took place in a period in which the evacuation of France was proceeding apace, and as the distribution of the order took weeks, owing to the postal conditions at the time, it may well be said that the new decree never became seriously effective for France. A witness will inform the Tribunal about this, a witness from France.

Q. Did Himmler now agree to this new adjustment, I mean this adjustment which had been effected by the communication dated 18 August?

A. No. Because he concluded from Hitler's order of 1 July, that he, Himmler, and he alone, was to have jurisdiction over foreign nationals in Germany, and he now demanded that such persons of foreign nationality as were imprisoned by the armed forces or the civil courts were to be put at his disposal for work. That was a new demand for us. We prepared a short memorandum in which we pointed out that it was a completely incomprehensible measure to effect such a reorganization at this juncture. We were less concerned by this, but the Ministry of Justice was affected to a considerable extent.

Q. Why were you not concerned?

A. Because only a few such aliens were detained in the penal institutions of the army; but now a new picture resulted. I have already related to the Tribunal that on 20 July 1944 Himmler became commander of the Replacement Army, and the execution of sentences passed by the armed forces was dealt with by the Replacement Army. As far as prisoners of the armed forces were concerned, Himmler was himself competent, and I used this as a reason against his demand, by stating that I could understand his demand even less now, seeing that he had already got the people. Thereupon Field Marshal Keitel replied to me: "As you state quite properly, it is not merely a matter of a formal detachment from the armed forces. In point of fact, all these inmates of the prisons of the armed forces are already subject to the jurisdiction of Himmler. All this has been conceded by Hitler and so ordered, and these orders are to be carried out." Thereupon, although we were the least to be affected, as I have stated, we called the departments concerned for a consultation. This is shown by Document D-765, Prosecution Exhibit 830,* a communication dated 2 September 1944. All agencies concerned had been requested to participate in a conference, the subject of which was to be this new demand, of which we made no mention in the communication itself in order not to commit the departments concerned at the outset.

Q. The invitation is contained in the last paragraph of this communication.

A. This conference took place, but I didn't attend it. It had been convened for 8 September 1944. On that day I returned to the hospital in Baden-Baden because I had suffered a relapse, and the conference was conducted by my deputy, a Ministerialrat. From this fact alone it is evident that it was merely a technical conference in which no decisions were to be made, for otherwise a civil servant holding the rank of a Ministerialrat could not have dealt with this matter. Everything had been fixed already

* Ibid.

by Hitler's orders, and by the orders of Himmler and Keitel. This conference, as I heard upon my return, merely concerned the transfer for labor allocation [of "night and fog" prisoners].

Q. Did you subsequently hear anything more about the conference?

A. Yes. I merely learned this fact, that we had made an attempt to emphasize the technical difficulties, that however the police rigidly stuck to their purpose, and presented the draft which Hitler had accepted to be redeemed by us. It was known that Himmler was seeking labor everywhere in Germany for his work program. That was known to us through other occurrences too.

Q. Was the legal aspect of this decree under international law referred to subsequently?

A. No, as it merely concerned a shifting of competency, which we all regarded as completely fatuous and inexpedient, but which meant nothing but a change of the place of work, as far as I know no such objections were raised by any of the participants.

* * * * *

E. Deportation and Enslavement of Civilians

I. INTRODUCTION

In count three of the indictment (pars. 59, 62, and 64 through 67), all of the defendants were charged with criminal participation in the slave labor program of the Third Reich. Contemporaneous documents submitted below in connection with these charges (section 2) are followed by extracts from the testimony of the defense witnesses Westerkamp and Heidkaemper (section 3).

2. CONTEMPORANEOUS DOCUMENTS

PARTIAL TRANSLATION OF DOCUMENT NOKW-3485* PROSECUTION REBUTTAL EXHIBIT 9

EXTRACT FROM DIRECTIVE OF OKW, 8 MAY 1941, CONCERNING
ECONOMIC ORGANIZATION TO BE SET UP IN "BARBAROSSA" AREA

EXTRACT FROM OKW/ECONOMIC ARMAMENT OFFICE

Staff Ia 42/41 Top Secret, Matter for Chiefs, dated 8 May 1941

Enclosure 1

To OKW/Armed Forces Operations Staff/L IV Quartiermeister
No. 44560/41 Top Secret

Matter for Chiefs

19th copy

Composition and tasks of the Economic Organization to be set up in the "Barbarossa" area

The Fuehrer has placed the Reich Marshal in charge of the coordinated management of economy in the area of operations and in the political administration territories. The Reich Marshal has assigned to this task an economic directing staff, for which the Chief of the Economic Armament Office is responsible.

The structure and presumable activity of the economic organization will be as follows:

Composition of the Economic Organization—

Reich Marshal, Economic Direction Staff East,

(Chief of Economic Armament Office in charge)

Economic Staff, (Lieutenant General of the Air Force
Schubert)

Economic Inspectorates

Economic Units [Wirtschafts Kommandos]

Groups IV Economic, with the Feldkommandanturen

Liaison Officer of the Economic Armament Office as Section
IV—Economics of army headquarters [AOK]

The economic offices subordinate to the Economic Staff Schubert will, as far as they have their *field of activity within the area of operations*, be the military subordinates of the command authorities of the army.

The Reich Marshal will give his orders to the *Economic Staff Schubert* via the *Economic Direction Staff East*; the former [Economic Staff Schubert] will execute them through *military*

* Additional parts of this Document are contained above in section VI D 3 b volume X, of this series.

command channels via the Army High Command/General-Quartiermeister, as far as it is required that they be passed on to the troops through command channels or when it is necessary for the holder of the executive power to intervene.

Purely technical economic orders will be given directly to the subordinated economic offices through [economic] service channels, while the military command authorities concerned will be informed simultaneously.

The economic offices set up in the area of operations are at the disposal of the command authorities of the army for the purpose of providing army supplies.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-2460
PROSECUTION EXHIBIT 436

EXTRACTS FROM MONTHLY REPORT FOR MAY 1942 FROM ECONOMIC INSPECTORATE NORTH TO ARMY GROUP AREA NORTH CONCERNING THE DISPATCH OF CONSCRIPTED LABOR TO REICH

Commander, Army Group Area North
Enclosures to War Diary Quartiermeister
Monthly Reports, Economic Inspectorate North, from 1 March 1942 to 31 August 1942

Economic Inspectorate North
Group Leader/M/ I/Ia
Registry No. 637/42 Secret

[Handwritten]

461/42 Secret .

14/6 [Initials] Ke

Back to Chief of Staff, to be submitted again
Ps Kov, 6 June 1942

[Stamp]

Commander, Army Group Area North
Received: 10 June 1942
Action: Quartiermeister II
Registry No. 1372/42 Secret

Monthly report for the period from 1-31 May 1942

1. *Population*
- a. Attitude of the population

* * * * *

The rural population everywhere shows commendable industry with regard to the spring cultivation, working from early in the morning till late at night. This active participation exceeds our expectations by far and allows the conclusion to be drawn that at least the rural population evinces a positive attitude which in turn gives rise to the hope for a favorable harvest. This activity of the rural population can be regarded as the first positive outcome of the new agrarian regulations. Opposed to this there is a certain dissatisfaction, which seems to become evident in the area of Ostrov, here and there, with the more or less compulsory recruitment and deportation of Russian laborers to the Reich; this dissatisfaction is at present of minor importance, but should be closely watched all the time.

* * * * *

4. *Labor allocation and wage policy*

* * * * *

On 16 May 1942, a meeting of all leaders of recruitment commissions under the chairmanship of Economic Unit Commander, Lieutenant Colonel Becker, took place at Pskov. At this meeting it was unanimously agreed that the recruiting drive could not be improved any further. Army Group and Inspectorate therefore agreed to the proposals of the recruiting commission to restrict the number of workers to be deported to the following quotas:

In the area of Army Command 16	6,000
In the area of Army Command 18	4,000
In the area of Army Group Area North	4,500

When these figures have been reached, about 50,000 workers will have been dispatched to Germany, and the figure originally aimed at will have been surpassed by about 70 percent.

Further transports will be impossible without seriously impairing the needs of the troops, according to the opinion of army group, with which all these present concurred. A detailed survey will be given on the carrying out of the recruitment campaign for Germany in the report for the month of June.

* * * * *

a. *Labor Allocation in former Russian territory*

The tasks have not essentially changed. As before, the following must be taken first into consideration:

- (1) Deportation of workers to Germany
- (2) Renewed demands for "Panje" [horse-drawn wagon] drivers
- (3) Recruitment of necessary workers for road repairs and, in addition, for repair of numerous bridges which have been

destroyed, or badly damaged by ice floes, as well as for large-scale construction work above ground.

These requirements could not be met to a full extent.

The commander of the rear area has issued a new decree as well as a directive concerning labor allocation. The regulations concerning the carrying out of conscription, the prohibiting of demobilization, etc., have not been essentially broadened, so that now vast areas of the country can be drawn on also.

* * * * *

b. Labor Allocation for Germany. During the month of May, 15 trainloads carrying roughly 15,000 persons, were dispatched from the area of the Economic Inspectorate North.

Until 24 May 1942, there have been dispatched:

From the area of Army Command 16	11,149 persons
From the area of Army Command 18	11,349 persons
From the area of Army Group Area North	16,424 persons

38,922

Added to the transports from all three recruiting areas mentioned earlier, the number of workers dispatched to the Reich up to 31 May 1942 amounts to about 42,000.

No further prisoners of war were dispatched during the month of May, and further transports are not to be expected unless the military position in Sector North is changed.

* * * * *

Charged with taking over of Command
[M.d.w.d.g.b.]

Signed: BECKER
Lieutenant Colonel
Certified True Copy:
[Signed] FRANKE
Captain

PARTIAL TRANSLATION OF DOCUMENT NOKW-2393
PROSECUTION EXHIBIT 440

EXTRACT FROM MONTHLY REPORT OF ECONOMIC INSPECTORATE
NORTH FOR JULY 1942 CONCERNING TRANSPORTATION OF
CIVILIANS TO THE REICH FOR LABOR (SAUCKEL PLAN)

[Handwritten] VII 568/42 Secret

SECRET

Economic Inspectorate North
Direction Group/M *** I d
Diary Nr. 836/42 Secret

Pskov, 6 August 1942

[Stamp] Received

Quartiermeister, 11 August 1942

[Handwritten]

M.R. Department VII

Monthly Report for the period from 1 July to 31 July 1942

* * * * *

b. Labor Allocation for Germany—Several transports were still carried out for the Sauckel Plan in July, and 50,725 persons altogether have been transported into the Reich so far; 2 transports from the Demyansk basin, with a total of about 1,000 workers, are still to be expected. It is impossible to remove any more; for it is clear even now that the removal of these 51,000 persons from a region which is depopulated to such a great extent, makes it extremely difficult to carry out the work which must be done here for the troops.

* * * * *

Charged with taking over of Command
[M.d.w.d.g.b.]

[Signed] BECKER
Colonel

TRANSLATION OF DOCUMENT VON KUECHLER 119
VON KUECHLER DEFENSE EXHIBIT 119

DECREE OF THE FUEHRER, 30 SEPTEMBER 1942, ON THE EXECUTION
OF THE DECREE CONCERNING A PLENIPOTENTIARY GENERAL FOR
THE ALLOCATION OF LABOR

I herewith authorize the Plenipotentiary General for the Allocation of Labor, Reich Governor and Gauleiter Fritz Sauckel, to take all necessary measures for the execution of my decree concerning a Plenipotentiary General for the Allocation of Labor, dated 21 March 1942 (Reich Law Gazette [part] I, page 179, according to his own judgment in the greater German Reich including the Protectorate as well as in the Government General and in the occupied territories; measures which will safeguard under all circumstances the regulated allocation of labor for the German war economy. For this purpose he may appoint commissioners in the offices of the military and civilian administration. These are subordinated directly to the Plenipotentiary General for the Allocation of Labor. In order to carry out their tasks, they are entitled to issue directions to the competent military and civilian authorities in charge of the labor allocation and wage policy.

More detailed instructions will be issued by the Plenipotentiary General for the Allocation of Labor.
Fuehrer Headquarters, 30 September 1942

The Fuehrer
[Signed] ADOLF HITLER

The Reich Minister and Chief of the Reich Chancellery
[Signed] DR. LAMMERS

The Chief of the High Command of the Armed Forces
[Signed] KEITEL

PARTIAL TRANSLATION OF DOCUMENT NOKW-2341
PROSECUTION EXHIBIT 444

REPORT FROM COMMANDER ARMY REAR AREA 590, GROUP VII,
(MILITARY ADMINISTRATION), TO 3d PANZER ARMY, 29 NOVEMBER
1942, CONCERNING RECRUITMENT AND USE OF CIVILIANS FOR
LABOR

[Handwritten] Qu 2 564/42 Top Secret

Command Post, 29 November 1942

Commander of Army Rear Area 590
Group VII (Military Administration) File Reference I 15/42
Ia 134/42 Top Secret

[Stamp] Top Secret

[Handwritten] Circulation for official notice

Ia
I T
IV a
and return to
Quartiermeister 2
19 December
Army Group
Area North

[Stamp]

3d Panzer Army/Oberquartiermeister Section
Received: 2 December 1942
Secret Top Secret
[Initials] No. 4130/42

[Stamp] Top Secret

[Stamp]

Top Secret No. 8088/42
3d Panzer Army
Received: 1 December 1942
Dept. Oberquartiermeister

To: 3d Panzer Army, Oberquartiermeister 2

Subject: Employment of prisoners of war and civilians

Reference: 3d Panzer Army Ia/Oberquartiermeister 2 No. 4566/
42 Top Secret, dated 10 October 1942

In accordance with Section 21 of the order referred to, the
following report is herewith submitted concerning experiences
gained in connection with the measures ordered.

* * * * *

A conclusive picture of the tasks and of the distribution of available labor forces is presented by the list below made by the Ortskommandatur I/292:

Serial No.	Assignment	Men	Women
*	*	*	*
9.	Women for the Reich		100
10.	Men and women as a detachment quartered in barracks	200	200
11.	Men and women, field railroad machine division 5, Vyazma	50	50
12.	Men, Vyazma Supply Sector	300	
13.	Commander of army rear area worker detachment	100	60
*	*	*	*
18.	Field fortification construction	956	2199
*	*	*	*

b. Recruitment of the civilian population

The recruitment poster contemplated in paragraph II of the reference instruction has not been delivered. The workers could not be recruited on a voluntary basis. In contrast to the summer months, practically nobody is volunteering for work in Germany any more.

* * * * *

Five hundred male and 500 female workers were conscripted at the time, as ordered in paragraph 18 of the reference instruction. This conscription, however, was superseded by the subsequent orders concerning the formation of transports of labor detachments. The following must be said about the organizing of these transports.

Nowhere was there any desire or inclination for this labor assignment; indeed, sometimes it even occurred that men wept when they were being shipped away. Almost all the workers had literally to be dragged away. This caused very grave difficulties for the Ortskommandanturen, because all the transports had to be assembled at very short notice and almost simultaneously. There were not always sufficient forces (military police, regular police) to bring the workers from remote villages. Those who were brought, however, sometimes proved to be unfit for work. There was no suitable place to accommodate those who were fit to be sent away—a place which would have made guarding easy until they could be shipped away. The workers, however, had to

be closely guarded at all times, otherwise, they would have run away.

* * * * *

[Illegible signature]
Major General

PARTIAL TRANSLATION OF DOCUMENT NOKW-2351
PROSECUTION EXHIBIT 458

ADMINISTRATIVE ORDERS FROM 263d INFANTRY DIVISION TO
ORTSKOMMANDANTUREN, 30 MARCH 1943, CONCERNING USE OF
CIVILIANS FOR BUILDING FORTIFICATIONS

30 March 1943

263d Infantry Division
Section Ib/Z

Administrative Orders for Ortskommandanturen No. 4

1. *Utilization of the civilian population as labor*

a. *Fortification of positions*—The consolidation of the position is the first and supreme order. All other work projects even the most urgent, must give way to this.

The use of civilian workers for the construction of positions will help us save blood.

The number of civilian workers formed into labor columns for fortification work has decreased through loss of workers, due to sickness or unfitness for work, to such an extent that the General has ordered immediate replenishment. For this purpose, the Ortskommandanten, in pursuance of the ordered registration (Administrative Order No. 3, par. 1a), will submit reports on the utilization of the civilian for labor (example, see encl. No. 3). Deadline for submission of reports to Section I. Ib/Z: 5 April 1943.

The local population in the territory of Section R, in pursuance of Order 263d Infantry Division Ia No. 407/43, secret, dated 28 March 1943, will be drafted by order of the sector commander as auxiliary labor for completing the fortification of the villages as strong points.

* * * * *

In view of this multiplicity of requirements it is obvious that the amount of civilian labor available must be exhausted to the last man and utilized properly. Children under 14 years of age and other civilians not fit for full employment must be assigned to lighter kinds of work, such as keeping the villages clean, re-

removal of waste material, collecting stones from the fields—primarily those with winter crops during frost periods, or after the seeds have dried. The stones must be stacked in piles along the roadsides to be picked up.

No women under 45 years fit for work must be used as laundresses, or charwomen, or for work with field kitchens, etc.

For the care of infants whose mothers are employed in work, the heads of communities and the village elders are to be held responsible that persons unfit for work are made available for supervision (setting up of kindergartens).

A working day of 12 hours will be in force for the civilian population.

* * * * *

In future any Ortskommandanten who violate these orders will be called to account.

* * * * *

**PARTIAL TRANSLATION OF DOCUMENT NOKW-2100
PROSECUTION EXHIBIT 471**

ORDER FROM XLIII ARMY CORPS HEADQUARTERS TO SUBORDINATE UNITS, 2 JUNE 1943, CONCERNING DRAFTING OF ABLE-BODIED POPULATION FOR LABOR

[Stamp] TOP SECRET

[Handwritten] Ia

Corps Headquarters, XLIII Army Corps
Department Ia/Ic/Quartiermeister No. 237/43 (1132) Top Secret

Field Headquarters, 2 June 1943

11 copies—11th copy

Subject: The drafting of the able-bodied population and those fit for work for labor allocation

1. The great need of labor for the building of field fortifications and roads renders it necessary to draft by force male and female labor from the rural communities of the Corps Rear Area, which is a territory under partisan influence, and, as such, drops out completely as far as the food economy is concerned.

Simultaneously with this operation the cattle and horses which are not essential for the provisioning of the section of the population remaining behind, are to be taken into regions occupied by us.

2. The coercive measures shall first of all be carried out in the rural communities of Shalachovo, Denisova, Timonovo, Novava (Jurovo), and Gorka (Berezno Lake).

3. Chief of the operation—Commander of Corps Rear Area, Major Zutt. For this purpose the following units will be placed under his command—Cossack Battalion 443, 3d Co., Panzer Reconnaissance Battalion 120.

4. *Particulars for execution [of operation]*

* * * * *

It is of the greatest importance from the start of the occupation of the above-listed rural communities to spread propaganda by word of mouth to the effect that this occupation is a permanent one. The Cossack Battalion 443 is also to be instructed correspondingly. The population will then come out from its hiding place and can then be seized.

* * * * *

10. *Security regulations*

a. The drafted labor forces will attempt to evade the labor allocation with every means at their disposal, by fleeing into the woods or from the transport trains, as the case may be. For this reason strong contingents should be provided for guarding. I [Bn.]/1st Brandenburg Regiment is in readiness to support with two companies the seizure operation on X-day upon demand of the Commander of Corps Rear Area for example, by strengthening the "Erfassungskommandos" [seizure detachments].

b. All men and women are to be instructed that they will be shot at when attempting to flee. Reason—only partisan adherents flee; they undergo corresponding treatment.

c. The labor camps with the divisions must be surrounded by wire and remain under constant supervision. Marching to and from the place of work must take place in closed ranks and under German supervision. Checking by counting!

* * * * *

As Deputy
[Illegible signature]
Major General

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-2340
PROSECUTION EXHIBIT 484

ORDER FROM 3d PANZER ARMY TO SUBORDINATE UNITS, 19 JULY
1943, CONCERNING DRAFTING OF EASTERN WORKERS FOR LABOR
IN THE REICH AND LABOR DRAFT PROCLAMATION

[Stamp] SECRET

3d Panzer Army
Oberquartiermeister/Qu.2 No. 5377/43 Secret

[Handwritten] Activity Report 11
Army Headquarters, 19 July 1943

Subject: Labor Allocation Reich, Drafting of age group 1925

Reference: 1. 3d Panzer Army/Oberquartiermeister/Economy
Officer/VII/Qu.2 No. 4602/43 Secret, dated 18
June 1943;

2. 3d Panzer Army/Oberquartiermeister/Qu.2 No.
5305/43 Secret, dated 16 July 1943.

*To be kept absolutely secret up to 24 July inclusive (also the fact
of the age group 1925 being drafted)*

Pursuant to Article 1, paragraph 2, of the regulation of the
Army High Command relative to compulsory labor service and
labor allocation in the operational area of the newly Occupied
Eastern Territories, and to the pertinent directives issued by
Army Group Center, it is ordered:

* * * * *

III. *Procedure*

1. Beginning 3 August 1943, a transport train with eastern
workers will be dispatched each Tuesday and Friday from the
army area to the Reich. Entraining stations—Rudnya, Vitebsk,
and Polotsk.

* * * * *

FOR THE PANZER ARMY COMMAND

The Chief of the General Staff

Signed: HEIDKAEMPER

Certified:

[Signed] WESTERKAMP

First Lieutenant and Quartiermeister 2

For distribution (see draft)

Enclosure 2 to 3d Panzer Army

Oberquartiermeister Qu. 2 No. 5377/43 Secret, dated 19 July 1943

Proclamation concerning labor utilization in the Reich

Pursuant to Article 1, paragraph 2, of the decree relative to compulsory labor and labor allocation in the operational area of the newly Occupied Eastern Territories, it is ordered:

Article 1—All persons of the age group 1925 have to serve their compulsory labor terms in the Reich territory, with the exception of those who are employed as voluntary auxiliaries, with indigenous units or with the police.

Article 2—No exemptions for reasons of indispensability from industrial plants, offices, troop units, etc., in which persons of the age group 1925 are employed, will be granted in any case.

* * * * *

Article 5—Whoever tries to evade his service obligation will be severely punished. The same also applies to persons who harbor anyone liable to service, or in any other way help him (her) in his attempts to evade the service obligation, or strengthen him in his intent to evade his duty. Moreover, in place of a person liable for service who has not appeared, his next of kin may be drafted for labor allocation in the Reich regardless of personal circumstances.

* * * * *

[Illegible initial]

1 August 1943

The German Commander in Chief

PARTIAL TRANSLATION OF DOCUMENT NOKW-2336
PROSECUTION EXHIBIT 491

SUPPLEMENT TO ACTIVITY REPORT OF 3d PANZER ARMY, 4 AUGUST
1943, CONCERNING LABOR ALLOCATION OF EASTERN CIVILIAN
POPULATION

*SUPPLEMENT TO ACTIVITY REPORT 3d PANZER ARMY,
OBERQUARTIERMEISTER/QU.2 FROM 1 JULY 1943 TO
31 DECEMBER 1943*

4 August 1943

Labor allocation of the civilian population

General reference is made to last month's statements concerning this matter. The newly ordered drafting of the 1925 class

and, just now, also that of the 1926 class for the Reich is being started. This resulted in a partially not insignificant uneasiness among the population, according to experiences gained; however, the situation will be kept under control, thanks to intensive preparation by propaganda and organization. The first batches of eastern workers for the Reich have been assigned to the assembly camps without the use of unpleasant measures. In some areas, about 50 percent of the persons liable to the labor draft have fled, possibly joining the guerrillas. The attitude of the remaining ones in the assembly camps is not bad. Due to the good care and organization, the army anticipates favorable results from its propaganda, which will facilitate the continuation of the drafting of this age group. A deciding factor will be that the reports from the Reich concerning the treatment of the eastern workers there will also sound favorable. If the contrary should be the case, a successful continuation of this drafting cannot be expected.

[Signed] WESTERKAMP
First Lieutenant and Qu. 2

PARTIAL TRANSLATION OF DOCUMENT NOKW-2570
PROSECUTION EXHIBIT 492

EXTRACTS FROM WAR DIARY, 13 JULY-18 SEPTEMBER 1943, AND
APPENDIX TO WAR DIARY, XLIII ARMY CORPS, CONCERNING
LABOR ALLOCATION OF RUSSIAN CIVILIAN POPULATION

War Diary, No.: ***

XLIII Army Corps/Quartiermeister—Started 13 July 1943, concluded 18 September 1943.

XLIII Army Corps was subordinate to the 3d Panzer Army from 13 July 1943 to 18 September 1943.

The War Diary was kept from 13 July 1943 to 18 September 1943 by:

[Signed] LIEUTENANT STAFFNER

* * * * *

[Handwritten] 12 August 1943

*** Military Administrative Counsellor Behnisch of Economy Command Vitebsk, Labor Group, arrives for a discussion concerning the recruitment of age groups 1925-1926 for labor allocation in the Reich. Altogether the following numbers are reported as belonging to age groups:

	1925	and	1926
District Pustoshka	935		1072
83d Infantry Division	272		290
205th Infantry Division	240 (1447)		307 (1669)

A total of 3106 [sic].

The corps area is to furnish one hundred people for each transport (twice weekly) ; acceptance in Pustoshka on 14, 17, 21, 24, and 28 August. One soldier may be assigned as escort for each twenty Russians (subsequent furlough). Possible delousing in Reval. Transport if possible by army supply. Return transport of unfit will be supervised by labor office.

* * * * *

Appendix to War Diary, 10 August 1943

2. Conference of Corps Economy Leaders and Division Economy Leaders with the Army Economy Leader of 3d Panzer Army on 10 August 1943.

* * * * *

Labor allocation of the civilian population

The conscription of age groups 1925-1926 for the Reich had to take place because volunteers did not suffice. The gaps due to this will have to be filled by measures of the corps. As a matter of principle no releases will be granted (perhaps temporarily to turn over the work).

Recruitment of both age groups must proceed rapidly (2,000 weekly).

It must become a basic principle in the performance of work that not all projects are to be carried out simultaneously (order of priority).

The *furnishing* of labor forces is the affair of the command authorities. These are responsible for bringing them to the rear to the assembly camps. Those found unfit during examination will be brought back.

The Russians are to receive an impression of German order and cleanliness in the camps. The transport of workers to the Reich is not a deportation. The proclamation of the army had a good effect.

Every Tuesday and Friday a transport with about a thousand workers leaves Vitebsk for the Reich. The workers must arrive at the assembly camp two days previous to this (on 15, 18, 22, 25, and 29 August). One hundred workers are to be sent each time from the area of the XLIII Army Corps.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-3475
PROSECUTION REBUTTAL EXHIBIT 23

ORDERS FROM ARMY GROUP NORTH TO CORPS COMMAND TIEMANN, 19 SEPTEMBER 1943, AND 30 SEPTEMBER 1943, AND ENCLOSED ORDER FROM HIGH COMMAND OF THE ARMY, 12 SEPTEMBER 1943, CONCERNING PROCUREMENT OF LABOR

[Handwritten] 25/43

[Handwritten] War Diary

[Stamp] TOP SECRET

Headquarters, 19 September 1943

High Command Army Group North
The Oberquartiermeister
Quartiermeister 2 No. 1927/43 Top Secret

Reference: High Command Army/General Staff Army/Generalquartiermeister, Dept. War Administration. No. II/1434/43 Top Secret, dated 12 September 1943

Subject: Procurement of labor for the execution of Fuehrer Order No. 10

1 enclosure

To: Corps Command Tiemann

For information we enclose the "Special regulations for the procurement of labor for the execution of Fuehrer Order No. 10" (reference above).

In this connection Army Group North orders the following:

Re section I—The procurement of the labor and its allocation to the employers will be affected by Army Group North/Oberquartiermeister in cooperation with Economic Inspectorate North.

* * * * *

Re section II, 2a—The making available of prisoners of war *fit for labor* from the area of operation refers only to prisoners of war of the operations "Steiger" and "Hauer".

Re section II, 2c—The labor offices have orders to retain the male members of the age groups 1925-1926 and 1927 upon their arrival in the reception camps for transport to the Reich.

* * * * *

FOR THE HIGH COMMAND OF ARMY GROUP NORTH
The Oberquartiermeister

[Signed] BUCHER

Distribution: (Contained in draft)

Copy

19 copies of copy—11th copy of copy

Headquarters, High Command Army, 12 September 1943

40 copies—4th copy

High Command Army
General Staff Army/Generalquartiermeister
Dept. War Administration
No. II/1 434/43 Top Secret

[Stamp] TOP SECRET

*Special regulations for the procurement of labor for the execution
of Fuehrer Order No. 10*

In agreement with the Plenipotentiary General for the Allocation of Labor, the following orders are issued:

I. The procurement of labor and its allocation to the employers is to be effected by the army groups for their areas in cooperation with the delegates of the Plenipotentiary General for Labor and the competent economic offices.

II. As regards the procurement of labor, the following is ordered:

1. The following are primarily available to the army groups for allocation:

a. The population of the territory which is fit for work, especially the population of the zones enumerated in High Command Army/General Staff Army/Operations Dept. I, No. 430 585/43, Top Secret, Matter for Chiefs, dated 4 September 1943, section 4 (40 kilometers east, 20 kilometers west).

b. Persons fit for work, in the reception camps and reception regions, who are drawn from the population of the evacuated territories, and the territories still to be evacuated, to the extent that they are not suitable for labor allocation to the Reich.

c. Parts of the labor forces suitable for allocation to the Reich, if and when the forces enumerated under *a* and *b* do not suffice. (Exempted are individuals belonging to the age groups 1925–1926 and 1927, which are being conscripted now.)

2. Furthermore the following persons are to be deported for utilization in the Reich:

a. Prisoners of war from the area of operations, who are fit for work. This means that the operations "Steiger" and "Hauer" are being carried on according to orders. Also to be deported are the prisoners of war of the operation "Atlantik", who, although not fit for labor, are fit to be transported and to be conditioned for labor by sufficient nourishment.

- b. The new contingent of prisoners of war.
- c. The age groups 1925, 1926, and 1927 being conscripted now in the area of operations.
- d. Persons in the reception camps and reception regions fit for labor allocation in the Reich, who can be drawn from the population of the evacuated territories and the territories still to be evacuated, to the extent that their allocation is not required in accordance with Section 1 c, for the execution of Fuehrer Order No. 10.

The personnel of plants which are being transferred are to be transported to their new place of allocation as a group and in cooperation with the competent agency who requires them.

* * * * *

IV. The army groups will report to the General Staff Army/Generalquartiermeister.

* * * * *

2. Regularly—The prisoners of war turned over for operations "Steiger", "Hauer", and "Atlantik", as hitherto.

In view of the serious situation of the entire labor allocation question, every employer requiring labor is responsible for the extent of his requisition. The working capacity of the laborers is to be increased with all means, and to be exploited to the fullest extent. All measures must be pushed forward with the greatest urgency.

BY ORDER:
 Signed: WAGNER
 Certified true copy:
 [Illegible signature]
 Major

[Handwritten] 101/43 Top Secret

[Stamp]

Received: 1 October 1943
 Dealt with: Ia

TOP SECRET

[Handwritten] War Diary
 Dealt with: R Ia

Headquarters, 30 September 1943
 19 copies—9th copy

High Command
 Army Group North
 Ia/Oberquartiermeister/Qu. 2 No. 2203/43 Top Secret

Reference: High Command Army Group North/Oberquartiermeister/Qu. 2 No. 1927/43 Top Secret, dated 19 September 1943

Subject: Procurement of labor for the execution of Fuehrer Order No. 10

To: Corps Command, Tiemann

I. *The construction of the Panther position* requires 80,000 civilian laborers. The procurement of these labor forces is the most important and most urgent task, a task to which all other operations, including clearing and evacuation, have to yield priority. Only by the sternest action in recruiting, and the most ruthless procedure in making available dispensable laborers, can the labor requirements be met. The armies and the Commander of Army Group Area North are within their spheres responsible for the execution of the measures as ordered. All suitable military aid is to be provided for the economic agencies charged with the procurement of the civilian manpower. All of the labor procured in accordance with section II is to be kept available for the construction of the Panther line exclusively.

II. In view of the increase of the need for labor forces, the following supplementary orders are issued:

1. *The local population* living within a zone of at least 10 kilometers at either side of the line is without restriction to be available for labor allocation. Demands will be made by Higher Engineer Commander 3 to the competent employment offices direct.

2. In the *Panther zone east*, all families with 50 percent fitness for labor are to be registered and recruited. The supplying of these labor forces to Higher Engineer Commander 3 will be effected by the commander of Army Group Area North in cooperation with the competent Economic Command, Group Labor.

3. In the *remainder of the army group area* (the old Russian territory) the labor forces and families fit for labor are to be recruited on the injunctions of the economic commands to the districts and in the course of the evacuation.

4. In the *army group areas* the recruiting of families fit for labor is to be effected in the course of the evacuation. For this purpose it will be necessary to segregate the persons fit for labor already in the army reception camps and to report them to the Economic Inspectorate North, Chief Group Labor. The commander of Army Group Area North has to arrange the procedure for making these labor forces available to Higher Engineer Commander 3.

5. In the case of all headquarters and offices in the army group area and army areas it must be examined by means of the economic agencies, to what extent the allocation of female labor is necessary. In this respect the strictest standards must be applied. All labor forces which are not absolutely required, are to be released and made available for allocation to the construction of the Panther line.

6. The armies will check the use made of the labor detachments and of the Russian labor service and will report to Army Group North/Oberquartiermeister, not later than 10 October 1943, which forces of the above can be made available for the construction of field fortifications. The army group will hereby make sure that such labor forces are utilized for construction within its own army sector.

* * * * *

IV. The Higher Engineer Commander 3 is responsible for the housing of the laborers. The commander of Army Group Area North has to support him in this to the fullest extent. In the billeting space the troops and military installations must move together more closely, the population must be housed in the very narrowest space, and the population unfit for labor allocation, must be ruthlessly deported. The prohibition of troops and population being billeted together may in special cases be relaxed on the responsibility of the commanders.

FOR THE HIGH COMMAND OF ARMY GROUP NORTH

The Chief of the General Staff
Signed in Draft: KINZEL

Certified:
[Illegible signature]
Colonel, GSC

Distribution: (As per draft)

PARTIAL TRANSLATION OF DOCUMENT NOKW-684
PROSECUTION EXHIBIT 719

EXTRACTS FROM REPORT OF SECRET FIELD POLICE GROUP 703 TO
COUNTERINTELLIGENCE OFFICER, 3d PANZER ARMY, 24 NOVEMBER
1943, CONCERNING ESPIONAGE ACTIVITY AND ALLOCATION OF
CHILDREN TO WORK IN REICH

[Handwritten] Secret

[Handwritten] Commander in Chief, Ia

Command Post, 28 November 1943

Secret Field Police Group 703

Diary No. 920/43

3d Panzer Army

Ic/Security Officer—Counterintelligence III, 119/43 Secret

To 3d Panzer Army Ic Counterintelligence Officer

Enclosed is report on results in an extensive espionage affair
which was brought to an end during the last few days; please note
and inform chief of staff.

[Signed] v. DUEHREN

Field Police Commissioner and Unit Leader

[Handwritten note] 5 December—Concerning 30; information requested
which branch of Organization Todt is involved.

[Initial] W.

Command Post, 24 November 1943

Secret Field Police Group 703

Diary No. 920/43

Report

* * * * *

8. Jefim Charitonow was in collaboration with Chripatsch,
Belochwestikow, and Pauline. Through mediation of Karlowna
Chripatsch, he, with his three juvenile children, made his way
to the partisans against the children's will; he was arrested on
the way.

He was shot on 22 October; the three children were sent to
Germany to work.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-2531*
PROSECUTION EXHIBIT 527

REPORT OF FORTRESS ENGINEER STAFF 7, 6 MARCH 1944,
CONCERNING ESCAPE OF RUSSIAN WORKERS

[Handwritten] Chief Pi 1 61 Quartiermeister 2

Command Post, 6 March 1944

Fortress Engineer Staff 7 Ia

[Subject: Experience report about the escape of Russian workers

[Stamp]

Army Engineer Officer
3d Panzer Army
Received 7 March 1944

[Initial] H

[Handwritten] Taken care of

[Handwritten] U.R. [for return] Oberquartiermeister. Qu. 2 to report to me (a) What can we do; (b) Who is the guilty party.

HEIDK [Heidkaemper]

To 3d Panzer Army, Engineer Officer

[Handwritten] With enclosure to the activity report, 3 March.

The high number of Russian workers escaping from their working places or from their billets despite being guarded is mainly to be traced back to the following reasons:

1. *Manner of conscription*—Partly the workers are being seized in the streets and under the pretext that they are to work for 2-3 days, they are being brought to work without any winter clothing, shoes, mess kit, and blankets. In some cases the Russians were told that only their personnel data were to be taken down and then they could go home. Couples were being fetched and the children were left at home by themselves. The indigenous auxiliary police fetched the Russians out of their houses at night, but partially these people could buy themselves out of it by giving some alcohol to the indigenous auxiliary policemen.

This manner of conscription did not increase the Russians' willingness to work.

Men and women were assigned for work from labor camp Vitebsk, which had been unable to work for quite some time. They were told they would be taken to a hospital. Among them

* Further extracts from this document were introduced in evidence by the defense as Document Reinhardt 208, Reinhardt Defense Exhibit 17. These extracts are reproduced in full immediately hereinafter. See also the statements of defense counsel contained in the testimony of the defense witness Westerkamp, reproduced in Section VII E 3.

were people 78 years of age, blind, paralytics, people with heart diseases who collapsed at the slightest amount of work, epileptics, women pregnant in the last stages up to the ninth month, people sick with bad abscesses out of whose shoes pus ran, and some with frozen limbs.

[Handwritten note] Fortress Engineer Staff on 8 March: only 1 group of 15-20 men transferred from Vitebsk via Buyush at the beginning of February.

(VI 2.) [Illegible initial]

The high number of people newly fallen sick in the labor camps results from bad clothing.

* * * * *

When food supplies were issued last, the food supply officer announced that the potato ration of 1 kilogram would be reduced to 700 gram at the next issue of rations. The potatoes issued are very much frozen and a lot is waste. The official in charge of administration of supplies with the higher engineer leader for special employment promised sauerkraut as supplementary ration, but it was not issued up till now. Only little fat is being issued with the rations (9 grams per person per day), though supplementary meat is being issued.

* * * * *

TRANSLATION OF DOCUMENT REINHARDT 208
REINHARDT DEFENSE EXHIBIT 17

MEMORANDUM BY QUARTIERMEISTER 2 OF THE 3d PANZER ARMY,
12 MARCH 1944, CONCERNING THE REPORT OF FORTRESS
ENGINEER STAFF 7 DATED 6 MARCH 1944*

[Handwritten] Chief Pi 1
Fortress Engineer Staff 7 Ia

61 Quartiermeister 2

Command Post, 6 March 1944

Subject: Experience report about the escape of Russian workers
To 3d Panzer Army, Engineer Officer

[Stamp]
Army Engineer Officer
3d Panzer Army
Received 7 March 1944

[Initial] H
Taken care of. [Handwritten]

[Handwritten] U.R. [for return] Oberquartiermeister. Qu. 2 to report to
me (a) What can we do. (b) Who is the guilty party.

HEIDK [Heidkaemper]

* * * * *

Qu. 2

Command Post, 12 March 1944
[Handwritten] Oberquartiermeister

Notes for an oral report

1. *Measures for relief*

a. *Food for fortification construction workers*—The army economy official has immediately sent his specialist to the Senior Engineer Officer for Special Missions 8 and to Fortress Engineer Staff 7 and granted a supplementary soup of skimmed milk with wheat flour. The official in charge made a statement to the effect that so far the entire allotted ration (according to Army High Command ruling) had been distributed, including potatoes, which, however, have been partly frozen.

b. *Improved selection of workers*—Oberquartiermeister order to the corps headquarters, that in case of drives for the recruitment of labor forces, a labor allocation official has to participate right from the start. The Army Economy Leader—Group Labor

* Only the heading and introductory part of the report of the Fortress Engineer Staff 7 is reproduced in this document, since the early parts of that report are reproduced immediately above in Document NOKW-2531, Prosecution Exhibit 527.

could supply officials from his own ranks; but whether this employment could be achieved speedily enough in each case is a matter still open to doubt.

2. The criticized conditions in the recruitment of labor forces (kidnaping on the street, corruptness of the indigenous auxiliary police, etc.,) can never be entirely eliminated, especially in cases of sudden demand. It is possible that the criticized events concern the Action Kaminski in which 750 workers were once supplied. But such abuses are not entirely avoidable even within the area of the divisions. The case of the "78 year olds, the blind, and the cripples, etc.", according to a statement by the Fortress Engineer Staff 7, concerns a group of 15-20 people which happened to get mixed up with a transport at the beginning of February. Responsibility cannot be fixed any more, as nothing is known about this in Vitebsk. In general it is also acknowledged by the Fortress Engineer Staff 7, that the total result in the recruitment of labor forces is to be evaluated in an absolutely positive manner, and that the complaints are only accompanying circumstances of a comparatively minor nature. Fortress Engineer Staff 7 considers it only as exceedingly troublesome that presumably exact reports are to be submitted about every escaped civilian, etc., and points out the extraordinary difficulties in guarding them.

[Illegible initials]

TRANSLATION OF DOCUMENT REINHARDT 222
REINHARDT DEFENSE EXHIBIT 18

EXTRACT FROM ACTIVITY REPORT OF 3d PANZER ARMY,
1 JANUARY-30 JUNE 1944,
CONCERNING CONDITION OF RUSSIAN WORKERS

[Handwritten] Enclosure 4 to War Diary No. 5, 3d Panzer Army,
Oberquartiermeister

[Stamp] TOP SECRET

*Activity Report, Quartiermeister 2, for the period from
1 January-30 June 1944 with enclosures*

* * * * *

8 March 1944, continued:

In a letter to Ia/Engineers, Fortress Engineer Staff 7 complained that the workers put at their disposal were (1) infected with serious ailments, (2) insufficiently fed. Regarding this [subject], telephone conversation with Lieutenant Colonel Reusch

(Fortress Engineer Staff 7), MVR [Military Administration Councillor] Behnisch, MVR Dr. Kaercher, and Captain Gehrke (Fortress Engineer Staff 7) took place. It was ascertained that a group of approximately 20 persons is concerned, which supposedly arrived from Vitebsk via Bogushevskoye at the beginning of February, or at the end of January, representing a transport of sick people which by mistake got into the workers' train. Fortress Engineer Staff 7 has to give a detailed report for each escape, and had therefore felt that in the report on hand a corresponding general review was called for. However, it was admitted * * *.

PARTIAL TRANSLATION OF DOCUMENT NOKW-2648
PROSECUTION EXHIBIT 528

REPORT FROM 3d PANZER ARMY TO HIGH COMMAND ARMY GROUP
CENTER, 23 MARCH 1944, CONCERNING EVACUATION OF
VITEBSK AND DEPORTATION OF INHABITANTS FOR
LABOR ALLOCATION

[Handwritten] Qu. 2 No. 394/44 Secret

[Stamp] SECRET

3d Panzer Army Command Post, 23 March 1944
Oberquartiermeister/Qu. 2 No. 2585/44 Secret

Subject: Evacuation of Vitebsk

The evacuation of the town of Vitebsk was completed on 18 March 1944. The total number seized was 25,792 persons.

Of those the following were transported:

To Olita, 4,081 persons.

To Orsha and Borisov to be sent further for labor allocation to the Reich, 11,359 persons.

To Grajevo for labor allocation to the Reich, 1,638 persons, for labor allocation to Parafianov, 999 persons.

Persons unfit for labor in trucks to the Tshashniki district, 3,846 persons.

The following were housed in special sections of the town of Vitebsk for lack of other means of accommodation:

Persons unfit for labor, 3,318 persons.

Persons unfit for labor, but who have earned special consideration, 551 persons.

Apart from the last two categories of persons the following remained in Vitebsk:

Indispensable workers in local offices with their dependents, 1,300 persons.

Hospital patients, 1,200 persons.
Nonapprehended members of the civilian population (estimate),
1,500 persons.

* * * * *

FOR PANZER ARMY HEADQUARTERS

The Oberquartiermeister
As Deputy
[Illegible signature]
Major

1 enclosure

Distribution:

High Command of Army Group Center, Oberquartiermeister/
Qu. 2

For information to:

Army Economy Leader

Ia

[Handwritten] Activity Report

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-2637
PROSECUTION EXHIBIT 523

DIRECTIVES ISSUED BY 3d PANZER ARMY IN JANUARY, APRIL AND
MAY 1944, CONCERNING FORCED LABOR OF CIVILIANS

[Stamp] SECRET

3d Panzer Army Command Post, 24 April 1944

Oberquartiermeister/Qu. 2 No. 3467/44 Secret

[Handwritten] Activity report

Subject: Employment of the civilian population

Reference: 3d Panzer Army, Oberquartiermeister/Qu. 2 No. 579/
44, Secret, dated 5 January 1944

[Handwritten] Qu. 2 No. 530/44 Secret

* * * * *

It is ordered:

1. Corps headquarters and Commander of Army Rear Area 590
will ascertain by checks to be initiated at once, where the utmost
possibilities for seizing members of the civilian population capable
of working are not yet exhausted. * * *

2. The checking is to be carried out by specially assigned and energetic officers or officials with officers' rank (with an interpreter) in all communities which are garrisoned with German units or otherwise are situated in the security zone of German units. * * *

3. You are reminded of the following general directions for the checking by the officers and officials assigned in the localities:

a. All able-bodied persons and those able to work must be seized for allocation for labor, that is to say, in general all men and women aged 14 to 55.

b. Civilians who are tied to their homes (mothers with small children) are to be utilized primarily for road and highway construction in the vicinity of their home communities, or—within the permissible limit (3 percent of the actual strength of the unit)—with troop units in the village for cleaning, washing, and mending.

* * * * *

FOR THE PANZER ARMY

The Oberquartiermeister
[Typewritten] Engels

Certified:

[Signed] WESTERKAMP
1st Lieutenant and Qu. 2

Distribution:

Corps Headquarters
Commander Army Rear Area 590

For information:

Ia
Chief Army Engineer Officer
Chief Army Economy Official
Ic
Propaganda Company 697
Activity Report.

[Handwritten] Qu. 2 No. 595/44 Secret

[Stamp] SECRET

Army Headquarters, 7 May 1944

The Commander in Chief 3d Panzer Army
No. 3802/44 secret

Subject: Labor allocation of the civilian population

* * * * *

I order that until further notice the civilian population should keep to an 11-hour working day excluding the time taken up

going to and from work. The labor forces to be further economized by this means on many work-sites are likewise to be made available for employment elsewhere through channels as ordered (3d Panzer Army, Oberquartiermeister/Qu. 2 No. 579/44 Secret, dated 10 January 1944).

[Typewritten] REINHARDT
Certified:

[Signed] WESTERKAMP
First Lieutenant and Qu. 2

Distribution:
Activity Report

[Handwritten] Qu. 2 No. 57/44 Secret
Command Post, 10 January 1944

[Stamp] SECRET

3d Panzer Army
Oberquartiermeister/Qu. 2 No. 579/44 Secret

Subject: Employment of the civilian population for construction
of field fortifications

* * * * *

Neither the labor offices nor the Kommandanturen (V) can by themselves sufficiently penetrate the country in order to force their will on the population and make them work. This is only possible through the authority of the troops stationed in the various villages. In view of the present combat situation it must at last be achieved that, wherever German troops are stationed, everybody down to the last able-bodied indigenous person—men, women, and children above the age of 12—must be made to work.

* * * * *

[Typewritten] REINHARDT
Certified:

[Signed] WESTERKAMP
1st Lieutenant and Qu. 2

Distribution:

893964—51—19

PARTIAL TRANSLATION OF DOCUMENT NOKW-2406
PROSECUTION EXHIBIT 541

EXTRACT FROM SITUATION REPORT, 27 DECEMBER 1944, FROM ARMY
ECONOMY LEADER, 4th ARMY, CONCERNING REQUEST FOR
FOREIGN WORKERS FOR ARMY GROUP CENTER (CinC REINHARDT),
AND USE OF CIVILIAN LABOR FOR FIELD FORTIFICATIONS

The Army Economy Leader with Army Command 4

Diary No.: 466/44 Secret

Enclosure 1 to Army Command 4/Ia No. 10825/44 secret, of
30 December 1944

Command Post, 27 December 1944

SECRET

*Situation Report for the period from 26 November to
25 December 1944*

* * * * *

B. *Labor allocation*

a. *General—*

* * * * *

In order to fulfill the remaining requirements, the Army Econ-
omy Leader requests the release of 7,000 foreign workers from
the area of Army Group A for the armies of Army Group Center.

b. *Construction of field fortifications*—For the larger work
projects for the construction of field fortifications by the divi-
sions, the need for 2,290 workers for 12 December 1944, was
reported.

The allocation of entire families for fortification construction
near the front line met with difficulties. By arrangement, 25
families, making a total of 80 persons, were sent to VI Army
Corps. Of these, 12 families, consisting of 51 persons (including
11 children under 10), were sent back as unsuitable by the
receiving division.

* * * * *

[Illegible signature]

3. Extracts from the Testimony of Defense Witnesses Westerkamp and Heidkaemper

EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS EBERHARD WESTERKAMP*

DIRECT EXAMINATION

DR. FROHWEIN (counsel for the defendant Reinhardt) : Please state your full name to the Tribunal, Witness.

WITNESS WESTERKAMP: Eberhard Karl Ludwig Westerkamp.

Q. Please spell your last name slowly.

A. W-e-s-t-e-r-k-a-m-p.

Q. When and where were you born?

A. On 30 September 1903, in Osnabrueck.

Q. What is your professional training?

A. I am a jurist, and I have passed my first and second state examinations as a law clerk and government assessor.

Q. How long were you with the German armed forces?

A. From May 1940, until the beginning of February 1945.

Q. Thereafter what did you do?

A. Thereafter I was delegated to the government agency in Waldenburg, Silesia as vice president.

Q. What is your profession now?

A. Now I am a farmer.

Q. What was your last military rank in the army?

A. First lieutenant.

Q. During the last war did you serve in the 3d Panzer Army under General Reinhardt?

A. Yes. I did.

Q. How long did you serve in the 3d Panzer Army under General Reinhardt?

A. From the end of July 1942, until the end of July 1944.

Q. In what capacity did you serve in the 3d Panzer Army under General Reinhardt?

A. During the first week I served as ADC; thereafter until the end as Qu. 2.

Q. Can you please state in broad outline what the tasks of a Qu. 2 were and what these letters meant?

A. The Qu. 2 was a department on the staff of the Oberquartiermeister. This department had mainly to deal with those questions which referred to administration and economy in the army area. Apart from that, it had to deal with a part of the prisoner of war administration; and, it also had some individual

* Complete testimony is recorded in mimeographed transcript, 11 May 1948, pp. 3761-3811.

tasks such as questions of leave supervision, soldiers' homes and similar matters.

* * * * *

Q. I have now a few questions about the labor of indigenous personnel. I repeat, I have a few questions regarding the labor of the civilian population. That is, about those parts of the civilian population who were not band suspects. Was this population enlisted for work in your army area?

A. Yes.

Q. And for what kind of work?

A. It was firstly with the various German agencies. Many German agencies, in agreement with other agencies, took indigenous help for their kitchens, for tailoring, etc., for the rest, the civilian population was also enlisted for other types of work, such as road and bridge building, clearing of snow, narrow-gauge railroad construction, etc.

Q. Was the civilian population ever enlisted to build fortifications?

A. Yes. They were, for the same kind of fortifications which I listed previously; they were projected on a large scale to the rear, far outside the danger zone.

Q. And in what manner was the enlistment of this peaceful population effected?

A. It took place partially, as I have stated, by way of agreement, in voluntary recruitment. Also the indigenous administration, that is in Russian communities, were asked to furnish so-and-so many labor forces at such-and-such a time and such-and-such a place.

Q. Did these laborers receive a consideration?

A. Yes. They received wages, monetary wages at a certain scale, and in addition they received several privileges, for instance, additions to their food rations, bonuses in kind, such as clothing and so forth, were also issued.

Q. What was the attitude of the Russian population toward these enlistments?

A. They were willing. The population was very pleased to help, if only for the privileges which would otherwise have been inaccessible to them, but generally there was very good relationship between us.

Q. You stated before that these civilians were used for the construction of fortifications in the rear area. Do you know of cases in which these civilians were used for fortification construction in the fighting zone?

A. No. I know of no such labor.

Q. Now, subsequently were the German troops themselves used for the seizure of labor for the building of fortifications?

A. Yes. That happened later. It became necessary when the situation had become aggravated. The pressure for labor became ever greater and the labor offices were no longer able to cope with this to supply the adequate labor for us without further help.

Q. Did the 3d Panzer Army at that time issue any orders on the strength of which the population was to be compelled by force to work?

A. No, certainly not. The very opposite, in fact. Not only for that period, but for the whole period in which I was attached to the army, I do not know of one case in which the use of force was ordered. Here again we had to have a kind of directive from General Reinhardt. It was to the effect that every use of force was costing the blood of the German soldiers, by increasing band activities, etc. Force was to be used under no circumstances. Nevertheless the population, if possible, was to be used for labor in the crucial situations, they were to be fully exploited for labor in critical situations.

Q. I will now put to you NOKW-2531, Prosecution Exhibit 527.* This is the report based on an experience of the Fortress Pioneer Staff Company, dated 6 March 1944, about an escape of Russian laborers. This report mentions that sick persons, old people, etc., were also dispatched for work.

A. My memory about this incident suddenly revived very graphically when with this document, you directed my attention to it, and this incident probably was retained by my mind because at that time it created a good deal of publicity. I was immediately called up by the chief of staff and asked what this unheard of matter was which had happened. I didn't even know this matter. It had just been received by the chief of staff.

Q. Who was the chief of staff?

A. At that time the chief of staff was General Heidkaemper and, of course, measures had to be taken immediately. I believe one officer and one civil servant were sent to the spot and everything was being done, and the explanation was quite innocuous. As a matter of fact the explanation was that obviously nobody knew exactly what had happened, but obviously it was a misdirection, a misdirection of persons who were to be taken to the rear from Vitebsk. They were to be evacuated. Now, by some kind of error, they must have got into the wrong transport, wrong convoy; and they must have landed at this particular place of work, but this was an unusual individual case, and, therefore,

* Document reproduced above in section E 2.

great commotion about it, which relatively soon abated because on the spot the officer who had complained, that was the commander of the Fortress Engineer Staff, admitted in the course of conversation, "Well, things are not as bad." He wanted to vent his anger about something. I think, because he had to do so much paper work, to write so many reports, etc.

Q. Now what you say now is that revealed from the entries in your activity report?

A. I don't know because I didn't look at them, but my memory is still fairly clear, although I did not read it.

Q. Perhaps I may ask the Tribunal in this connection to turn to the two defense documents, Document Reinhardt 208, Reinhardt Defense Exhibit 17, and Document Reinhardt 222, Reinhardt Defense Exhibit 18. These passages which contain these exonerating remarks were not translated by the prosecution in their document (*NOKW-2531, Pros. Ex. 527*), and I want to submit them in the defense documents.* Now, a few questions regarding the labor of the civilian population in Germany. How was the manpower enlisted to work in Germany?

A. It was done only on a voluntary basis. That was at the beginning.

Q. And subsequently?

A. And subsequently we had an order from higher level which I think applied to the whole eastern front. At any rate it applied to the army group. No, actually it applied to the whole eastern front because it came from the High Command of the Army. It imposed a 2-years' labor duty, a term of labor for 2 years in Germany for members of age groups 1925 and 1926, that is, persons born in the years 1925 and 1926. I think initially it was only for 1925, then it was for age group 1926.

Q. What was the attitude of General Reinhardt to this draft of these age groups?

A. General Reinhardt was absolutely opposed to any measures which in any way might constitute coercion, if it was bound to have the effect that the fighting soldiers in the army area would be in a more difficult position.

Q. Did he undertake any steps?

A. Yes. He sent me, among others, to the High Command of the Army in order to present matters as they really were and to state what in his view, the situation required; that it's most disadvantageous and, in cases, it might even be disastrous for the army if they had to deal with all these requirements necessitated by the draft.

* The three exhibits mentioned are reproduced earlier in this section.

Q. Was any change effected by your conversation with the High Command of the Army?

A. No. No change took place, but, of course, my request was listened to with sympathy. There was understanding in the High Command of the Army, but I had the impression that they themselves were powerless.

Q. And now what procedure did the 3d Panzer Army set up in this draft of age groups?

A. The Panzer army could not refuse to draft these age groups, 1925 and 1926, pursuant to the central order. That is, it did not do the work itself, but there were the labor allocation agencies, to execute these functions. This had to be done and the only thing that concerned the army in this matter was the best welfare of these people from the moment when they were actually recruited. I visited many labor offices—if you are interested in my mentioning a further factor—these labor offices proceeded in the same manner as German labor offices. They were very orderly, and I myself inspected each one of these camps in which these people were housed, and perhaps I may point to an activity report. There are certain notations in there, I know for sure, in which it is stated, "Such-and-such an age group has to be detailed". Mostly they were very small.

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Q. Witness, during the examination this morning, you said in conclusion that after conscription was introduced for the age group 1925, 3d Panzer Army, on principle, maintained the voluntary system. Is that correct?

A. Yes. I said that the Panzer army did not issue any order which provided coercive measures. On the contrary, I said, that I only know orders and instructions to the effect that coercive measures were admissible under no circumstances.

Q. I should now like to put to you Document NOKW-2341, Prosecution Exhibit 444.* This is a report of the Commander, Army Rear Area 590, dated 29 November 1942. It concerns the commitment for labor of prisoners of war and the civilian population. In this report it is said that the manpower for commitment in the Reich will have to be gathered with forceful measures. Since you worked as an expert in the Oberquartiermeister department, I should like you to tell me what you know about this procedure.

A. I have no clear recollection of that particular procedure. However, I gather from my own handwriting on this document that I was in some way concerned with it. I further gather from

* Document reproduced above in section E 2.

a small notation immediately above my initials that after that report had been circulated to various departments, it was to be attached to the activity report as an enclosure. What is stated in here sounds rather gruesome. I have no doubt that this report of the Commander of the Army Rear Area is one isolated experience, which the agency of the Commander of the Army Rear Area reported when the operation started. We are dealing here with the year 1942—29 November 1942, to be exact—and there can be no doubt that pursuant to this report, the [3d Panzer] army, probably I myself as the expert, immediately took up contact with the Commander of the Army Rear Area in order to explain that in this way it was impossible to handle matters. It says here literally, "We chased, etc". That is the very opposite of what the Commander in Chief of the [3d Panzer] Army wanted and ordered. If such a report arrived, therefore, then I, who had to deal with it, received a shock because matters could be directed in quite the wrong direction, and that was most certainly to be prevented. In my opinion there must be some indication in the activity report of the connections and the further handling of this affair. It says here, "After having been circulated to the Ia Section," etc., "this report is to be attached to the activity report of the Qu. 2," and that leaves no doubt in my mind that the activity report had to receive some details clarifying the matter. However, I did not find them in the report.

DR. FROHWEIN: If Your Honor please, I have to draw the attention of the Court at this point to the fact that this particular activity report would be the proper evidence for the defense case in order to prove that as an answer to such a dreadful report the 3d Panzer Army did take positive steps and did not approve of this report. According to the notation, as the witness remembered, that is contained in the activity report which the witness himself compiled. The prosecution did submit the activity report of Qu. 2 covering that period of time, but that specific period of time to which this report refers is left out in the submitted document. I have made every effort to look through the Washington documents, so far arrived, in order to discover whether the remaining portions of the activity report might be contained there, but I did not find it among these documents. Therefore I have to assume that the prosecution has the whole of the activity report but has not made that particular portion available to the defense. I should ask—

PRESIDING JUDGE YOUNG: Dr. Frohwein, you don't have to assume that. It does not follow because you haven't found it that the prosecution does have it. You can make a request of the prosecution for it, and if they have it the Tribunal will turn it

over, but you don't need to make that kind of an assumption. It does not follow at all. Have you requested that from the prosecution?

DR. FROHWEIN: Yes. I am doing this now. I should like for the prosecution to make the whole activity report available to us, of which we have a portion only now.

PRESIDING JUDGE YOUNG: That is all you need to say about it, you would like to have that report. Does the prosecution have it?

MR. NIEDERMAN: If the Court please, we have no original documents here at all. All the original documents are in Washington. If that was requested by counsel it would have been delivered with the 50 foot lockers that have already been delivered here. The only parts of that exhibit are the ones we put in evidence, and I would like to even challenge his statement that he doesn't have the entire part of that report, and that he has the entire report.

PRESIDING JUDGE YOUNG: Well, you don't know about it, there is no need of challenging him. What we want to find, is the record here, and if the prosecution has it, of course it should be submitted. These lockers have come over here, and if you can't find it, why that is no fault of the prosecution. It is no fault of the Tribunal. You have the witness here. He can testify to what was in it.

DR. FROHWEIN: I beg your pardon, Your Honor. A portion of a book has been submitted. If the prosecution has that portion of the book, then the Washington document ought to contain the remnants of the book. You can't just have 20 pages from the middle of a book and the remainder isn't available. As all other activity reports, this activity report was complete. Whether here or in Washington, I don't know. The book has been requested, but it is not contained among the documents. Therefore, the defense will have to have the benefit of the fact that this document was not submitted. I can only present the evidence from the document, and I have no way of getting at the document. I have no way.

PRESIDING JUDGE YOUNG: What do you want the Tribunal to do to help you get it?

DR. FROHWEIN: For the prosecution to be asked or requested to obtain the whole of the book from Washington if it isn't here already.

PRESIDING JUDGE YOUNG: You have already made your request to Washington and we have granted it, and if you didn't request it why we can't help that at this late stage. You have the man that made it. You ask him about it. The Tribunal does not care for any more argument on that point.

DR. FROHWEIN: I beg your pardon, Your Honor, I did request

it. Just to clarify it, it is a part of those documents which I requested from Washington. I am not making a new motion. That book is contained on the list but it didn't get here.

PRESIDING JUDGE YOUNG: Well, you look through and see if you can find it. If you can, you can submit it. Otherwise, the Tribunal can't look through all of those documents for you.

DR. FROHWEIN: Witness, one question in conclusion. After you have had a look at that photostatic copy in front of you, are you sure of the fact, which you have mentioned previously, that the Panzer army initiated steps in order to discontinue that matter?

WITNESS WESTERKAMP: There isn't the slightest doubt in my mind that this was so. Probably I myself was sent to the Commander of the Army Rear Area in order to discuss matters with him and to clarify what was allowed and what was not allowed.

Q. Why is it that there isn't the slightest doubt in your mind that the Panzer army did not just accept the facts, but took steps?

A. That results from the whole attitude and from the very clear orders which the Commander in Chief [of 3d Panzer Army] issued about the problem of the relationship towards the civilian population, not only once, but as a permanent directive. It was the simple consideration that such measures in the final analysis will cost German soldiers' lives. We did not want to send the civilian population into the bandits' arms.

Q. Do you know whether General Reinhardt himself saw the reports, these reports of the Commander of the Army Rear Area which you now hold in your hand?

A. I am not sure of it, but I don't think that he received knowledge of it. The document not only does not contain the initial of the commander in chief but instead there is a circulation note which shows the Ia as the recipient; apparently, not even the Ia, however, received the document, because the Oberquartiermeister crossed out the notation "to be sent to the Ia" and added another notation "dealt with." At any rate, it was not sent on to the commander in chief and apparently not to the chief of staff, either.

Q. It is your opinion then, that the matter was conclusively dealt with by the Panzer army?

A. There isn't the slightest doubt in my mind that that was so, because it would be impossible, in view of the commander in chief's attitude, to suffer such incidents. I may add that I, myself, as the man who dealt with these matters was excited and indignant when I heard of these things. Apparently the whole report was written in a very excited mood and does not necessarily seem to be consistent with the facts.

Q. You said just now that the report was not submitted to

General Reinhardt. You know General Reinhardt from working with him. What, in your opinion, would he have done if he had been shown this report by you or if anybody else had told him about it?

A. Not five minutes would have passed before steps would have been taken and measures would have been ordered. Someone would have had to go off to the Commander of the Army Rear Area to clarify matters. At any rate there would have been a terrific fuss.

DR. FROHWEIN: I have no further questions to put to the witness.

PRESIDING JUDGE YOUNG: I would like to ask a few questions. General Reinhardt had jurisdiction over the area where this incident that you are speaking of occurred, did he not?

WITNESS WESTERKAMP: It was the army rear area in which this incident allegedly took place. I am not informed concerning the jurisdiction in this area.

Q. You said General Reinhardt would have done something about it. He wouldn't have done anything about it unless he had had some jurisdiction, would he?

A. That has nothing to do directly with jurisdiction as far as I know. The army rear area in any event was part of the army area and was under the command of General Reinhardt. From that fact, his intervention would have been quite authorized.

Q. You were around in the area of General Reinhardt's command there, were you not, at different places?

A. Yes, I was on the staff of the Oberquartiermeister.

Q. Did you ever see anybody rounding up labor forcibly?

A. No. I personally never observed any such thing.

Q. Had you ever seen any that had been rounded up forcibly?

A. That depends what you understand by "forcibly". On the basis of the duty to work, yes, but if you regard force as using forcible means I would have to say no.

Q. What do you mean by forcible means?

A. Well, that would mean a forcible driving together of the population by the field police or other troops; driving them from the houses or picking them up in the streets and committing them for labor. Your Honors, may I comment on this? It actually took place in this way. Where the population didn't report voluntarily and didn't like to do that type of work, certain instructions were issued and then, generally speaking, the population obeyed.

Q. Suppose they didn't obey, what happened then?

A. Well, I didn't observe or experience anything where they didn't obey.

JUDGE HARDING: Were there orders from higher headquarters to conscript the age groups 1925 and 1926?

A. Yes. As I stated before, there was. That was the generally announced labor draft, the age groups 1926 and 1925, to work in the Reich all along the eastern front.

Q. Didn't they come from the 3d Panzer Army, those orders?

A. Yes.

Q. Do you contend that those orders to conscript those classes were not carried out?

A. No, I don't contest that.

Q. They were carried out; they were conscripted and transported into the Reich?

A. Yes. The agencies of the labor administration had received from their superior agencies the express order and many detailed instructions to the effect that they were to arrange for the recruitment and transport of these people. For this purpose certain camps were erected, and labor exchanges, etc. That took place before my eyes, I would say.

Q. And that was done regardless of whether these people wanted to go to the Reich or not?

A. I beg your pardon?

Q. They were taken to the Reich regardless of whether or not they wanted to go?

A. It was their duty and this draft had been announced for these age groups and it was not dependent upon their own free will whether they went.

JUDGE HARDING: That's all.

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EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS
OTTO HEIDKAEMPER*

DIRECT EXAMINATION

DR. FROHWEIN (counsel for the defendant Reinhardt) : Witness, please state your full name to the Tribunal.

WITNESS HEIDKAEMPER: Otto Heidkaemper.

Q. Will you please spell your last name?

A. H-e-i-d-k-a-e-m-p-e-r.

Q. When and where were you born?

A. On 13 March 1901, in Lauenhagen.

Q. Can you pronounce the place of birth a little clearer?

A. Lauenhagen.

* Complete testimony is recorded in mimeographed transcript, 11-12 May 1948, pp. 3812-3878.

Q. Where do you live now?

A. Bueckeberg.

Q. What was your last military rank in the German armed forces?

A. At the end I was a major general.

Q. What military position did you have in the Eastern Campaign in Russia?

A. At the beginning of the Eastern Campaign I was 1st General Staff Officer of the 4th Panzer Division; in May 1942, I became chief of staff of the 24th Panzer Corps; in May 1943, I became chief of staff of the 3d Panzer Army; and on 1 September 1944, I became chief of staff of Army Group Center.

Q. What were your functions as chief of staff of the Panzer army?

A. I was the first adviser of my commander in chief, and I was responsible to him for the whole work carried out in the staff.

Q. What documents could you yourself sign in your capacity as chief of staff?

A. I was only authorized to sign those documents which did not contain any basic decisions; and, such documents as needed a quick decision in view of the situation at the front.

Q. In what event could you make those last mentioned decisions?

A. Only if I could not reach the commander in chief who was usually en route some place during the day.

Q. If you signed such orders, when did you inform General Reinhardt of such a decision which you had made?

A. When it was possible I informed the commander in chief while he was absent by telephone or by radio; otherwise, later in the evening after he returned to the headquarters.

Q. How often was General Reinhardt away from the headquarters?

A. During the week he was away almost every day of the week. You can count the days when he was present there at the headquarters.

Q. What was General Reinhardt's purpose in making these daily trips to the front?

A. The General wanted to maintain contact with the fighting troops by personal observation of the conditions at the front; by personally observing the conditions at the front he wanted to gain his information and through his frequent visits with the troops he wanted to exert immediate, direct influence on the leaders and the soldiers.

Q. In what manner could he exert influence on the spot?

A. He frequently issued orders on the spot which had local validity.

Q. Why did he give such oral orders on the spot, and why didn't he issue them in writing?

A. The commander in chief usually visited one or two divisions and, therefore, only orders pertaining to the restricted area were given orally whereas written orders were only issued when matters of the whole Panzer army were concerned.

Q. You in your position as chief of staff, were you informed of what the commander in chief, General Reinhardt, ordered during his trips to the front and what he discussed in his trips to the front?

A. Yes. The commander in chief informed me of important matters; he did that in the evening when I reported to him; then, he had his notes of everything that happened during the day during his visits to the troops and I learned of it later in the evening through written reports of the officers who in each case escorted the General.

Q. That is how you were informed of what General Reinhardt did. Now, in what manner was General Reinhardt informed of what you did and of the events which took place during his absence; reports, orders, documents, which came in, etc.?

A. Generally, the General arrived, returned from the front at six o'clock in the evening. Then he looked at the incoming mail and subsequently I appeared to report to him orally.

Q. Were all the incoming communications shown to him?

A. No. By far not that; that would have been impossible.

Q. What type of communications were as a rule submitted to him?

A. The General was only shown the most important documents which I had particularly marked to be shown to him.

Q. Can you even today recognize on certain documents whether such a document was submitted to General Reinhardt or not?

A. Yes. The General signed all documents which had been shown to him with the first and last letters of his name.

Q. You as chief of staff, did you yourself see all the documents which were submitted to General Reinhardt for signature?

A. Nobody was allowed to submit a document to the General for signature which had not previously been shown to me and which I had not initialed. That was the identification for the General that the document in question had been dealt with according to his directives; that it was correct as far as the contents went; and, that all the necessary departments had participated in the work on the document.

Q. I would like to discuss with you who reported orally to

General Reinhardt? How often did you yourself orally report to General Reinhardt?

A. I saw him daily in the evening after his return from the front trips; in some special situations I saw him early in the morning before he left.

Q. Did other officers also come to General Reinhardt to report orally; I mean officers of the staff of the Panzer Army?

A. Generally the IIa, the adjutant reported to the General daily; once or twice during the week the Oberquartiermeister and once or twice weekly the army judge. The remaining officers of the staff whenever they had the time or the General had time and whenever it was necessary. The First General Staff Officer did not report independently; he was only present during the reports, if a tactical, important tactical situation or tactical order of importance was being discussed. Furthermore, the Ic reported daily.

Q. During these daily oral reports or on any other occasions were all Ic reports shown to General Reinhardt?

A. You have to distinguish between the so-called Ic reports which was a fixed term; that was the report which the Ic compiled from the enemy information which he received daily; and, between the other Ic reports, particularly the Ic reports which arrived from the troops. These numerous reports I would estimate that there were daily 150 to 200 of them. To show these to the General would have been impossible.

Q. What did the Ic report orally to the General every day?

A. He reported daily about the enemy situation, about troop movements upon the front, and about the tapping of enemy radio service. These reports formed the basis for further decisions, for the tactical orders for our main task, namely, to conduct the war.

Q. Did the Ic also report other matters in his sphere of work?

A. There was no time to do that daily, because the discussion of the enemy situation took up a lot of time, but once or twice during the week, the Ic reported about other factors in his sphere of work, the band situation, for instance, special reports of the counterintelligence troops, reports of the Secret Field Police, etc.

Q. Were you as chief of staff informed of what was said during these reports of the other officers to General Reinhardt?

A. Yes. Before these officers went to report orally to the General, they came to see me and I established what was to be reported to the General. If the General touched upon certain questions on his own initiative during these reports, then the officers, according to their orders, immediately after the oral

report, had to tell me about it, at the latest before their next report on the next day.

Q. Were there also officers who could go immediately to the General and not report to you prior to their reporting to the General?

A. That was only the judge advocate. I had nothing to do with him in my capacity as chief of staff.

Q. Apart from matters of jurisdiction, you were informed about everything that was reported to the General while you were not present?

A. Yes.

* * * * *

Q. I will now turn to the topic, the Wehrmacht and its relations with the SD. Did you personally have any contact with the SD while you worked with the 3d Panzer Army?

A. I personally had nothing to do with the SD as chief of staff. I recall that only once during my work as chief of staff an SS man called on me, and I surmise today he was a member of the SD. I assumed that this man, as it was shortly after my arrival at the army headquarters, that this person at that time presented himself to me, he wanted to introduce himself as being the chief of the SD detachment, but I cannot bind myself to the assertion that it was actually an SD man. At any rate it was not a basic conference. It was merely a sort of call, a courtesy call of this person in order to introduce himself to me.

Q. Do you know whether General Reinhardt had any personal contact with members of the SD at any time?

A. In my view the General had no personal contact with the SD. The only case which I recall was that stated in the summer of 1943. The Ic officer called upon me and told me that one or two SD people had called on him who wanted to report to the commander in chief, and the commander in chief told his ADC that he was reluctant, he didn't want to receive them. The Ic also was of the opinion that you could not tell these people to go away because they may come again, and he asked me to intervene and see that the commander in chief actually received those people. I myself called on the commander in chief and reported to him, and then the commander in chief very angrily told me that he wanted to have nothing to do with those people. Now whether subsequent to that a reception took place I do no longer know, but I do not believe so because I certainly would have attended. I don't think that the General would have received SD people without having me present as a witness.

Q. Was there a relationship of subordination of the SD to the Wehrmacht?

A. No. The SD was not subordinate to us. I would have to know about this from some kind of order during my time as chief of staff.

Q. You previously mentioned that you did not know, Witness, that the SD, for instance, transferred band suspects to concentration camps for penal servitude?

A. No. I did not know about it. I stated before that I saw these orders for the first time during my interrogation in November, when the prosecution put it before me.

Q. Did the Ic officer—wasn't he bound to have reported to you about these transfers?

A. I can only answer today, now, what I have said about different communications that the Ic officer had no reason because these transfers, these shipments did not concern us. They were a pure SD matter and the SD of course, did not report to us about them.

Q. Did the OQu., that is the Oberquartiermeister, who, in his activity reports on several occasions mentioned these shipments, would not he have been bound to give you an oral report about them?

A. There was no special reason for that because the shipments, the priority of these shipments, was dealt with by the section of Oberquartiermeister quite independently. I had no interest in them, into what shipments were classified by the Oberquartiermeister as having top priority or having deserved less priority.

Q. What could General Reinhardt himself know about this connection between the SD and the Oberquartiermeister with respect to this question of shipments?

A. The General could not know anything about it, because if the Oberquartiermeister did not even inform me about it, then he certainly would not have informed the General himself.

Q. Did you know at the time that the SD killed civilian persons who had been turned over to them?

A. I did not know of it at the time. For the first time I heard about these killings after the end of the war.

Q. Did you know that in Auschwitz and in Lublin the SD in particular killed band suspects who allegedly came from the area of the 3d Panzer Army?

A. During the war I had no idea of the existence of the camps of Auschwitz and Lublin. It was for the first time, I think in the summer of 1945, I heard from an American officer while I happened to be in a prisoner of war camp.

Q. This brings me to the end of this topic of the relations between the Wehrmacht and SD, and I have a few specific ques-

tions about the labor question. I refer to Document NOKW-2340, Prosecution Exhibit 484.* This deals with the drafting of age group 1925, for labor in the Reich. This order was signed by you personally on 19 July 1943. Why did you sign this order and not General Reinhardt?

A. In June and July 1943, the General was on leave for 4 weeks. The deputy commander in chief was with his corps because we were engaged on the front as I mentioned in the beginning in static warfare, and this order in its essentials was only an implementation order to an order of the High Command of the Army so I thought that I was authorized to sign this order myself.

Q. Did you report anything to General Reinhardt about this order upon General Reinhardt's return from his leave?

A. Yes. A few days after his return from his leave, on the occasion of a conference attended by the Oberquartiermeister, as far as I remember, and an expert of the staff in the Qu. 2 section, I reported to him about this order.

Q. And did General Reinhardt agree to this order which you had signed?

A. No. At the time he was very angry, not only about my order but also about the substance of the High Command of the Army or OKW order—I don't know which it was—because for the first time the principle of recruiting labor forces for Germany on a voluntary basis had been broken.

Q. Did the Panzer army have any interest in maintaining the principle of voluntary recruitment?

A. Yes. We had the greatest interest in that principle, because any coercion which we exerted on the population was bound to result in the population running over to the bands; and we had very great interest in it, especially since the 3d Panzer Army had the biggest bandit area in the whole Army Group Center, and we did not want even more civilians to run over and help the bands.

Q. Now, what was General Reinhardt's decision when you brought this, your order, to his attention?

A. The General amended this order in a certain manner. I recall that during this conference, which I previously mentioned, he once again clearly explained his point of view to us and issued a prohibition against any force or any terror being used. He prohibited the use of force or terror. He further ordered that the quotas of people that had to be shipped to Germany once a week, first of all had to be made up of persons from the age group of

* Document reproduced above in section E 2.

those born in 1925, who voluntarily reported for working in Germany. He further ordered that the Oberquartiermeister should do everything in order to calm down the population, and the people should be told that if the quotas imposed on us cannot be filled by volunteers from the age groups of those born in 1925, only people drafted from age group 1925 were to be sent. He wanted to see to it that the population knew that as far as they did not fall under this 1925 age group they need have no anxiety about their being recruited for transfer to Germany. I recall that on the strength of this conference a report was made to the army group in which this principle of the General and his modified orders were expounded.

* * * * *

Q. Now in spite of this, was your order dated 19 July 1943, still executed in spite of this about the drafting of age group 1925?

A. The drafting of this age group had been ordered by the High Command of the Army, we could not circumvent it. The recruitment was the task of the labor offices. I know that first of all volunteer workers were shipped, and I think that, in fact, only one train left for Germany; because when the drafting of the age group had been finished, a counterorder arrived that the age group was no longer to be sent to Germany but that they were to be used for harvesting in the army area.

Q. After this period were members of other age groups forcibly sent to Germany for labor in Germany?

A. No. I previously stated that the General, on principle, held the view that manpower was only to be supplied on a voluntary basis, which actually happened. There is only one small exception to be mentioned. I believe it was in March or April or even May 1944, when we were forced to do this, because owing to the position at the front in the area of Vitebsk, we had to evacuate the population and were confronted by the question—either we had to leave them at the fringe of the band areas where they would have immediately gone over to the bands, or else we had to ship them to the rear. It was ordered that they were to be sent to a camp in the rear of the army. Another agency then decided who among the population were to remain in the camps and who were to be sent to Germany. That was no longer our concern.

Q. Did you yourself hear about any incident in which, nevertheless, force was used in order to reach this manpower demand?

A. I can only think of one case, that is the case which I heard from the General himself when he returned from a front line

visit. He called me and told me most indignantly that he had found out at an Ortskommandantur that people had been recruited and had forcibly been made ready for shipment to Germany. He himself said that he had intervened immediately on the spot, and he ordered me immediately to tell the Oberquartiermeister that once again all agencies involved were to be supplied with the order of the commander in chief, that on principle, volunteers only were to be sent to Germany.

Q. This brings me to the end of this topic of labor in Germany. I now have a few questions about the ill-treatment of the population. There are two short documents, about which the witness personally can testify. They are NOKW-2531, Prosecution Exhibit 527, and I would ask the Court to read this in conjunction with Document Reinhardt 208, Reinhardt Defense Exhibit 17.* Do you know this report, Witness?

A. I recall this report very exactly, because I know that when I read it for the first time I was most indignant about it; this is also revealed by my personal entry at the head of this communication which reads "U.R. [Unter Rueckerbittung (for return)] Oberquartiermeister, Qu. 2 to report to me about (a) what we can do, (b) who is the guilty party." It is unusual for me that, firstly, I ordered the expert concerned to report to me personally, a thing which never happened; and, secondly, that I put "U.R." on this communication which meant that I myself wanted this communication returned to me in order not to let the whole affair escape my attention.

Q. And what was actually reported to you about this incident?

A. The Qu. 2, the Quartiermeister 2, I think on the same day or the next, called me on the telephone and told me that he had initiated the first investigation and that the case had turned out much more harmless than was actually to be gleaned from the report of the Fortress Engineer Staff.

Q. And how was it more innocuous?

A. The Quartiermeister 2 had found out—I believe it is contained in the document—that 15 to 20 sick persons had been shipped for welfare reasons from Vitebsk which was threatened by the enemy. They had been shipped with a train in which the able-bodied population was also being evacuated. Upon the unloading of this train, the sick people had unfortunately been mixed up with the people fit for work and were conducted to their place of work along with the able-bodied personnel. At the time I ordered or rather explained to the Quartiermeister that this case was not settled for me yet. I wanted the matter to be

* Ibid.

investigated and further reports submitted to me. A few days afterwards, probably the Qu. 2, again, I don't know who it was, reported to me again. This report is noted in the documents under "Notes for an oral report". We intervened by issuing an additional ration to the working population, because in this report the food was objected to; then the corps' headquarters received an order that in the future, when manpower was being mobilized, more attention and greater care was taken so that such incidents as this one did not recur. I further recall that the army engineer officer, who himself had also initiated an investigation, reported to me that the commanding officer of this Fortress Engineer Staff who had made this report had admitted that it was an isolated incident, and he had even conceded that he had wanted to express it in that stringent manner because he had been very angry about the fact that the army called constantly for reports about the condition of the working civilian population.

Q. I also want to refer to Document Reinhardt 222, Reinhardt Defense Exhibit 18.* The last case concerns Document NOKW-2352, Prosecution Exhibit 485. This is a correspondence between the Panzer Army and the Higher SS and Police Leader stationed in Riga. The prosecution appears to gather from this document that the 3d Panzer Army shipped all able-bodied men and women for labor to Germany. The prosecution has merely translated the first sentence in the communication of the Higher SS and Police Leader. I would ask the Court to read in conjunction with this Reinhardt Document 210, Reinhardt Defense Exhibit 8—perhaps you can briefly describe this incident and its essentials, Witness.

A. The incident which was the basis for this correspondence was as follows: The Higher SS and Police Leader Jeckeln was in charge of an antipartisan operation which also overlapped into our army area. It had been agreed that the band suspects, seized in the course of this operation were to be turned over to the 3d Panzer Army after the conclusion of the operation. This agreement had not been adhered to by the police leader, but he had the whole population shipped away, not only the band suspects but also the persons who had been completely exonerated. Members of the population then turned to the 3d Panzer Army in order to find out where their relations and next of kin had been sent. For that reason the Panzer Army had written to the Higher SS and Police Leader; then we received this insolent reply, dated 31 July, in which it is stated among other matters, in the second paragraph: "For the rest these persons come from band

* Ibid.

infested areas in which no German soldier can move without danger to limb and life. For that reason your inquiries are unintelligible, and we ask you to desist from submitting such applications because we cannot deal with them." At that time I submitted this communication to the commander in chief and he refused personally to sign the reply and ordered me to do it because he was so angry, and, in addition only an SS first lieutenant had signed the letter. I myself replied and said among other things that the inquiries of the Panzer Army would become more comprehensible if the sober facts were known and could be fully appreciated, the facts which determine the position in our local areas and the necessity arising therefrom of a sensible and consistent policy towards the civilian population. This policy was, that although lawlessness and resistance were counteracted with ruthless severity, justice and welfare were to be striven for. On the next page of the reply I stated that the Panzer Army would not take responsibility if disturbances were fermented from outside. The fact alone that the persons came from band infested areas was no reason why their fate should be brushed aside and their condition ignored. At that time I submitted my reply to the General, or rather, I talked to him before I sent it off, and we expressly put the army point of view on paper, that is, the point of view which we followed in our policy towards the population coming from the band infested areas.

Q. This brings me to the end of my questions, General. On 3 May 1943, you became chief of staff of the 3d Panzer Army. When did you leave the service?

A. On 26 January 1945, together with my commander in chief, I was dismissed and sent home. The personnel office gave me no new assignment.

Q. Now, in view of your long collaboration with General Reinhardt, my last question is, will you please tell me something about the character of General Reinhardt; will you give me a brief and concise appraisal of his character?

A. I may perhaps make the preliminary remark that it is repugnant to me to talk about my commander in chief in his presence, but I believe that I have to do so before this Tribunal, because in the last 2 years of the war I knew the commander in chief, as nobody else did. When in May 1943, I became chief of the staff, it was known to me that the General had the reputation in the army of combining in a very rare manner, the best soldierly traditions with the highest principles of humanity. The war, with its many crises and dangers, had torn all the masks from our faces. I think that everybody got to know the other fellow as he really was. And I think I also learned to know the General

as he really was. We all knew that the General used all his force; that he derived all his energy from his deep, profound belief in God. His justice and sense of responsibility were based on this deeply religious attitude, and this sense of responsibility before the Highest Being is the essence and decisive factor for all his actions. The General was an example to us all in his irreproachable conduct, in the chivalrous attitude which he displayed towards the enemy, and also in his modesty which very often put us to shame. He was devoid of any feeling of vindictiveness towards the enemy, and that is the reason why he was entitled again and again to admonish his soldiers to wage this struggle, and particularly the struggle against the partisans, as decent soldiers. We at headquarters, from the chief of staff down to the youngest enlisted man, all revered the commander in chief as a father, and I know that the front-line soldier who knew his commander in chief through his daily visits to the front lines—to the most advanced trenches, loved him on account of his uprightness and kindness in a manner such as I had never before witnessed throughout my 27 years in the service. I can well say that the Tribunal might ask any officer or even any single soldier who ever served under the General, to come to the witness stand and on oath, he could not say anything else than what I have said about the commander in chief. In conclusion, I may perhaps say that throughout the army there was only one opinion voiced about the General, because he was one of our very best.

DR. FROHWEIN: I have no further questions.

* * * * *

F. Plunder of Public and Private Property, Destruction and Devastation Not Justified by Military Necessity

I. INTRODUCTION

In paragraph 68 of the indictment all the defendants were charged with the conduct alleged to be criminal in connection with "unjustified devastation, wanton destruction, and plunder of public and private property in German occupied territory pursuant to a deliberate design and policy of the German armed forces". The defense claimed that, when devastation occurred, it was dictated by military necessity and therefore no criminal character could be attributed to the conduct of the defendants.

In the materials appearing below, a number of contemporaneous documents (section 2) are followed by defense evidence (section

3) containing extracts from two allied publications and from the testimony of the defendant Woehler.

Considerable argumentation on questions of the rights and duties of military occupation, military necessity and related matters appears below in section IX, Final Argumentation.

2. CONTEMPORANEOUS DOCUMENTS

PARTIAL TRANSLATION OF DOCUMENT NOKW-3438 PROSECUTION EXHIBIT 1599

EXTRACT FROM WAR DIARY OF 4th ARMY, 1 JANUARY—31 MARCH
1943, CONCERNING DEVASTATION ORDERS

War Diary No. 15

4th Army Headquarters

Started: 1 January 1943

Concluded: 31 March 1943

4th Army was subordinate from 1 January 1943 till 31 March
1943 to Army Group Center (already since September 1940)

The War Diary was kept from 1 January 1943 till 31 March 1943
by Lieutenant Colonel von Mienskowski

13 February 1943

* * * * *

Operation "Buffalo"

* * * * *

Army group has given the order to destroy the terrain in front of the "Buffalo" line effectively. Directly in front of the position a devastated zone is to be created. The highway and the autobahn are to be destroyed. The 9th Army is responsible for seeing that the autobahn is destroyed. The 4th Army will provide an engineer battalion for this. The town of Vyazma is to be destroyed by the 4th Army. Thereupon, at 1815 hours the commander in chief asked the general of the engineers of the army group to assign the destruction of Vyazma also to the 9th Army, since the latter will receive an army engineer battalion. With regard to this, General Woehler decided at 2125 hours that the 4th Army is to reach an agreement with the 9th Army as to who is to destroy Vyazma.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-1295
PROSECUTION EXHIBIT 565

EXTRACT OF ORDER OF 11th ARMY COMMAND, 3 JANUARY 1942,
SIGNED BY DEFENDANT WOEHLE, CONCERNING OPERATIONAL
STRATEGY IN THE EAST

TOP SECRET

Army Headquarters, 3 January 1942

11 copies—11th copy

11th Army Command

Department Ia No. 20/42 Top Secret.

[Stamp] TOP SECRET

[Handwritten] War Diary

Subject: Situation and operational strategy in the East

The Fuehrer has ordered—

1. The Soviet Russian leadership at this time is concentrating all its forces in order to make the German front lines fall back and thus annihilate them under the effects of the icy Russian winter.

* * * * *

But if every town and village is held to the last man, and there [in cases] where I order a withdrawal, each town and village is burned down and the hearths and chimneys are demolished, then the enemy who has broken through between the localities, will also surely be annihilated. For even the Russian, cannot live in winter without the protection of buildings or of constructed positions.

* * * * *

Distribution:

Corps Headquarters LIV Army Corps, 1st copy
Corps Headquarters XXX Army Corps, 2d copy
Corps Headquarters XLII Army Corps, 3d copy
Staff Officer, Artillery, 4th copy
Chief Engineer Officer, 5th copy
Chief Signal Officer, 6th copy
Commander of Land Passages, 7th copy
Oberquartiermeister, 8th copy
Staff Military Control Officer, 9th copy
Circulation Ic/IIa (draft), 10th copy
War Diary, 11th copy

11 copies

FOR THE ARMY COMMAND

Chief of the General Staff

[Signed] WOEHLE

PARTIAL TRANSLATION OF DOCUMENT NOKW-631
PROSECUTION EXHIBIT 568

REPORT FROM EINSATZGRUPPE D, TO 11th ARMY, 12 FEBRUARY 1942,
SIGNED BY OHLENDORF,* CONCERNING SEIZURE
OF WATCHES AND RUBLES

[Handwritten] W [Woehler]

The Commissioner of the Chief of the Security Police and the
Security Service assigned to the Commander of Rear Area
Army Group South
Einsatzgruppe D

Command Post, 12 February 1942

Journal No. 381/42

To 11th Army Command

Subject: Confiscations by Einsatzgruppe D

Reference: Telephone conversation between Brigadier General
Woehler and SS Captain Seynstahl on 12 February
1942

I. Confiscated watches

The watches confiscated in the course of the anti-Jewish actions were duly entered as received. The watches which represent valuables (gold and silver watches) were sent to the treasury in Berlin, as directed. The rest of the watches, whose value is so trifling that their general conversion does not appear appropriate, were handed over to members of the armed forces (officers and rank and file) and to members of Einsatzgruppe D, for a nominal price or gratuitously, dependent on the individual case.

* * * * *

II. Confiscated rubles

The money seized in the course of the anti-Jewish actions was duly entered as received, and transmitted as directed to the Reich Credit Bank to be credited to the Reich, except for a small amount which is required for official purposes (wages, etc.).

* * * * *

[Signed] Ohlendorf
SS Oberfuehrer [Senior Colonel]

* Defendant in the case of United States vs. Ohlendorf, et al., Case No. 9, Vol. IV, this series.

PARTIAL TRANSLATION OF DOCUMENT NOKW-3238
PROSECUTION EXHIBIT 1606

REPORT FROM EINSATZGRUPPE D, TO 11th ARMY, 12 FEBRUARY 1942,
SIGNED BY OHLENDORF, CONCERNING SEIZED WATCHES

Command Post, 12 February 1942
[Handwritten] W [Woehler]

The Commissioner of the Chief of the Security Police and Security
Service assigned to the Commander of the Rear Area of Army
Group South
Einsatzgruppe D

To 11th Army Command

Subject: Watches

I was informed by telephone by the town commander of
Simferopol that the commander in chief requests the watches still
on hand from the anti-Jewish action for the army for official use.

I am herewith turning over 120 watches to the army which in
the meantime have been made serviceable by repair. Fifty watches
are still at the repair works, some of which can be repaired.

Please let me know if the army still needs the rest of the
watches.

[Handwritten in margin] Yes

[Signed] OHLENDORF
SS Oberfuehrer [Senior colonel]

[Stamp]
Army Command 11, Ic/Counter
Intelligence Officer
16 February 1942

[Handwritten] Counterintelligence officer dealt with.

To the files.

R 14/2

PARTIAL TRANSLATION OF DOCUMENT NOKW-1300
PROSECUTION EXHIBIT 564

EXTRACT OF TELETYPE FROM ARMY GROUP SOUTH TO 11th ARMY,
22 DECEMBER 1941, CONCERNING DISSEMINATION
OF FUEHRER ORDERS

Teletype Office 11th Army Command-----Signal Officer

H C G X 5236

Teletype Code Address Current Number

Date: 22.12.41 Sent -----

Time: 1405 [Stamp]

By: H B 1 X Army Command 11 Section Ia

Through: [Signed] SCHMID 22 December 1941

No. 4641/41 Top Secret

[Stamp]

Ia

Id

* * * * *

The following deliberations of the Fuehrer are to be disseminated in a suitable form among all commanding officers of the fighting troops and of the supply troops.

* * * * *

3. Any terrain which the enemy compels us to leave to him must be made useless to him to the greatest extent. Every town and village must be burned down without consideration for the inhabitants in order to deprive the enemy of the possibility of shelter. That must be prepared. Should the destruction not be possible, undestroyed towns and villages must be destroyed subsequently by the air force, because the enemy, exactly like our own troops, is dependent on the towns and villages during the cold. For him, being the aggressor, the difficulties will be greater than for our own troops if they are in a fairly well constructed position.

* * * * *

Army Group South Ia
No. 2298/41 Top Secret

PARTIAL TRANSLATION OF DOCUMENT NOKW-1727
PROSECUTION EXHIBIT 896

EXTRACT FROM ACTIVITY REPORT FROM ORTSKOMMANDANTUR
YEVPATORIYA TO COMMANDER OF ARMY REAR AREA 553,
21 DECEMBER 1941, CONCERNING THE COLLECTION AND STORAGE
OF PROPERTY OF "RESETTLED" JEWS

Yevpatoriya, 21 December 1941

Ortskommandantur I (V) 277

Office 45.876

Diary No. 365/41

Subject: Activity report for the period 11 December—20 Decem-
ber 1941

To: Commander of Rear Area 553,
Department Quartiermeister

[Handwritten] Department V has copy Sector III received.

[Initial] B

I. Military affairs

* * * * *

The placing in safety of furnishings which are being collected
in warehouses is under way. The apartments of Jews *resettled**
by the Security Service were taken over by the Ortskommandan-
tur; furnishings, clothing, and crockery were collected and put in
order. The collecting of captured enemy material and junk is
under way. Due to the fact that none of the vehicles of the
Ortskommandantur are functioning, this work is very difficult.

* * * * *

[Handwritten] 22 December. 1 copy sent to Army Command 11, Oberquar-
tiermeister/Qu. 2.

To the files. "O" [Initial] B 22 December

* * * * *

* The original typewritten word "exekutierten" (executed) was crossed out and substituted
with "umgesiedelten" (resettled) in handwriting.

PARTIAL TRANSLATION OF DOCUMENT NOKW-1881
PROSECUTION EXHIBIT 913

EXTRACT FROM ACTIVITY REPORT OF ORTSKOMMANDANTUR
BAKHCHISARAI TO ARMY REAR AREA 553, 31 MARCH 1942,
CONCERNING BURNING DOWN OF VILLAGE

[Handwritten] Commander

Bakhchisarai, 31 March 1942

[Stamp]

Oberfeldkommandantur 553

Received: 1 April 1942

Department: Quartiermeister, 5651

Ortskommandantur II/576 (V)

APO No. 26890

To: The Commander of Army Rear Area 553,
Department Quartiermeister

Reference: Commander Army Rear Area 553/Quartiermeister/
Diary No. 7441, dated 13 December 1941
Activity Report for 16—31 March 1942

* * * * *

2. Political matters—While Bakhchisarai can be called pacified, the partisans in the neighborhood continue their evil doings as before. Thus, it was found that they spent every night in Laki, and that the mayor there had organized food rationing and had set up a regular trade with the partisans. So much food was stored there that the partisan group could have been provisioned until the next harvest. In the course of an operation started by the Security Service, with the support of the militia, on 23 and 24 March, 15 persons were arrested and shot. The entire place was burned down after the population had been evacuated. * * *

[Handwritten] 1 copy to Oberquartiermeister/Qu. 2, on

1/April. [Initial] B

* * * * *

[Illegible signature]

Captain and Ortskommandant.

PARTIAL TRANSLATION OF DOCUMENT NOKW-3442
PROSECUTION EXHIBIT 1600

ORDER FROM ARMY GROUP CENTER, 11 FEBRUARY 1943,
SIGNED BY WOHLER, CONCERNING DESTRUCTIONS IN THE
AREA IN FRONT OF THE BUFFALO LINE*

[Stamp] TOP SECRET

Army Group Headquarters, 11 February 1943

11 copies—1st copy

[Stamp]

Army Command 4

Received: 13 February 1943

No. 014/43

Headquarters Army Group Center
Ia/General of the Engineers
No. 5/43 Top Secret, Matter for Chiefs

[Handwritten] sent ahead by teletype.

Subject: Destructions in front of the Buffalo line

[Stamp]

Matter for Chiefs

By Officers Only!

To:

Distribution:

1. The terrain in front of the "Buffalo" line is to be destroyed effectively by the armies with all available means. Directly in front of the line a devastated area is to be created which is to be as wide as possible.

2. The execution of the destructions is to be arranged in detail; especially, orders are to be given stating who will give the order to carry out the destructions.

3. The road from Yukhnov to Roslavl and the autobahn [super highway] are to be destroyed effectively when falling back on the "Buffalo" line, so that motor traffic will be difficult for a long time. A commander and special units are to be designated for each of these roads, who will be responsible for preparing and carrying out the destructions.

The 9th Army will be responsible for seeing that the autobahn is destroyed; the 4th Army will furnish an engineer battalion to the 9th Army to prepare and carry out destructions from Gzhatsk to Vyazma.

* Line of defense in central sector of Russian front then held by Army Group Center.

4. The 4th Army will prepare and carry out a thorough destruction of the town of Vyazma.

5. It will be the duty of Air District Command "Moscow" to destroy the airfields and their installations. The ammunition required for this is to be requested from the General of the Engineers/Headquarters Army Group Center.

6. The destruction of the railways is the task of the General of Transportation Headquarters, Army Group Center, who will make the necessary arrangements in collaboration with the armies.

7. The Army Signal Commander will give the instructions required to destroy the signal communications.

8. Furthermore, preparations are to be made for the troops during their retreat to destroy all buildings, wells, and bridges, and to mine the terrain extensively.

It is to be calculated how much material is needed for the destructions, and this is to be requested by the armies through Oberquartiermeister channels, all others needing it are to request it from the General of the Engineers/Headquarters Army Group Center.

A copy of the requests made by the armies is to be submitted to the General of the Engineers/Headquarters Army Group Center.

* * * * *

FOR HEADQUARTERS ARMY GROUP CENTER

The Chief of Staff
[Signed] WOEHLER

Distribution:

4th Army, 1st copy

9th Army, 2d copy

Special Staff Schaum, 3d copy

Air Force Command East, 4th copy

Air District Command "Moscow", 5th copy

Headquarters Army Group Center/HQ Signals Commander,
6th copy

Headquarters Army Group Center/General of Transportation,
7th copy

Headquarters Army Group Center/Oberquartiermeister, 8th
copy

Headquarters Army Group Center/Ia, 9th copy

Headquarters Army Group Center/General of the Engineers,
10th copy

War Diary, 11th copy

PARTIAL TRANSLATION OF DOCUMENT NOKW-2981
PROSECUTION EXHIBIT 1593

EXTRACTS FROM SUMMARIES ON BANDS' ACTIVITIES IN III PANZER
CORPS AREA AND REPORTS FROM III PANZER CORPS TO
8TH ARMY, 15 OCTOBER AND 7 NOVEMBER 1943,
ON SAME SUBJECT

Reports on Bands made by the Divisions on 15 October 1943

[Handwritten] War Diary 1559

* * * * *

SS Panzergrenadier Division "Viking"—A squad of 7 men from the 57th Infantry Division was attacked by a band in the area west of Kreshtshatik. One member of the Wehrmacht was shot. According to statements of the attacked, the attackers were Russian civilians. In addition, a cable connection to a unit adjacent on the left was cut.

Planned for 16 October 1943—

Cleaning the band area east of the Olshanka bridge.
Burning the locality of Guta Mishirizkaya.

[Handwritten] 2453

Hq III Panzer Corps

Section Ia

15 October 1943

To: AOK 8 (priority teletype)

[Handwritten] 2145

For information to:

3d Panzer Division	2240	
57th Infantry Division	2255	Teletype
168th Infantry Division	2400	2240
SS Panzergrenadier Division "Viking"		
223d Infantry Division	2335	

[Stamp]

Headquarters III Panzer Corps

Chief Signal Officer

Received: 15 October 1943

accepted-----transmitted 2110

Report on Bands

* * * * *
e. Cleaning up the band area east of the Olshanka bridge. Burning the locality of Guta Mishirizkaya. Reconnaissance in the woods east of Tagantsha and north of Yablonoff, as well as in the area of Buda Orlovezkaya.

Ia

Certified:

[Signed] VON SCHWERIN

Lieutenant

[Handwritten] Taken care of

* * * * *
Report on Bands made by the Divisions on 7 November 1943

* * * * *
57th Infantry Division—a. (1) At 1800 hours 6 November, a band of six men attacked the guard post of Buda Brochvachskaya. We had two men killed. Twenty-seven houses in which the men were not present in the evening, or in which ammunition was found, were burned down. Four suspected men were shot. Mopping up has not been concluded as yet.

* * * * *
7 November 1943

Hq III Panzer Corps

Ia

[Stamp]

Hq III Panzer Corps

Chief Signal Officer

7 November 1943

accepted-----transmitted 2140

To: AOK 8 (priority teletype) [Handwritten] 2305

For information to:

SS Division Viking 2210

57th Infantry Division) teletype 2110

72d Infantry Division) 2245

Report on Bands

* * * * *
2. At Buda Brochvachskaya (southern sector of the forest of Tagantsha) bandits attacked the guard post. We had two men killed. Twenty-seven houses in which ammunition was found

or in which the men were not present at night were destroyed.
Four bandits were shot.

* * * * *

Ia

Certified:

[Signed] VON SCHWERIN

Lieutenant

[Handwritten] Taken care of. (signature) Pfc

3. DEFENSE EVIDENCE

DOCUMENT REINHARDT 302
REINHARDT DEFENSE EXHIBIT 136

EXTRACT FROM THE AMERICAN "RULES OF LAND WARFARE"
CONCERNING TREATMENT OF ENEMY PROPERTY

FM 27-10

WAR DEPARTMENT
Basic Field Manual
RULES OF LAND WARFARE
Prepared under direction
of
The Judge Advocate General

United States
Government Printing Office
Washington: 1940

* * * * *

Treatment of Enemy Property

[Paragraph] 313. Destruction and seizure of.—It is especially forbidden * * * to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war (*H.R., art. 23, par. (g)*).

314. *General rule as to war right to seize and destroy property.*—The rule is that in war a belligerent may destroy or seize all property of whatever nature, public or private, hostile or neutral, unless such property is specifically protected by some definitive law of war, provided such destruction or seizure is imperatively demanded by the necessities of war.

* * * * *

EXTRACT FROM THE "BRITISH YEARBOOK OF INTERNATIONAL LAW",
1944, CONCERNING VIOLATIONS OF THE LAW OF WAR

The British Year Book of International Law
1944

Humphrey Milford
Oxford University Press

* * * * *

The Law of Nations and the Punishment of War Crimes
by Professor H. Lauterpacht, M.A., LL.D.

Whewell Professor of International Law in the University of
Cambridge

* * * * *

"Such acts as general devastation * * * may supply ample reason for condemnation and protest; * * * they may, at the end of the war, justify the imposition of collective sanctions by way of compensation or otherwise as distinguished from individual penalties of a criminal nature. But criminal proceedings before the municipal courts of the victor may seem to many a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy.

"Total war has altered the complexion of many a rule. At a time when the "scorched earth" policy, with regard to the belligerent's own territory, has become part of a widespread practice, general destruction of property ordered as an incident of broad military strategy will not properly form the subject-matter of a criminal indictment."

* * * * *

EXTRACTS FROM TESTIMONY OF DEFENDANT WOehler¹

DIRECT EXAMINATION

* * * * *

DR. RAUSCHENBACH (counsel for the defendant Woehler) : Now, Document NOKW-631, Prosecution Exhibit 568,² is a document connected with the Security Service, but as it concerns the seizure

¹ Complete testimony is recorded in mimeographed transcript, 10-11, 14-17 June 1948; pp. 5675-6083.

² Reproduced in part above in section F2. Translation of this document appears in full in section VIII B 5 b, vol. X.

of property of the civilians, and not killings, it belongs rather to this context. It is a report by the Security Service, signed by Ohlendorf, directed to the Headquarters of the 11th Army, and reference is made to a telephone conversation between you and an SS captain about confiscated watches. The Security Service reports that the watches confiscated in the course of the anti-Jewish actions had been properly entered as received. As you had this telephone conversation with the Security Service officer, will you tell us what led up to this report by Ohlendorf?

DEFENDANT WOEHLER: I recall in this winter of 1942, Field Marshal von Manstein came to me one day rather excitedly and said, "Listen, I want to know what has become of the property which must have been seized during the resettlement of the Jews."

Q. May I interpose just one question—what did both of you understand by that term "resettlement" at the time?

A. At the time I understood the term "resettlement" to mean what every unbiased person would understand by resettlement or evacuation. It was only here in Nuernberg, when I was a witness and a defendant for the first time in 1946, that I learned from the Security Service records, which were available to me at the time, what this "resettlement" meant.

* * * * *

Q. We will now revert to the conversation you mentioned between Field Marshal von Manstein and yourself, about those watches. What did von Manstein tell you to do?

A. He told me to talk to Ohlendorf. The Field Marshal wanted to know where those things were that had been left behind, and how they were administered.

* * * * *

CROSS-EXAMINATION

* * * * *

DR. HORLIK-HOCHWALD: Witness, I asked you whether you, on 15 October and 7 November 1943, were Commander in Chief of the 8th Army?

DEFENDANT WOEHLER: Yes, I was.

Q. Will you have a look at page 2 of the original (*NOKW-2981, Pros. Ex. 1593*).^{*} It is a report from the III Panzer Corps dated 15 October 1943, where it is reported under the heading "Reports on Bands" that the locality of Guta Mishirizkaya was burned down. Did you hear of this incident?

A. I haven't found this sentence yet.

^{*} Document reproduced above in section F 2.

Q. It is on page 2 of the original, Witness. That should be down—possibly the last—it is paragraph e, the last paragraph. Did you find that?

A. Yes, the burning of Guta Mishirizkaya was quite definitely necessary for military reasons, because the bands were dependent on such localities for their depots, etc., and in addition, also to hide themselves. Without being able to remember this individual incident, I think that there was a very good military justification for a locality which was in the partisan territory, and which was expressly designated as such to be burned down, if it was a military necessity. If one reads the previous reports which are contained in the same document, one gets a slight insight into what could happen on one single day to one single corps in the way of band activity—what was possible as regards surprise raids, and other band activities. I think that there was a military necessity here for this.

Q. Will you then turn to page 5 of the document and look at the reports on bands made by the divisions, and I think it is the 57th Infantry Division on 7 November 1943. Look at letter a, Arabic 1. It says that, "At 1800 hours, 6 November, a band of six men attacked the guard post of Buda Brochvachskaya. We had two men killed. Twenty-seven houses in which the men were not present in the evening, or in which ammunition was found, were burned down. Four suspected men were shot. Mopping up has not been concluded as yet." If you look at page 6 of the original you will see that the III Panzer Corps gave a similar message to the 8th Army with the only differentiation that instead of four suspected men were shot, it is said here four bandits were shot. The message is of the same date. Did you receive any information about the burning down of these 27 houses, of the killing of these four suspects?

A. Well, I can't remember it. I can only think that here too, because these bandits lived in these houses and were not there in the evening, that it was a military necessity to burn down these houses so that the partisans should not have the possibility of hiding there again. With regard to the suspected men who appear here, I say the same as I have already repeatedly said—that it is my firm conviction that the suspicion of being connected with partisan activity was confirmed with regard to these men. I can comment on the report of the III Panzer Corps briefly because it talks about four bandits who were shot. I don't know whether I may be allowed to read this page?

Q. Surely, you can read every part of the document you want to read.

A. Here it says, "Here, too, German and Russian uniforms,

German and Russian machine guns, tommy guns, and hand grenades, and two antitank rifles were found." I would like to stress the German uniforms in which the partisans fought.

* * * * *

Q. Do you remember having issued an order for the destruction of Vyazma?

A. No. For the simple reason that as army group chief of staff, as I explained in detail yesterday, I was not authorized to issue any orders—let alone an order for the destruction of a city. The "Buffalo" movement was a large scale retreat movement on the left wing of Army Group Center, which I am not going to explain in detail. It had been ordered by top levels, and had to be carried out for military reasons, in order to save forces and to be able to form new reserves. All these "Buffalo" movements were carried on for months, both theoretically and practically. This is a war diary entry, if I'm not mistaken, dated 13 March [February] 1943, and it [the diary] was concluded on 31 March 1943. It is possible that I had this telephone conversation with the commander in chief of the 4th Army. If I said, "The town of Vyazma is to be destroyed", then—

Q. May I interrupt you? I can also hand you the order, NOKW-3442, which I offer, Your Honor, as Prosecution Exhibit 1600.* So this is the written order of yours where, under paragraph 4, this provision appears?

PRESIDING JUDGE YOUNG: Admitted as part of the cross-examination.

DR. HORLICK-HOCHWALD: So possibly, Witness, we can shorten this?

DEFENDANT WOehler: Very well.

Q. As you have both documents now before you?

A. We can make it very brief. As it says here under paragraph 4, the thorough destruction of Vyazma was to be prepared and carried out by the 4th Army, and I signed this order as chief of staff [of Army Group Center]. It was upon the order of my Commander in Chief, Field Marshal von Kluge. Even today I am convinced that this destruction of the remainder of Vyazma which the Russians had left—there were only a few houses and a few cellars which were destroyed by the 3d Panzer Army—I am convinced that this was a military necessity, so that in winter—we are talking now about 11 February—the pursuing Russians would be deprived of all accommodation and shelter. Therefore, it was a military necessity which prompted this order, an order of my Commander in Chief, Field Marshal von Kluge, which I signed as I concede.

* * * * *

* Ibid.

REDIRECT EXAMINATION

* * * * *
DR. RAUSCHENBACH: Did you see any reason to assume that the watches in question* were not obtained through confiscation from living people but were instead the property of dead persons?

DEFENDANT WOehler: I saw no reason to assume that these watches were the property of dead persons, and even today I believe that if that had been the case, the number of watches would have been larger.

Q. Do you know whether German prisoners of war, for instance while they were prisoners of the Americans, were deprived of their watches?

A. Yes.

Q. Do you know of any such instances?

A. Yes, I do.

Q. But these prisoners of war are still alive, aren't they?

A. Yes.

* * * * *

* See Document NOKW-631, Pros. Ex. 568; and Document NOKW-3238, Pros. Ex. 1696, reproduced in section F 2.

VIII. PHOTOGRAPHIC REPRODUCTIONS OF DOCUMENTARY EVIDENCE

Z. D. H. 121
 Chef Kriegsgef.
 Az. 2 f 24. 76 Allg. (Vis)
 Nr. 90/43 gKdos.

Geheime Kommando-Unternehmen

NOKW-004
 am 18. Mai 1943 -2-

I	II	III	IV
V	VI	VII	VIII
2 Aufnahmestellen A. Aufnahmestellen			
2360			
Nr. 002406/43 gKdos.			

An
 WFSt / Qu
 wachst. WStV

Bezug: WFSt Nr 003830/42 gKdos. v. 18.10.42
 Betr.: Meldeverfahren bei Vernichtung von Sabotagetrupps. -/-

Durch die Bezugsverfügung ist die Behandlung der von deutschen Truppen
 gestellten Angehörigen feindlicher Kommando-Unternehmen geregelt.
 Da ihre - auch nur vorübergehende - Verwahrung in militärischer Obhut
 (Kriegesgefangenenlager) verboten ist, gelten sie nicht als Kr.Gef.

Es wird um Entscheidung gebeten, ob die Angehörigen solcher feindl.
 Kommando-Unternehmungen als gefallene feindl. Wehrmachtangehörige -
 wie z.B. abgeschossene feindl. Flieger - gelten und nach den zwischen-
 staatlichen Abmachungen als solche an den Feindstaat gemeldet werden
 sollen oder ob in diesen Fällen jede Meldung des Todesfalls zu unter-
 bleiben hat.

*H. E. sollte für die Angehörigen
 Maßnahmen getroffen werden.*

Graevenitz

- End -

h. v.

Document NOKW-004, Prosecution Exhibit 149[1], on reporting deaths of
 enemy Commandos, signed by General von Graevenitz, Chief of Prisoner
 of War Affairs under defendant Reinecke. Defendant Warlimont's initial
 "W" appears in upper right near date line. Translation appears on p. 92.

NOKW-004

→ - *W*

Best / Nr. (IV)

Nr. 90/43 g.Kdos.

Entwurf

F.H.Qu., den 25.5.1943

Geheime Kommandofache

2 Ausfertigungen
3. Ausfertigung.

Besuch: Schrb. Chef Kriegsgef. An. 2 f 24. 76 Allg. (Via)
Nr. 90/43 g.Kdos. vom 18.5.43.

Betr.: Meldeverfahren bei Vernichtung von Sabotagetrupps.

An

Chef Kriegsgef. *W*

27 5 43

Der Befehl vom 18.10.42 geht davon aus, dass die Mitglieder feindlicher Sabotagetrupps für uns keine Soldaten, sondern im Grunde genommen gemeine Verbrecher sind und darum als solche behandelt werden müssen.

Nach Ansicht St. ist es hiernach ausgeschlossen, Gemäss dem Führerbefehl behandelte Saboteure dadurch als Soldaten anzuerkennen, dass ihr Tod nach den für gefallene feindliche Soldaten geltenden Bestimmungen an den Feindstaat gemeldet wird. St. vertritt also den Standpunkt, dass jede Meldung des Todesfalles zu unterbleiben hat.

Für eine Entscheidung dieser Frage ist St. nicht zuständig, da es sich um einen Führerbefehl handelt. Es muss vielmehr Chef Kriegsgef. überlassen bleiben, die erforderliche Entscheidung unmittelbar über Chef St. und Chef OK! herbeizuführen.

W *27/5*

Document NOKW-004, Prosecution Exhibit 149[2], defendant Warlimont's answer to reporting of commando deaths. His initial "W" appears at lower right next to date "27/5". Translation appears on page 93.

Geheime Kommandosache 8 Ausfertigungen
7. Ausfertigung

An
29.6.44
- KR -
AOK 1
AOK 19
Gen. Kdo. LVIII Pz. Korps
189. Res. Div. (durch Kurier)
Hauptverb. Stab 584 (durch Kurier)
im Hauptq
ic
V. O. Mil. Ber.
H. Qa.
KTB
Ia (S)

Betr.: Behandlung von Kdo.-Angehörigen.

OKW hat befohlen:

- 1.) Auch nach der Landung der Anglo-Amerikaner in Frankreich bleibt der Befehl des Führers über die Vernichtung von Terror- und Sabotagegruppen vom 18.10.42 voll aufrecht erhalten.
Ausgenommen bleiben feindliche Soldaten in Uniform im unmittelbaren Kampfgebiet des Landekopfes, d.h. im Bereich der in vorderer Linie kämpfenden Divisionen, sowie der Reserve bis einschli. Gen.Kdos., gemäß Ziff.5) des Grundl.Befehls vom 18.10.42.
- 2.) Alle außerhalb des unmittelbaren Kampfgebietes angetroffenen Angehörigen von Terror- und Sabotagegruppen, zu denen grundsätzlich alle Fallschirmspringer rechnen, sind im Kampf niederzuziehen. In Sonderfällen sind sie dem SD zu übergeben.
- 3.) Sämtliche außerhalb des Kampfgebietes der Normandie eingesetzten Truppen sind über die Pflicht der Vernichtung feindl. Terror- und Sabotagegruppen kurz und bündig nach dem hierfür erlassenen Bestimmungen zu unterrichten.
- 4.) Ob. West meldet ab sofort täglich, wieviel Saboteure auf diese Weise liquidiert sind. Das gilt vor allem auch für die Unternehmen der Militärberühmte. Die Zahl soll täglich im Wehrmachtbericht bekanntgegeben werden, um damit eine abschreckende Wirkung auszuüben, wie sie schon gegenüber dem früheren Kommando-Unternehmen auf gleiche Weise erreicht ist.

gemäß Kommando-Befehl.

Zusatz Obkdo. Armeegruppe G:

Die Meldungen sind in der Tagesmeldung zu erfassen.

Obkdo. Armeegruppe G
Ia Nr. 841/44.g. Kdos.
vom 29.6.44
M 29/6

9.

Document NOKW-213, Prosecution Exhibit 163, concerning continued application of the Commando Order after Allied landings in France. Translation appears on page 103.

WB-1755 e/1

Sernspruch · Sernschreiben · Sunkspruch · Blinkspruch

Durch die Nachr.-Stelle auszufüllen

Nachr.-Stelle <i>St. 2. 22:</i>		Nr. 273		Befördert				
				an	Tag	Zeit	durch	Rolle
Bemerkte: <i>...</i>				<i>VR</i>	<i>1</i>	<i>06</i>	<i>R</i>	
Angenommen oder aufgenommen								
von	Tag	Zeit	durch					
	<i>14. 11.</i>	<i>0845</i>						<i>R. N. - 0345-</i>

Abgang		An: <i>St. 2. 22</i>		Abfahrende Stelle	
Tag: <i>13/11</i>					<i>24. St.</i>
Zeit: <i>21:25</i>					
Dringlichkeits- Dermark	<i>10</i>				
				Sernspruch- Aufschlag:	

Inhalt	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>
	<i>...</i>

Document NOKW-1615, Prosecution Exhibit 257[1], a teletype concerning evacuation and casualties of prisoners of war, initialed by defendant von Roques. Initials "vR" appear at top center in column headed "an" [to]. Translation appears on page 30.

WB 1755 C/3

K. J. G.

Der Befehlshaber
des rückw.H.Geb.S u d.

H.Qu., den 26. 10. 41.

T a g e s b e f e h l .

Der Abschub der Kriegsgefangenenmassen aus der
grossen Umfassungsschlacht im Dnjepr - Djesna - Bogen ist
trotz mancher Erschwernisse planmässig und zeitgerecht be-
wältigt worden. Für diese Leistung spreche ich allen betei-
ligten Dienststellen meine Anerkennung aus, besonders der
24. I.- D., den Kriegsgefangenenbezirkskommandanten und den
Dulags.



General der Infanterie.

Verteiler:

Div. u. Ers. Brig. 202
Kr. Gef. Bez. Kdt. N u. E
sämtl. Dulags
IIa
Qu
K. T. B.

979

977

Document NOKW-1615, Prosecution Exhibit 257[2], an "Order of the Day" signed by defendant von Roques, complimenting subordinate units on evacuation of prisoners of war. Translation not reproduced in this abridgement.

WB3595

Feldpostamt II. Anlage 17

15

Geheim:

Commando XXVIII. A.K.

REF. 10

Be. 706/41/ka

Generalkommando XXVIII.A.K.
Abt. Ia Nr. 1552/41 geheim

K.Gef.St. Lissino, 6. 11. 1941

In der Anlage wird ein vom Führer gebilligter Befehl eines A.O.K.'s übersandt, der das Verhalten der Truppe im Ostraum behandelt. Auch im Korpsbereich liegen die Verhältnisse im allgemeinen so, daß die Soldaten zu größerer Härte erzogen werden müssen.

Auf folgende Punkte wird nochmals hingewiesen:

- 1.) Jedes Stück Brot, das an die Zivilbevölkerung ausgegeben wird, fehlt in der Heimat.
- 2.) Auf jeden Zivilisten, auch auf Frau oder Kind, der unseren Einschließungerring um Leningrad überschreiten will, ist zu schießen. Jeder Esser in Leningrad weniger, verlängert den Widerstand dort, und jeder Flüchtling neigt zu Spionage und Partisanen; all' dies kostet deutsche Soldatenleben.
- 3.) Deutsche Kraftfahrzeuge und Fahrzeuge dienen nicht zur Beförderung russischer Bevölkerung.

I.V.

Kratzert

Generalleutnant

Verteiler:

bis zu den Batl. (Abt.)

Document NOKW-3411, Prosecution Rebuttal Exhibit 14[1], the letter of transmittal for the "Reichenau" order with signature of Major General Kratzert, acting commander of the XXVIII Army Corps, a subordinate unit of the 18th Army, commanded by the defendant von Kuechler. Translation appears in Volume X.

Abschrift von Abschrift!

Armeeoberkommando

A.H.Qu., den 10. 10. 1941

G e h e i m !

Betr.: Verhalten der Truppe im Ostraum.

Hinsichtlich des Verhaltens der Truppe gegenüber dem bolschewistischen System bestehen vielfach noch unklare Vorstellungen.

Das wesentlichste Ziel des Feldzuges gegen das jüdisch-bolschewistische System ist die völlige Zerschlagung der Machtmittel und die Ausrottung des asiatischen Einflusses im europäischen Kulturkreis.

Hierdurch entstehen auch für die Truppe Aufgaben, die über das hergebrachte einseitige Soldatentum hinausgehen. Der Soldat ist im Ostraum nicht nur ein Kämpfer nach den Regeln der Kriegskunst, sondern auch Träger einer unerbittlichen völkischen Idee und der Rächer für alle Bestialitäten, die deutschem und artverwandtem Volkstum zugefügt wurden.

Deshalb muß der Soldat für die Notwendigkeit der harten, aber gerechten Sühne am jüdischen Untermenschentum volles Verständnis haben. Sie hat den weiteren Zweck, Erhebungen im Rücken der Wehrmacht, die erfahrungsgemäß stets von Juden angezettelt wurden, im Keime zu ersticken. Der Kampf gegen den Feind hinter der Front wird noch nicht ernst genug genommen. Immer noch werden heimtückische, grausame Partisanen und entartete Weiber zu Kriegsgefangenen gemacht, immer noch werden halb uniformierte oder in Zivil gekleidete Heckenschützen und Herumtreiber wie anständige Soldaten behandelt und in die Gefangenenlager abgeführt. Ja, die Gefangenen russischen Offiziere erzählen hohnlächelnd, daß die Agenten der Sowjets sich unbehelligt auf den Straßen bewegen und häufig an den deutschen Feldküchen mitessen. Ein solches Verhalten der Truppe ist nur noch durch völlige Gedankenlosigkeit zu erklären. Dann ist es aber für die Vorgesetzten Zeit, den Sinn für den gegenwärtigen Kampf wachzurufen.

Das Verpflegen von Landeseinwohnern und Kriegsgefangenen, die nicht im Dienste der Wehrmacht stehen, an Truppenküchen ist eine ebenso mißverständene Menschlichkeit wie das Verschenken von Zigaretten und Brot. Was die Heimat unter großer Entsagung entbehrt, was die Führung unter größten Schwierigkeiten nach vorne bringt, hat nicht der Soldat an den Feind zu verschenken, auch nicht, wenn es aus der Beute stammt. Sie ist ein notwendiger Teil unserer Versorgung.

Die Sowjets haben bei ihrem Rückzug häufig Gebäude in Brand gesteckt. Die Truppe hat nur soweit ein Interesse an Löscharbeiten, als notwendige Truppenunterkünfte erhalten werden müssen. Im übrigen liegt das Verschwinden der Symbole einstiger Bolschewistenherrschaft, auch in Gestalt von Gebäuden, im Rahmen des Vernichtungskampfes. Weder geschichtliche noch künstlerische Rücksichten spielen hierbei im Ostraum eine Rolle. Für die Erhaltung der wehrwirtschaftlich wichtigen Rohstoffe und Produktionsstätten gibt die Führung die notwendigen Weisungen. Die restlose Entwaffnung der Bevölkerung im Rücken der feuernden Truppe ist mit Rücksicht

Document NOKW-3411, Prosecution Rebuttal Exhibit 14[2], page one of the "Reichenau" order. Translation appears in Volume X.

auf die langen, empfindlichen Nachschubwege vordringlich. Wo möglich, sind Beutewaffen und Munition zu bergen und zu bewachen. Erlaubt dies die Kampf Lage nicht, so sind Waffen und Munition unbrauchbar zu machen. Wird im Rücken der Armee Waffengebrauch einzelner Partisanen festgestellt, so ist mit drakonischen Maßnahmen durchzugreifen. Diese sind auch auf die männliche Bevölkerung auszudehnen, die in der Lage gewesen wäre, Anschläge zu verhindern oder zu melden. Die Teilnahmslosigkeit zahlreicher angeblich sowjetfeindlicher Elemente, die einer abwartenden Haltung entspringt, muß einer klaren Entscheidung zur aktiven Mitarbeit gegen den Bolschewismus weichen. Wenn nicht, kann sich niemand beklagen, als Angehöriger des Sowjetsystems gewertet und behandelt zu werden. Der Schrecken vor den deutschen Gegenmaßnahmen muß stärker sein als die Drohung der umherirrenden bolschewistischen Restteile.

Fern von allen politischen Erwägungen der Zukunft hat der Soldat zweierlei zu erfüllen:

- 1.) Die völlige Vernichtung der bolschewistischen Irrlehre, des Sowjetstaates und seiner Wehrmacht,
- 2.) die erbarmungslose Ausrottung artfremder Heimtücke und Grausamkeit und damit die Sicherung des Lebens der deutschen Wehrmacht in Rußland.

Nur so werden wir unserer geschichtlichen Aufgabe gerecht, das deutsche Volk von der asiatisch-jüdischen Gefahr ein für allemal zu befreien.

gez.: Unterschrift.

F.d.R.d.A.:

N. Thutell

Oberleutnant

IX. FINAL ARGUMENTATION

A. Introduction

Only a small fraction of the final argumentation at the close of the trial has been reproduced below. (Sections B through G). The closing statements of the prosecution and the defense required 4 days to deliver, the prosecution's closing taking less than one full day and the defense closings taking more than 3 days. In addition voluminous briefs were filed by both the prosecution and defense which total hundreds of pages. Argumentation concerning all counts of the indictment appears in Section III, Opening Statements of the Prosecution and Defense, and on the charges of aggressive war, extracts from the final arguments appear in Section V, Crimes against Peace—Further Argumentation on the Charges of Aggressive War (Sections III and V, appear in vol. X.)

In this concluding section of argumentation, emphasis has been given to questions which usually applied to more than one type of the charges or to more than one specification of the indictment. Among the topics covered are a number of the special arguments which include: the effect of superior orders, the justification of alleged military necessity, the principle of *tu quoque*, the responsibility of a chief of staff, the nature of command authority and executive power in the areas occupied by the German armed forces, and the international law applicable to prisoners of war, partisans, and civilians. It has been impossible within space limitations to reproduce much of the testimony and many of the exhibits cited in the arguments. For these, the complete record in the Library of Congress may be consulted.

B. Extracts from the Closing Statement of the Prosecution*

COUNTS TWO AND THREE — WAR CRIMES AND CRIMES AGAINST HUMANITY

MR. FULKERSON: The evidence which the prosecution has submitted in support of the charges in count two and three 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 criminal responsibility of each defendant under counts two and three will be established in

* Complete closing statement is recorded in mimeographed transcript, 10 August 1948, pp. 9505-9620.

detail in the individual briefs. At this time we will content ourselves with calling to the Tribunal's attention only such portions of the evidence as are relevant to meet the conglomerations of vague, implausible, and mutually contradictory defenses which have been raised under these counts.

A. THE "COMMISSAR ORDER"

Under subdivision A of count two of the indictment, dealing with the so-called Commissar Order, Sperrle and Schniewind are not charged. The responsibility of Warlimont and Lehmann in connection with the drafting and distribution of the order, as well as the responsibility of Reinecke for the execution of the order at prisoner of war camps has, we submit, been clearly established. The remaining eight defendants—von Leeb, von Kuechler, Hoth, Reinhardt, von Salmuth, Hollidt, von Roques, and Woehler are all charged with the distribution and execution of the Commissar Order in their capacities as field commanders. All of them have resorted to substantially identical excuses and explanations. Once again, we think that these defenses can be discussed most expeditiously and clearly by examining the evidence with respect to a few individual defendants and for this purpose we will deal with von Leeb, von Kuechler and Hoth.

I. VON LEEB

None of the defendants, including the defendant von Leeb, denied the unlawful character of the Commissar Order. (*Tr. p. 2346.*) Nor does von Leeb deny that it was distributed within his army group. On the witness stand, he defended his conduct with respect to the Commissar Order by testimony to the effect that—

a. He protested against the issuance of the Commissar Order to Brauchitsch and Keitel (*Tr. pp. 2346-2349*).

b. He did not himself pass down the Commissar Order to the Fiftieth Corps or the army group rear area, which were directly subordinated to him (*Tr. p. 2349*).

c. The Commissar Order was transmitted by the High Command of the Army directly to the three armies under his command—the Sixteenth Army, the Eighteenth Army, and Panzer Group 4, which was the equivalent of an Army—and that he had no authority to prevent the further passing down of the order by the three armies (*Tr. p. 2350*).

d. He gave oral directions to the units subordinate to him that the order was not to be carried out, and thereafter "hoped that it would not be carried out to its full measure" (*Tr. pp. 2350-2352*).

e. He was never informed of the reports submitted by his subordinate units showing that the order was being carried out (*Tr. p. 2361*).

f. The reports of commissar shootings in the record in this case only cover a small percentage of all the commissars, and therefore the order must not have been carried out in most instances (*Tr. pp. 2354-2356*).

g. Many, if not all, of the reports of commissar shootings were deliberately falsified (*Tr. p. 2359*).

h. Many of the commissars reported as shot were, in fact, killed in battle. (*Tr. p. 2357*.)

The prosecution suggests that these so-called "defenses" are miserable fabrications, and that the record proves incontrovertibly that the Commissar Order was distributed and carried out within von Leeb's Army Group, with von Leeb's knowledge, and resulted in the outright murder of numerous prisoners of war. We will dispose of these defenses *seriatim*.

a. The fact that von Leeb protested against the order to von Brauchitsch and Keitel is, of course, no defense if he in fact distributed and executed the order. Like his memorandum to von Brauchitsch advising against the invasion of Belgium and Holland, these protests merely establish conclusively that he was fully aware of the wrongful character of his actions.

b. Whether or not von Leeb personally passed the Commissar Order to the commander of his rear area, it is perfectly clear that the order reached the rear area, because on 19 December 1941, the 281st Security Division, then subordinated to the rear area, reported that two commissars had been shot. (*NOKW-2154, Pros. Ex. 275*.) The headquarters of von Leeb's Army Group North was the only headquarters which could have reissued the Commissar Order to the rear area. The Fiftieth Corps also reported shootings of commissars. (*NOKW-2179, Pros. Ex. 64; NOKW-2207, Pros. Ex. 89*.) Von Leeb sought to explain this on the ground that the Fiftieth Corps was, for a time, subordinated to the Sixteenth Army, and that the Sixteenth Army may have passed the Commissar Order to the Fiftieth Corps at that time. (*Tr. pp. 2360-2361*.) Whether von Leeb himself passed the order to the Fiftieth Corps, or whether, knowing that the Sixteenth Army would pass the order to them he took no action to prevent this, seems to the prosecution a totally academic question.

c. Generals Busch, Hoepner, and the defendant von Kuechler, who commanded the three armies under von Leeb's Army Group, were directly subordinate to von Leeb in the chain of command. Von Leeb testified that all three of them shared his own view that the Commissar Order was unlawful. (*Tr. p. 2351*.) Von Leeb

could have instructed them not to pass it down, and there is absolutely no basis in the record for assuming that the three generals would not have followed his instructions. If we are to believe von Leeb's testimony that he himself did not pass the order to the Fiftieth Corps and the rear area, we must also conclude that Busch, Hoepner, and von Kuechler could have behaved in the same fashion. But there is no evidence in the record that von Leeb made any attempt to prevent the army commanders from disseminating the order.

In fact, the record clearly establishes that von Leeb's Army Group headquarters issued directives to the subordinate armies in connection with the execution of the Commissar Order. Von Leeb's own chief of staff signed and distributed to the armies and the rear area an order dated 2 July 1941, directing them to destroy all copies of the Commissar Order, and to refrain from shooting commissars who had previously escaped detection and were working in labor detachments with other prisoners. (*NOKW-3136, Pros. Ex. 1547*). Another document shows that von Leeb's Ic officer, Jessel, who testified in this proceeding, directed the Ic officer of von Kuechler's Eighteenth Army to screen prisoner collection points for commissars who had escaped detection by removing their insignia. (*NOKW-3149, Pros. Ex. 1553*.)

d. While there is no reason to doubt von Leeb's testimony that he disapproved of the Commissar Order, there is absolutely no evidence that he took any action which was effective, or could have been expected to be effective, to prevent its execution within his army group. Von Leeb, like almost all other German generals who have been charged with or questioned concerning their part in the Commissar Order, claims that he gave oral instructions that it should be disregarded. But since the documents in the record clearly establish that numerous commissars were shot by units under Army Group North pursuant to the order, it is clear that either von Leeb gave no such oral instructions or that they were totally ineffective.

e. Von Leeb's testimony that he did not learn of the reports concerning the shootings of commissars pursuant to the order is totally incredible. If we are to believe von Leeb's statements that he repeatedly protested against the order to von Brauchitsch and Keitel, that he expressed his views to the subordinate army commanders, and that upon other occasions at the front he expressed his disapproval of the order and made inquiries concerning its effect (*Tr. pp. 2351-2352*), then it stands to reason that the staff of the army group must have known that von Leeb was deeply concerned about the order and would surely have brought to his attention the reports showing that it was being executed in spite

of his own oral instructions. But, in any event, as was rightly held by Tribunal V in the Hostage Case,* (*Case No. 7, Tr. p. 10461*)—

An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime.

f. Von Leeb's argument concerning the percentage of captured commissars covered by the reports of shootings is an especially weird fabrication. He testified that two of the armies under him—the Sixteenth and the Eighteenth—captured over 200,000 prisoners, estimated that, for 200,000 Russian prisoners there should have been 2,000 to 2,500 commissars, and contrasted this figure with the 96 commissars covered by the reports of shootings. (*Tr. pp. 2354-2356.*) From this, he concludes that the Commissar Order was carried out only occasionally.

It is true that, in the setting of this case—with millions of Jews being slaughtered and hundreds of thousands of Russian prisoners dying of exhaustion and starvation—the figure 96 does not loom very large. But the suggestion that responsibility for 96 murders is something to be passed over lightly is, we submit, monstrous. Furthermore, von Leeb's elaborate and speculative calculations are shown to be entirely without foundation by the very evidence which the defense submitted. By no means all of the commissars who had been fighting with the 200,000 prisoners were captured alive; many of them were killed in action. The defense witness Gersdorff testified that many commissars committed suicide rather than suffer capture. (*Tr. p. 2179.*) He also testified that the Commissar Order became known on the Russian side (*Tr. p. 2160*) and that thereafter most of the commissars removed their insignia in an effort to avoid detection (*Tr. p. 2164*) and were not recognized as commissars by the troops. This testimony is confirmed by the entry in Halder's diary for 1 August 1941, which reads (*NOKW-3140, Pros. Ex. 1359*), "Treatment of captured political commissars (most of them are not detected before arrival in PW camps)". Considering that commissars were being killed in battle, committing suicide, and disguising their identity, and that no doubt the prosecution's collection of reports of commissar shooting is far from complete, von Leeb's calculations are seen to be worthless.

* *United States vs. Wilhelm List, et al., Case No. 7, Vol. XI.*

g. When desperately pressed, men are often driven to inconsistencies, and von Leeb's testimony that the reports of commissar shootings were false reports is a good example of just such an inconsistency. He suggested that the reports were concocted in order to cover up the nonexecution of the Commissar Order, by lulling the higher authorities into the belief that it was being carried out. (*Tr. p. 2359.*) Yet, only a few minutes before he had argued vehemently that the reports of his Sixteenth Army, which covered the shooting of only 17 commissars out of an estimated 1,200 to 1,500 captured, "reveal of necessity that the order on a whole was not carried out." (*Tr. p. 2354.*) If these reports show so clearly that the Commissar Order was not being carried out, it is impossible to believe that they were fabricated for the purpose of deluding someone into thinking that it was being carried out. Surely, in fabricated reports, the number of commissars reported executed would have been set high enough to carry conviction, rather than so low as to suggest the probability of general disobedience.

It is abundantly clear, in short, that the reports of commissar executions are not "faked", but are entirely trustworthy reports of commissars executed. What are "faked" are not these reports but both of von Leeb's defenses with respect to percentages (*f*) and fabricated reports (*g*); these defenses are not only spurious but mutually inconsistent.

h. Von Leeb's final contention is that the reports do not show commissar executions, but only commissars killed in battle. These reports, chameleon-like, now have three natures, each inconsistent with the other two. This latest guise is particularly transparent, and is disproved by the very wording of the reports. Thus, many of them carefully distinguish between commissars "shot" (*Erschossen*) and "killed in action" (*Gefallen*). (*NOKW-2117, Pros. Ex. 61.*) On 27 September 1941, the XXVIII Corps of von Kuechler's army reported (*NOKW-2096, Pros. Ex. 88*):

"On 25 September, the Battalion Commissar Kanajev (110th Railway Protection Regiment of the 2d NKVD Division) was found asleep on the bank of the Tossna near the mouth of this river. He was taken prisoner and shot after a thorough interrogation."

Other reports by the same corps stated (*NOKW-1580, Pros. Ex. 670*):

"On 18 and 19 September, troop operations were carried out in the woods of Nove Lissine by the corps signal battalion and many prisoners were brought in. Among the prisoners was a commissar who claimed to be an Intendant of the second rank.

It was possible to convict him by papers found on his person and he was shot.”

These are a few examples only of many reports which, by their wording, completely disprove von Leeb's contention that these commissars were killed in battle, and prove beyond a shadow of a doubt the obvious fact that when commissars were reported “shot”, “liquidated”, or “taken care of”, it was meant that the commissars had been executed after capture pursuant to the clear language of the Commissar Order.

2. VON KUECHLER

The defendant von Kuechler's course of explanations with regard to the Commissar Order began in June 1946, at which time he signed an affidavit under oath which was submitted to the International Military Tribunal in connection with the indictment of the General Staff and High Command as a criminal organization. In this affidavit, von Kuechler swore (*Tr. pp. 2923-24*) :

“Commissar Order—I never held this order in my hands; whether it ever reached my agency, I do not know; whether and in what manner troop commanders were informed of it, I cannot state.

* * * * *

“My then commander in chief, Field Marshal von Leeb, I met several times on the battlefield. We never discussed an order concerning special measures against political commissars.”

Faced with the documentation in the record of this case, there has been prodigious sharpening of von Kuechler's recollection. On the witness stand here he clearly remembered that he received the order direct from the High Command of the Army, that he found the order repugnant, that he knew the army group commanders shared his views, that he immediately discussed the order with von Leeb “whom I met more frequently in those days”, that he caused his chief of staff to lodge a protest with the chief of staff of the army group, and that he passed it down to his subordinate commanders at a “tactical conference which had already been called at Tilsit in East Prussia”. (*Tr. pp. 2829-31*).

Von Kuechler's defenses are, in general, the same as those of von Leeb. He testified that, at the conference with his subordinate commanders, he “expressed repudiation” of the order and advanced the opinion that it would be detrimental to discipline (*Tr. pp. 2831-32*); that he never learned that any commissars were being shot pursuant to the order (*Tr. p. 2833*); that his Ic officer (Jessel) never showed him any of the reports concerning the shooting of commissars (*Tr. pp. 2833-35*); and that probably

the commissars reported shot were in fact killed in action. (*Tr. p. 2834*). He adopted Leeb's argument that the low number of commissars reported shot shows on its face that the order was not carried out. In fact, his testimony follows Leeb faithfully from inconsistency to inconsistency.

Von Kuechler admits that he passed the order down to his subordinate commanders; he claims that he had no alternative. "Of course I could not, as it were, embezzle the order. I couldn't withhold it. I had to make it known." (*Tr. p. 2831*.) On cross-examination he said that he had to pass it down because "I did not want to be endangered of being regarded as a disobedient commander." (*Tr. p. 2922*) But was von Kuechler in fact under any pressure to pass it down? Von Leeb, according to his testimony, did not pass the order down to the Fiftieth Corps or the rear area. Von Kuechler knew that von Leeb was opposed to the order, and can hardly have feared that von Leeb would take any action to make him pass it down, or any disciplinary action should he refrain from passing it down. Before the IMT, Dr. Laternser claimed that many of the army group and army commanders in chief "did not pass this order on to their troops at all", and that Field Marshal Rommel burned the Commando Order "on account of his personal opposition to it" rather than pass on to his subordinates an order which he knew to be unlawful.* But von Kuechler did not want to be a "disobedient commander". Rather, he preferred to pass down to his subordinates an order which he knew to be unlawful and which called for the commission of murder. Whatever comments he may have made about the order to his subordinates were ineffective to prevent its execution in numerous instances by units under von Kuechler's command. Von Kuechler's responsibility for these murders is as clear as von Leeb's.

3. HOTH

In the cases of von Leeb and von Kuechler, we have observed the execution of the Commissar Order on the northern sector of the Russian front. The defendant Hoth was in the central sector, in command of Panzer Group 3 in von Bock's Army Group. He admits that he received the order and that he passed it down to his subordinate corps commanders, "The fact that it was passed on by me is beyond any doubt". (*Tr. p. 3081*.) Hoth seems to say that he disapproved of the order, but, unlike von Leeb and von Kuechler he does not claim that he gave any oral expression to his disapproval when passing the order down. (*Tr. p. 3087*).

* Trial of the Major War Criminals, *op. cit. supra*, vol. XXII, p. 78.

Instead, he advanced the extraordinary view that his subordinate commanders and his troops knew that Hoth would disapprove of such an order even though he did not say so, and that therefore, they would not carry the order out, even though he had passed the order down to them without qualification of any kind. (*Tr. p. 3086.*)

If Hoth really believed that his officers and men would feel themselves to be at liberty to disregard the order; if he actually thought that the tens of thousands of men in his command would be so sensitive to telepathy as to detect an objection on Hoth's part which he was careful not to voice; if he thought that the stern discipline and the military traditions of the German Army would have the effect of causing its members to disobey an explicit command—if Hoth really believed all these things—he needed only to read the constant flow of reports coming into his headquarters to become quickly disenchanted. According to these reports, his troops began killing commissars on June 22—the first day of the campaign. That day, the 20th Infantry Division reported to the XXXIX Motorized Corps that one commissar was killed, and followed that up the next day with a similar message. (*NOKW-2246, Pros. Ex. 62.*) On June 30, the 12th Panzer Division reported “A political commissar holding the rank of colonel was taken prisoner. He was shot as ordered”. (*NOKW-2245, Pros. Ex. 69.*) This report, like many others, by its language excluded the standard excuse that the commissars included in these documents were merely killed in battle. Commissar shooting activity by the troops of the 20th Panzer Division continued to be brisk throughout the month of July. On the 6th, the Ic officer reported to Panzer Group 3 on the enemy situation. Among the things included in this narrative was the “interrogation of a Soviet Russian Commissar and shooting of same”. On the 18th, he reported “Approximately twenty commissars were shot by the division within a 2-week period”.

A good deal has been said in this Court about how the Commissar Order gradually became obsolete because of lack of enthusiasm for its enforcement by the very officers who handed it down in the first place. It was not allowed to become obsolete within Panzer Group 3. On August 8, Hoth's intelligence officer compiled an intelligence bulletin which was sent to every unit within the Panzer group down to battalion level, and which included the following (*NOKW-2239, Pros. Ex. 70*) :

“In accordance with new Soviet regulations, all regiments and divisions, as well as higher staffs, have now *war* commissars (formerly political commissars), while companies, batteries and troops have political leaders (Politruks) who also fall under the

classification of war commissars. Individual inquiries on the part of the troops who make it necessary to point out again that there will be no change in the treatment of these persons.”

This intelligence bulletin was distributed by Hoth's chief of staff. Aside from the fact that it shows that the troops were being ordered a second time to kill captured commissars—and completely explodes Hoth's elaborate theory that the order was not carried out because he had never lent his approval to it—it shows conclusively that the troops had been carrying out the Commissar Order. If these figures of executed commissars were, as Hoth would have us believe, merely figments of some officer's imagination, and if, in fact, the troops had not been executing these men after capture, there would have been no “individual inquiries on the part of the troops”. There certainly would not have been a reply to these inquiries by the chief of staff of Panzer Group 3, instructing the troops to continue treating commissars as they had been doing in the past, but to accord members of the GPU and of the border guards the same treatment as was given to ordinary captured soldiers.

Finally, other records of Hoth's Panzer Group 3 once again demolish the concocted excuse that the reports of shootings were fabrications and that the Order was in fact not carried out. In an activity report by the intelligence officer of Panzer Group 3, written in the fall of 1941, the following appears (*NOKW-1904, Pros. Ex. 67*):

“The special treatment of political commissars by the armed forces resulted in its becoming known to the Russians and in the strengthening of their will to resist. To prevent its being known, the special treatment should have been performed only in camps located far back in the rear. Most of the captured Red Army men and officers are aware of such a special treatment, of which they said they had learned from routine orders and from political commissars who had escaped.”

One of the witnesses for the defendant von Leeb tried to suggest that this very natural fear which overtook Russian commissars was due to “Russian propaganda”. (*Tr. p. 2171.*) But the document quoted above shows conclusively that the commissars became alarmed, not because of propaganda, but because they soon discovered what fate was in store for them if they were captured. All along the front, German officers and men were being captured and interrogated by the Russians, and Russian officers and men were being captured and interrogated by the Germans; sometimes, as the document quoted above shows, commissars were captured by the Germans, and then escaped and rejoined the Red Army. What

was it that frightened these commissars? Was it an ugly rumor that Hitler had issued an order for their execution, but that all the German officers and men were opposed to it on the basis of international law and were "quietly sabotaging" it? Is that why, as late as the spring of 1942, Russian commissars "were fighting for their very lives." (*Tr. p. 2162.*) Is that why the commissars often committed suicide, or removed their insignia? (*Tr. pp. 2164, 2179.*) Did all these things happen because commissars were *not* being killed? We suggest that common sense and the evidence in this case furnish the answer.

4. SUMMARY

Your Honors, here is an order issued by the High Command of the Germany Army which ordered and directed the commission of murder on a large scale. All the defendants knew this; every officer and man in the German Army who handled the order knew it too. The defendants passed it down to their subordinates, and as a result many murders were committed by troops under their command.

The mere passing down of this order was a criminal act; the defendant Raeder was convicted by the International Military Tribunal of having committed war crimes largely because he passed the Commando Order "down through the chain of command".¹ Military Tribunal V, in the *Hostage Case (Case No. 7, Tr. pp. 10509-10510)*, convicted Rendulic of passing down the Commissar Order, although there was no proof in the record in that case that any commissars were shot by the troops of Rendulic's division.²

Tribunal V also convicted von Leyser in connection with the Commissar Order.³ (*Case No. 7, Tr. pp. 10524-10525.*) Von Leyser commanded a division in the defendant Reinhardt's Corps, and three reports by von Leyser's Division showed that his troops had, in fact, shot commissars pursuant to the order. The evidence against the defendants here is infinitely more extensive and compelling than the evidence against von Leyser and, needless to say, their responsibility as army group, army, and corps commanders was far greater than that of divisional commanders such as Rendulic and von Leyser.

These commanders were under an affirmative duty to direct and control their subordinates in such a manner as to prevent violation of the laws of war by troops under their command. The

¹ Trial of the Major War Criminals, *op. cit. supra*, vol. I, p. 317.

² United States *vs.* Wilhelm List, et al., Vol. XI.

³ *Ibid.*

whom they should shoot after capture. Canaris said that a definite obligation of a commander "to control the operations of the members of his command" was discussed at length and firmly recognized by the Supreme Court in the *Yamashita* case,¹ and as was held by Military Tribunal V in the Hostage Case² (*Case No. 7, Tr. p. 10456*):

"Those responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if international law is to be anything more than an ethical code, barren of any practical coercive deterrent."

But the defendants are not accused here only of sins of omission, regardless of how grave an offense their failure to take preventive action, without more, may be. These men participated affirmatively in the commission of these murders by putting the order into the hands of their subordinates. These defendants, or members of their staff, took further steps to insure the execution of the order, by passing down supplementary directives in connection therewith. Their guilt for these crimes has been established beyond any shadow of a doubt, and the crime for which they bear this guilt is the crime of murder.

B. THE "COMMANDO ORDER"

MR. HIGGINS: If Your Honors please.

We turn now to the Commando Order. The events which preceded its issuance were various raids carried out between 19 August and 6 October 1942 by English commando units on Dieppe, the island of Sark, and various installations in Norway. (*516-PS, Pros. Ex. 144.*)

On 7 October a German radio broadcast announced "all terror and sabotage troops of the British and their accomplices who do not act like soldiers but like bandits have in the future to be treated as such by the German troops, and they must be slaughtered ruthlessly in combat wherever they turn up". (*1266-PS, Pros. Ex. 118.*) The next day the defendant Warlimont directed the Legal Department of the OKW, headed by the defendant Lehmann, to draft a formal order. Lehmann's assistant, Dr. Huelle, complied with this request and telephoned the text of a draft back to Warlimont on the same day. (*1266-PS, Pros. Ex. 118.*) Warlimont then sent it to the office of Foreign Counter-intelligence under Admiral Canaris and asked for his comments. Canaris immediately objected to the legal department draft, root and branch. It allowed the troops to determine for themselves

¹ United States Reports, vol. 327, October Term 1945, Nos. 61 and 672.

² United States *vs.* Wilhelm List, et al., Vol. XI.

criterion should be laid down; that the German troops should be restricted in the exercise of this order to commandos who were either in civilian clothing or in German uniform. (1264-PS; Pros. Ex. 119.) Had this modification been adopted, the whole meaning and effect of the order would, of course, have been altered.

But Canaris suggested an even more radical change. The legal department draft provided that commandos who fell into German hands outside of combat should be interrogated immediately and then handed over to the Security Service. Canaris wanted such people to be placed in special confinement after capture, to be reported to the Office Foreign Counterintelligence, and to be tried by court martial. (1264-PS, Pros. Ex. 119.) Canaris also pointed out that reprisals against prisoners of war were absolutely forbidden. (1265-PS, Pros. Ex. 121.)

Lehmann now says that he and Canaris were working hand-in-glove trying to mitigate the effect of this criminal order. It has become fashionable in this trial for the defendants to hide behind Canaris at every turn. The evidence shows that Lehmann's way of working with him was to disagree with the principal objections which Canaris had raised to the legal department draft. Lehmann argued that Section 23c of the Hague Convention, which forbids the killing of an enemy who lays down his arms and surrenders, did not extend to commando troops because "such methods of warfare had not been thought of at the time this article was formulated". (1265-PS, Pros. Ex. 121.) Lehmann also argued that reprisals against prisoners of war were not absolutely prohibited but that they depended on reciprocity. It is also significant that Lehmann never once objected in the course of this extensive correspondence to anything except the criticism and reservations which Canaris had expressed. Almost every sentence in the draft which issued from Lehmann's office on 8 October was subsequently incorporated into the final order.

With the various opinions before him, Warlimont elaborated upon the legal department draft and sent it to Jodl. Warlimont's version was followed almost paragraph by paragraph in the order which Hitler signed on 18 October, although it was further edited by Jodl and Keitel and, to a certain extent, by Hitler himself. There were six paragraphs in the final version. The first paragraph was worded by Hitler, but the argument used there that commando warfare was outside the Geneva Convention originated with Lehmann. The second one was written entirely by Warlimont, and the third was a joint effort in which Hitler, Keitel, and Jodl supplemented and extended what Warlimont proposed. The fourth, again, was solely Warlimont's work.

The illegality of the Commando Order is clear, and has been established by the decision of the IMT and by the opinion in *United States vs. Wilhelm List, et al.* Lehmann himself said on the stand that he considered the order to have been an "inadmissible reprisal" to the extent that it applied to uniformed military personnel. "Graf Leicester hat nicht immer so gesprochen".* His argument concerning the inapplicability of Section 23c of the Hague Convention was concocted for the specific purpose of furnishing an excuse for murdering captured soldiers who were in proper uniform.

After the order had been reedited for the last time and signed by Hitler, Warlimont distributed it to the three branches of the armed forces which in turn passed it on to the field commanders. As was to be expected, it was not long before teletype messages reporting the murders of captured commandos began to pass over Warlimont's desk. He helped formulate the answers which had to be made to the protests subsequently filed by the British. Warlimont began to occupy himself with such matters less than a month after the order had been issued, and continued to busy himself with correspondence concerning the execution of the Commando Order until at least July 1944. After the Allied landing in France, Rundstedt, the Commander in Chief West, requested instructions as to how the Commando Order should be applied. Warlimont answered him by saying that it "remains basically in effect even after the enemy landing in the West." A few days later, a formal order to this effect was drafted by Warlimont's Quartiermeister staff and initialed by him, after which it was signed by Keitel and passed on to the field commanders.

The line taken by those defendants who were field commanders is that the order, even if it was passed on to them, had no application in the East. Hoth, for example, made the sardonic observation that he was fighting in the Steppes south of Stalingrad when he heard the German radio announcement of 7 October, and that he did not anticipate seeing any British commando troops there. Von Roques, whose sense of humor did not rise to this pitch, owlishly stated that for his part he did not consider the Commando Order to be applicable because it referred only to Europe and Africa, whereas he was in Asia at the time he received it. (*Tr. p. 5350.*)

To a certain extent, we agree that the order did not have the same effect in Russia that it had in the West. The reason that it did not bring about a radical innovation in the treatment of captured prisoners of war in Russia is that too long before it was

* "Graf Leicester hat nicht immer so gesprochen (Lord Leicester hath not always spoken thus)." Act II "Maria Stuart," by Friedrich von Schiller. See further reference to this quotation in section F 6, closing brief for defendant Lehmann.

issued the German troops had been shooting captured paratroopers and members of sabotage units. These classes of troops, and are included regularly on the Security Service lists of liquidated persons. (NOKW-2747, *Pros. Ex. 752*.) This was done by virtue of other orders which had been issued from the outset of the Russian campaign. (NOKW-2626, *Pros. Ex. 249*.)

But the evidence shows that it is certainly not correct to say that the order was only of academic interest to field commanders in the East. For example, an entry in the war diary of Reinhardt's 3d Panzer Army for 18 November 1942—exactly one month after the Commando Order was issued—reads (NOKW-3482, *Pros. Rebuttal Ex. 46*):

“Various difficulties have arisen concerning the execution of the Fuehrer Order of 21 October relative to the shooting of terrorists and groups of bandits. The Panzer army asks the army group to clarify, above all, whether this order merely concerns British terror groups or whether it also applies to the other bands in the occupied area. In this connection, the army takes the attitude that, until a new OKW decree is published, which is in prospect, all bandits are to be shot to death even if they wear uniforms.”

The order issued by the 3d Panzer Army the next day provided (NOKW-3358, *Pros. Rebuttal Ex. 40*):*

“Until intended new regulations of OKW are published, bandits who surrender voluntarily without being forced by other circumstances, will be treated as prisoners of war. All other bandits, including the uniformed ones, will be shot.”

Similarly, on 29 October, (NOKW-2746, *Pros. Ex. 748*), the chief of staff of Salmuth's Second Army asked the army group to “clarify”, in connection with the Commando Order, whether the German troops were required to massacre all deserters from partisan units who surrendered. These examples are sufficient to show the participation of the defendants in carrying out this order and, incidentally, to explode the contention that it had no relation to the war in Russia.

We have thus gone further in our proof than we needed to go. It was not necessary to show that the Commando Order was carried out in order to show the commission of a crime. The mere transmittal of such an order to subordinate units is sufficient, as was held in the cases of Raeder and Rendulic, mentioned above in connection with the Commissar Order. This was done by the defendants von Kuechler, Reinhardt, von Salmuth, and Reinecke. They are all guiltier than was Doenitz, who was convicted by the IMT because he “permitted the order to remain in full force when he became commander in chief, and to that extent he is respon-

* Document reproduced in section VII C-4.

sible".¹ Warlimont and Lehmann, of course, as the draftsmen of the Commando Order, are criminally responsible for all the murders committed thereunder, whether in the East or in the West.

C. OTHER CRIMES AGAINST PRISONERS OF WAR

Paragraphs 50 to 57 of count two of the indictment charge all the defendants except Schniewind with other crimes against prisoners of war. An abundance of evidence has been introduced in support of these charges. It will be summarized with respect to each individual defendant in our briefs, and we will limit ourselves here to a very few brief observations.

The defendants have relied heavily on the circumstances that the Soviet Union was not a party to the Geneva Convention with respect to the treatment of prisoners of war, but it is well settled—and was so held by the IMT—that the general principles of international law with respect to the treatment of prisoners of war were applicable as between Germany and the Soviet Union. The German High Command was fully aware of this, and Admiral Canaris of the OKW set forth this viewpoint in a memorandum of 15 September 1941, protesting against proposed regulations for the treatment of Soviet prisoners.² Under these well-established principles, war captivity is not a "punishment," and prisoners of war are not fit objects for revenge or reprisals. They must not be subjected to dangerous employment, nor required to work against the interests of their own country by being forced to engage in any type of labor directly related to war operations.

There are many documents in evidence showing that Russian prisoners of war were regularly employed to clear mines. The reason given in one of the orders which required this was that the use of prisoners of war for this purpose was "to spare German blood". (NOKW-1527, *Pros. Ex. 180*; NOKW-2251, *Pros. Ex. 187*). Another ingenious practice which was engaged in was billeting prisoners of war in buildings which the Germans were to occupy if it was suspected that they might contain mines or booby traps. (NOKW-2357, *Pros. Ex. 188*; NOKW-3337, *Pros. Rebuttal Ex. 3.*)

Another regular occupation of these prisoners of war was to engage in the loading and unloading and transportation of munitions. (NOKW-2966, *Pros. Ex. 1346.*) From time to time, as could be expected, these prisoners of war were killed while so employed. (NOKW-1941, *Pros. Ex. 208.*) But the object of the order which committed them to this work was carried out: German blood was spared.

¹ Trial of the Major War Criminals, *op. cit. supra*, vol. I, p. 314.

² *Ibid.*, p. 232.

The most widespread use of prisoners of war was made in the course of constructing fortifications. There is hardly a field commander in the dock whose troops did not use prisoners of war to construct trenches, antitank ditches and field positions of various kinds. Von Salmuth did it in France just as Hoth did it in Russia.

Without trying to make this catalogue more complete, we pass on to a related topic—the general murder and ill-treatment of prisoners of war. It is clear from the reports and orders in evidence here that the German Army followed a consistent policy of shooting all Soviet prisoners of war who had attempted to escape and had been recaptured. But it is well settled under the laws of war that it is not a criminal offense for a prisoner of war to attempt to escape and that, if he is recaptured, he is only to be subjected to such disciplinary measures as security and the prevention of further attempts may require. The execution of a prisoner of war merely because he has attempted to escape and been recaptured is strictly prohibited by the laws of war, and is murder.* And the record in this case contains a multitude of reports which follow one another in an endless procession showing that Soviet prisoners of war who had escaped from confinement were shot as soon as they were retaken.

The treatment which Russian prisoners of war habitually received while in German custody is one of the most appalling parts of this appalling case. In connection with the Commissar Order, we have already mentioned that the inmates in the prisoner of war cages were screened for the purpose of removing those of them who fell within the meaning of that lethal ordinance. But the screening process went much further. All the prisoners of war were put into one of several classifications. Into the first of these three classifications fell ethnic Germans, Ukrainians, and natives of the three Baltic countries. Into the second fell Asiatics, Jews, and German-speaking Russians. The third category consisted of persons classified as “politically intolerable and suspicious elements, commissars and agitators”.

Theoretically, the treatment was to vary according to the classification. The first group was earmarked for service as auxiliaries of the German Army and, sometimes, even as combat troops; the third group was considered as temporary boarders who were to survive only until firing squads could be organized. The Jews were taken care of by the extermination squads of the Einsatzgruppen, and the remainder was scheduled to be shipped to Germany to work in the armament industry or to operate anti-aircraft guns.

* The general principles governing escaped prisoners of war are set out in sections 50 to 54 of the Geneva Convention.

These were the eventual fates which the German authorities had in mind, but before any given prisoner of war could fulfill this destiny, he had to contrive to stay alive long enough for the plans of his captors to be carried out. This was no mean feat. It will never be known how many millions of Russian prisoners of war died in the Dulags [transit PW camps] and Stalags [permanent PW camps] within the jurisdiction of these defendants. The Oberquartiermeister of von Kuechler's Eighteenth Army said in November 1941, that 100 men were dying daily within the army area. A little later it was disclosed that all the inmates of one camp there were expected to die within 6 months at the outside. At about the same time the Oberquartiermeister of Hoth's Seventeenth Army reported that deaths among prisoners of war within his jurisdiction were approximately 1 percent a day. Rosenberg wrote Keitel in February 1942 that "the fate of the Soviet prisoners of war in Germany is a tragedy of the greatest extent. Of 3.6 millions of prisoners of war, only several hundred thousands are still fully able to work."

What we have said about the illegal use of prisoners of war for labor, and about the care and treatment furnished them while they were in German custody applies primarily to what took place in the operational area while these prisoners were still under the control of the field commanders. The story of what happened to those of them who survived long enough to be shipped to Germany is a history in itself. The food which they received after they had arrived in the Reich was still inadequate to sustain life, particularly when these sick and half-starved prisoners were allocated to work which demanded strenuous physical exertion. We have mentioned that thousands of Russian prisoners of war were drafted to man anti-aircraft batteries: the Court will remember the testimony of the witness Erhard Milch¹ in this connection. Thousands of others were assigned to work in various armament plants in Germany. These included not only Russians, but French prisoners of war and Italian military internees as well. A description of the conditions under which some of these men were kept can be found in the judgment of Tribunal III in the Krupp Case.² The man most responsible for the plight of prisoners of war in Germany was the defendant Reinecke. In almost every war crimes case where the question of starvation, ill-treatment, and illegal use of prisoners of war has been an issue, Reinecke's name has played a prominent part. The number of victims of the system which he established and administered is incalculable. As has

¹ Defendant in the case of *United States vs. Erhard Milch*, Case 2, vol. II, this series. Erhard Milch testified as a defense witness in this case. Complete testimony is recorded in mimeographed transcript, 17, 18 June 1948, pp. 6119-6189.

² *United States vs. Alfried Krupp, et al.*, Case No. 10, Vol. IX.

already been shown, he knew fully and precisely from the very outset the extent to which he was disregarding international law. His guilt is enormous.

In general, there are three excuses offered by the defendants for having allowed this calamity to take place. The first is that the reports are either exaggerated or false. It is enough to say in reply to this that the gruesome uniformity which is to be found in every document relating to the physical condition of Russian prisoners of war, no matter what the source or authorship of the document, excludes the possibility of either falsehood or exaggeration.

The second defense is that the condition of these prisoners of war was partly self-inflicted. The argument goes this way: the Germans surrounded large groups of Russian soldiers during the early months of the campaign. If these Russians had been reasonable, they would have surrendered as quickly as they found that they were cut off. Instead, they obstinately persevered in resisting until their food, water, and ammunition supplies were exhausted. Therefore, they were in a somewhat debilitated condition when they first came into German hands. It follows that the Germans are not to be blamed if they died by the millions later on.

Apart from the fact that this argument is inconsistent with the contention that the reports are either fictitious or inaccurate, it is ridiculous to say that because a man is hungry and ragged, when he becomes your prisoner of war you have the right to allow him to die of malnutrition or to freeze to death. We know of no requirement in international law or anywhere else that soldiers, upon surrendering, must bring along their own housing and cooking facilities.

The third and last defense consists of a kind of shell game in which the pea represents responsibility for the care and treatment of prisoners of war. Von Leeb, the Army Group Commander, wants to say that this lay entirely with his army commanders and with the Commander of the Rear Area of the Army Group. The army commanders want to say that the responsibility fell on the commandant of prisoners of war, although Hoth testified candidly that his Oberquartiermeister dealt with prisoner of war affairs and that he, as commander of an army, was responsible for taking care of the prisoners of war in his area; the documents show conclusively that, within the operational area, the army groups and armies exercised complete control over prisoner of war affairs.

D. DEPORTATION AND ENSLAVEMENT

Paragraphs 64 to 68 of count three of the indictment charge the defendants with war crimes and crimes against humanity against

the populations of occupied countries, including the deportation of the inhabitants to forced labor in the Reich, the forced labor of the inhabitants on field fortifications and for mine clearance, the plunder of private and public property, and wanton destruction and devastation. We shall leave most of these matters to presentation in our briefs, and will deal here only with the responsibility of the defendants for the deportation of millions of civilians to forced labor in Germany.

When Germany commenced to reach the bottom of her manpower barrel, the scheme was initiated to make wholesale transfers of workers from occupied territory to the Reich for use in the armaments and munitions industries. This over-all plan was implemented in various ways. At first, drives were put on to encourage foreign workers to volunteer for labor service in Germany. The response to this was so feeble that machinery was set in motion to substitute force for persuasion. In the West, the "Sauckel Action" was instituted in the spring of 1942. The result of this was, as Tribunal III stated in the Krupp Case* [judgment] (*Case No. 10, Tr. pp. 13327-13328*):

"Wholesale manhunts were conducted and able-bodied men were shipped to Germany as 'convicts' without having been charged or convicted of any offense. Many were confined in penal camps for 3 months during which time they were required to work for industrial plants. If their conduct met with approval they were graduated to the status of so-called 'free' labor. This was a misnomer, as they were detained under compulsion."

The record shows that the defendant Sperrle, who was commander of all German Air Force units in the West and also served as Commander in Chief West during Rundstedt's absence, cooperated with the agencies of Sauckel's Labor Mobilization Program. Sauckel himself told Milch at a meeting of the Central Planning Board that Sperrle had been most obliging in this respect. On another occasion, Sperrle sent a basic order which directed that German agencies in northern France and Belgium were not to recruit laborers on their own initiative, as this practice interfered with the Sauckel Action.

A different procedure was used for impressing and deporting civilian workers in the east. There the agency which was primarily charged with the task of obtaining the labor which Germany needed was the Economic Staff East, which operated as part of Goering's Four Year Plan. The defendants attempt to disclaim all responsibility for what was done by this organization. But this disclaimer is contrary to the evidence of what actually hap-

* Ibid.

pened. An Economic Inspector was with each army group staff. Attached to the staff of each army was an economic leader. Economic offices which belong to the organization were also to be found with the army group rear area, the Security Divisions and the Feldkommandanturen. In other words, every agency of the German Ground Forces from the army group area to the front line troops was riddled with representatives of Economic Staff East.

As an example of the part which the army played in the implementing and execution of the slave labor program, a brief narrative of the evidence relating to the defendant Reinhardt will be illuminating. On the witness stand, he testified that the first time he or the staff of his 3d Panzer Army were involved in the drafting of workers to be shipped to Germany, was in July 1943. The downright untruth of this statement cannot be demonstrated better than by the contents of two documents, both issued in November 1942. The first is an order which was signed by Reinhardt himself in which he announced that (*NOKW-3539, Pros. Rebuttal Ex. 39*):

“The Fuehrer has charged Gauletier Sauckel with the direction of the entire labor allocation program reaching into the zone of operations. An intelligent cooperation of the military agencies with the departments of labor allocation administration must make it possible to mobilize the work capacity of the entire able-bodied population. If success cannot be achieved in any other way, coercive measures must now be applied to recruit the required labor for allocation in the Reich.”

The report of a Secret Field Police group to the 3d Panzer Army 3 weeks later stated the following (*NOKW-684, Pros. Ex. 719*):

“Jefim Charitonow * * * with his three juvenile children, made his way to the partisans, although the children objected; he was arrested on his way.

He was shot on 22 October. The three children were sent to Germany to work.”

An order issued by the headquarters of one of Reinhardt's subordinate corps on 2 June 1943, contains the following (*NOKW-2100, Pros. Ex. 471*):

“The drafted labor forces will attempt to dodge the labor allocation with every means at their disposal * * *. All men and women are to be instructed that they will be shot at any attempt to flee * * *. The labor camps with the divisions must be surrounded by barbed wire and remain under constant supervision.”

In July 1943, Reinhardt drafted and published a proclamation to the inhabitants of the territory occupied by his troops, which provided (NOKW-2340, *Pros. Ex. 484*) :

“All persons of the age group 1925 have to serve their compulsory labor term in the Reich territory, with the exception of those who are employed as voluntary helpers, with indigenous units, or with the indigenous police service.”

* * * * *

“Whoever tries to evade his service obligation will be severely punished. The same also applies to persons who harbor anyone liable to service or in any way help him (her) in his attempts to evade the service obligations, or strengthen him in his intent to evade his duty. Moreover, in place of the person liable for service who has not appeared, his next of kin may be drafted for labor allocation in the Reich, regardless of the personal circumstances.”

On 23 July, the minutes of a meeting held at the headquarters of the 3d Panzer Army noted that one reason for the difficulty in apprehending inhabitants for labor commitment was the large quota which had been imposed on the army, to wit, “a thousand Eastern workers per week for the Reich”. One cure which was proposed for attempted evasion of service in Germany was that members of the families of persons who had escaped were to be apprehended “regardless of personal situation” and substituted for the escapees. (NOKW-2473, *Pros. Ex. 487*.)

On 26 July the 3d Panzer Army made a report to Army Group Center, concerning the recruitment of Eastern workers. The introductory sentence reads, “The population rejects labor allocation in the Reich”. One of the measures suggested to overcome this resistance was the following (NOKW-2454, *Pros. Ex. 489*) :

“Persons apprehended by force, after attempts to evade this draft, at first will be sent to penal camps which must be run along strict lines.”

It was also mentioned that the age group 1926 had to be drafted as well as the members of the 1925 class.

This is an appropriate place to mention the testimony of one of Reinhardt's witnesses, who said that Reinhardt demonstrated his objection to these orders. He was asked how he demonstrated it. The answer was: by assuring the population that only members of the 1925 age group were affected, and that the rest of the population need not be apprehensive about this program. Apparently the witness had reference to the proclamation which was mentioned a moment ago. (*Tr. p. 3844*.) The value of Rein-

hardt's reassurance as a soothing syrup must have been somewhat diminished when he added, within less than a month, still another age group to the list. The documents show that the quota of a thousand workers a week, which had been assigned to the 3d Panzer Army, was being met by the middle of August (NOKW-2570, *Pros. Ex. 492*).

Reinhardt's army group headquarters continued to issue orders providing for the shipment of workers to Germany. One such order, involving approximately 100,000 persons, is dated November 1944. (NOKW-2931, *Pros. Ex. 1279*.) Reinhardt's principal defense on this issue almost takes us into the realm of metaphysics. He and his witnesses admit that a compulsory labor service program was instituted by the army, but they say that no force was used. How such a program could be compulsory without the use of force is indeed difficult to understand. Perhaps, the misunderstanding lies in the meaning of the word force. We associate shootings, severe punishments, and barbed wire enclosures with force. Apparently Reinhardt does not.

E. MURDER AND ILL-TREATMENT OF CIVILIAN POPULATIONS—THE EINSATZGRUPPEN.

DR. HORLIK-HOCHWALD: Repression and ill-treatment of the civilian populations of the occupied countries was not limited to deportation and enslavement of their persons and plunder and destruction of their property. Grave as these crimes were, there were others which were even more savage. Thousands upon thousands of civilians were illegally spirited away and imprisoned or murdered, pursuant to the notorious "Nacht und Nebel" [Night and Fog] Decree formulated by Warlimont and Lehmann. A stupid and brutal policy for the suppression of resistance by the indiscriminate slaughter of hostages characterized the German occupation almost everywhere. But the darkest blot on the record of the German Army and of these defendants is their participation in the slaughter of millions of Jews, gypsies, and political officials in the Eastern Occupied Territories. And we will conclude our discussion of the evidence today with a brief analysis of the responsibility of these defendants for the millions of murders committed by the Einsatzgruppen of the Security Police and SD [Security Service]—a program of murder which was described by Military Tribunal II [judgment] as "beyond the experience of normal man and the range of man-made phenomena*". (Case No. 9, *Tr. p. 6648*.)

All the defendants have emphatically denied any knowledge of the extermination mission of these units and of criminal acts

* United States vs. Otto Ohlendorf, et al., Vol. IV.

perpetrated by the SD. If they learned at all that Communists, Jews, and other so-called "undesirables" were being killed, then the rumors which came to their ears concerned only events which had happened somewhere far in the rear, in territories under civil administration. And they were never able to put their fingers on the sources of these rumors, or to evaluate their credibility. They never dreamed that the Einsatzgruppen of the SD were in any way concerned with such "excesses". In each and every case, it was the indigenous population which spontaneously killed Communists and Jews.

But, at the same time that this strange phenomena was transpiring, all these defendants, witnesses and affiants who professed complete ignorance of the "illegal" activities of the SD units, displayed detailed and accurate knowledge of what they called the "legal" tasks of the Einsatzgruppen, such as security tasks, appraising the political situation, and participating in antipartisan combat. That these security tasks embraced the extermination of those races and classes which might endanger or only inconvenience the future of Hitler's thousand-year Reich, escaped their attention somehow.

The laws and customs of war provide for *military* authority over the territory of the hostile state.¹ Territories are considered occupied according to these laws when it is actually placed under the authority of the hostile *army*. The occupation extends only to the territory where such authority has been established and can be exercised.² The military authority is obligated to ensure public order and safety³ and to respect family honor and rights and the lives of persons.⁴ Tribunal V in the "Hostage" Case [judgment] has given full recognition to this principle⁵ (*Case No. 7, Tr. pp. 10455-10456*):

"The commanding general of occupied territory having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself, was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime

¹ Annex to Hague Convention, sec. III, art. 42-56.

² *Ibid.*, art. 42.

³ *Ibid.*, art. 43.

⁴ *Ibid.*, art. 46.

⁵ *United States vs. Wilhelm List, et al., Vol. XI.*

rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense.”

As holders of executive power and commanders in their areas, the defendants were the highest authorities. Thus, they bear full responsibility for all criminal acts against civilians which were carried out by anyone for the time when they were in command of these areas. The testimony of the witness Ohlendorf is noteworthy. Ohlendorf was condemned to death in this very building, but the Tribunal which found him guilty of mass murder paid high praise to his truthfulness.¹ (*Case No. 9, Tr. p. 6787.*) When asked if the liquidation of Jews, Communists, and other “undesirables” was carried out with the authorization of the army authorities, Ohlendorf stated:

“I believe that the very fact that the armed forces itself issued requests and directives for these executions and gave their support for the carrying out of these executions is sufficient proof for their consent without having to add one other word. Such demands were repeatedly made with respect to mentally insane, but these could be rejected by me because the instructions issued to me made it possible for me to reject the requests of the armed forces. However, with respect to the demand to liquidate Jews in Simferopol at the beginning of September 1941, I had to comply with the instruction because I had no argument to counter it. In order to carry out this liquidation, which transcended our possibilities, the army afforded to us all necessities in factual and practical respects. For the rest, the army knew about liquidation of Jews earlier than I did myself, since at the beginning of the Russian commitment I, myself, had been eliminated from work with the army for at least 4 weeks, and the army commanded the Einsatzkommandos directly while I was left in Rumania. According to army instructions, these Einsatzkommandos reported directly to the army about the liquidation of Jews such as took place, for instance, in Chernovitsy. I myself didn't even get a copy of these reports.”

In view of the authority exercised and responsibilities borne by these defendants, it is not, strictly speaking, necessary to establish that they had actual knowledge of the Einsatzgruppen. As Tribunal V held in the Hostage Case², (*Case No. 7, Tr. p. 10461*) “An army commander will not * * * ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein”. But the contention that

¹ United States vs. Otto Ohlendorf, et al., Vol. IV.

² United States vs. Wilhelm List, et al., Vol. XI.

the activities of these gangs of murderers who were fed and housed by the army and would have been helpless without the army support were unknown to the army commanders, and that these killings of millions took place without their knowledge is a palpable and grotesque fabrication. As the defendant von Leeb himself testified (*Tr. p. 2364*): "Every military commander at the front is highly interested that in his battle area, and in the rear of his battle area, peace and quiet, and law and order prevails among the civilian population". The defense witness Halder was "firmly convinced" that the slaughter of Jews "certainly provoked indignation among parts of the Russian civilian population", and agreed that "it would not be unreasonable for a commander in chief to take the position that the activities of the Einsatzgruppen in executing substantial parts of the population was a threat to his security and to his operations". (*Tr. p. 2107.*) The defendant von Roques testified that it was his duty as Commander of the Army Group Rear Area to safeguard the lines of communication and supply, and to insure military security in his area. (*Tr. pp. 5142-5144.*) That is why Security Divisions were stationed in the rear area to patrol the roads and railways, and why the Feldkommandanturen and Ortskommandanturen were established in the towns and villages. As the record abundantly shows, the area behind the front line was not a desert where one could wander to and fro unchallenged, but rather a veritable maze of rear headquarters, command posts, prisoner-of-war stockades, airfields, ammunition and gasoline dumps, supply depots, hospitals, motor pools, and security and communication units that made it possible for the front line troops to engage in combat. That is why the army carried on counterintelligence activities in the occupied area, and why intelligence reports were regularly submitted to the headquarters of these defendants telling them what was going on behind the lines. The Secret Field Police, the Security Divisions, and many other units were in constant and close touch with the civilian population. Men, women, and children cannot be wrenched from their homes and snatched off the streets by the hundreds of thousands and led away to slaughter and burial in a common grave, without the knowledge of their relatives, friends, and neighbors, or without lamentation, outcries, and bitter protests. The bare suggestion that the Einsatzgruppen flitted through Russia, murdering Jews and other "undesirables" by the millions, but secretly and unbeknown to the army, is utterly preposterous—the desperate sparing of men who have no recourse but to say what is not true.

This evidence is compelling as to all the defendants and it is almost a work of supererogation to press the question further.

But the defendants did not have to depend for their information on what they could so plainly see and hear going on about them. Let us briefly examine some of the documentary evidence with respect to three of the defendants—von Leeb, von Roques and Woehler.

1. VON LEEB

The order concerning the employment of the *Einsatzgruppen* in the operational area was distributed to Leeb's headquarters on 28 April 1941. On 8 June came the Commissar Order directing the execution of civilian commissars and commissars attached to the troops. (*NOKW-1076, Pros. Ex. 57.*) This order expressly stated that commissars arrested in the rear area of the army group "on account of doubtful behavior" were to be handed over to the *Einsatzgruppen* or *Einsatzkommandos* of the Security Police and SD. On 24 July, the first of two criminal orders on segregation of prisoners of war and civilians in camps and the execution of "politically untenable and suspicious elements: commissars and agitators found among them" was issued to von Leeb's headquarters. (*NOKW-2423, Pros. Ex. 244.*) It also provided that "suspicious civilians" in the army group rear area would be turned over to the *Einsatzgruppen* and *Einsatzkommandos* of the Security Police and SD. The order of 7 October 1941, received by von Leeb's headquarters, altered the segregation procedure by providing that it was henceforth to be done in the rear area of the army group by *Sonderkommandos* of the Security Police and SD rather than by army units. I quote from it (*NO-3422, Pros. Ex. 367*):

"In agreement with the commanding officers of the rear army group area (district commanders for prisoners of war), the operations of the *Sonderkommandos* have to be regulated in such a way that the segregation is effected as unobtrusively as possible and that the liquidations are carried out without delay and at such a distance from transient camps and villages as to insure their not becoming known to the other prisoners of war and to the population."

One need not be a field marshal to understand these orders. Any semi-literate person who received any one of these three orders would very well know that the *Einsatzgruppen* were murder squads. Von Leeb's headquarters received all of them. Von Leeb does not deny this. He merely says that he does not recall reading them or doing anything about them. Far from being von Leeb's salvation, it is his condemnation.

A tabulation of the number of executions by *Einsatzgruppe A*, attached to von Leeb's Army Group, shows that, from the begin-

ning of the Russian campaign to 15 October 1941, 135,567 persons were murdered, all but a few thousand of whom were Jews. (*L-180, Pros. Ex. 956.*) The vast majority of these murders took place in Lithuania, Latvia, and Estonia, which were within the operational area of Army Group North during part or all of the afore-mentioned period. Estonia, where 1,158 were killed, was always within the operational area of Army Group North, as shown by the operational maps in evidence. The Reich Commissariat was established in Estonia on 5 December 1941, but von Leeb conceded that the Commander of the Rear Area of Army Group North still had military functions and powers after that date. (*Tr. pp. 2514-2515.*)

Von Leeb tried to shift substantially all of the murders by Einsatzgruppe A into the area of the Reich Commissariat Ostland. He testified that Einsatzgruppe A had no connection to the armed forces, that its crimes were never reported to the armed forces, and that they occurred hundreds of kilometers away from the front.

All of this is clearly refuted by the report of Stahlecker, commander of Einsatzgruppe A, as well as numerous other documents. The murderous activities began during the first days of the campaign in active and close collaboration with von Leeb's immediate subordinates. Stahlecker said (*L-180, Pros. Ex. 956*):

"Einsatzgruppe 'A' after preparing their vehicles for action proceeded to their area of concentration as ordered on 23 June 1941, the second day of the campaign in the East. Army Group North consisting of the 16th and 18th Armies and Panzer Group 4 had left the day before. Our task was to hurriedly establish personal contact with the commanders of the armies and with the commander of the army group rear area. It must be stressed from the beginning that cooperation with the armed forces was generally good, in some cases, for instance with Panzer Group 4 under Gen. Hoepner, it was very close, almost cordial. Misunderstandings which cropped up with some authorities in the first days, were cleared up mainly through personal discussions. At the start of the Eastern Campaign it became obvious with regard to the Security Police that its special work had to be done not only in the rear areas, as was provided for in the original agreements with the High Command of the Army, but also in the combat areas * * *."

The Stahlecker report describes further the horrible massacre at Kovno which was captured by the 16th Army a few days after the campaign opened (*L-180, Pros. Ex. 956*):

“During the first pogrom in the night from 25 to 26 June the Lithuanian partisans did away with more than 1,500 Jews, set fire to several synagogues or destroyed them by other means and burned down a Jewish dwelling district consisting of about 60 houses. During the following nights about 2,300 Jews were made harmless in a similar way. In other parts of Lithuania similar actions followed the example of Kovno, though smaller and also including the Communists who had been left behind.

“Those self-cleansing actions went smoothly because the army authorities who had been informed showed understanding for this procedure. From the beginning it was obvious that only the first days after the occupation would offer the opportunity for carrying out pogroms.”

Thus, army authorities under von Leeb were informed of the planned massacre before it even took place. Von Leeb's own headquarters were located in Kovno 1-10 July. He admits he heard of killings in Kovno while his headquarters were still in East Prussia, but denies any killings while his headquarters were in Kovno. (*Tr. pp. 2513-2514.*) It appears, however, that the murder and persecution of Jews continued during the time von Leeb was in Kovno and thereafter. The report above speaks of pogroms during the nights following 26 June. Another Einsatz report dated 11 July 1941 stated (*NO-2934, Pros. Ex. 922*):

“In Kovno a total of 7,800 Jews have been liquidated up to now, partly through pogroms, partly through shootings by Lithuanian Kommandos. All corpses have been removed. Further mass shootings are no longer possible; I summoned, therefore, a Jewish committee, and explained that up to now we had no reason to interfere with the internal arrangements between the Lithuanians and the Jews * * *.

“Prisons now are being combed through once more, Jews—if special reasons prevail—are being arrested and shot. This will involve executions of a minor nature of 50 to 100 persons only. To prevent Jews from returning to Kovno, an agreement was made with the Higher SS and Police Leader to the effect that the local police draw a cordon around Kovno not allowing any Jews to enter the town. If necessary, Jews will be fired upon. All armed forces agencies were informed about the directives”.

Von Leeb was asked what he did in connection with this wanton slaughter of over 7,500 Jews in an area controlled by his troops. His reply was that he told the 16th Army to prevent any further excesses. (*Tr. p. 2384.*) Assuming the truth of this highly doubtful statement, he caused no investigation to be made,

he had no one brought to justice, he took no effective steps to avoid its repetition. His troops controlled the city, his subordinates knew of and supported the atrocities. They continued while von Leeb was in Kovno. *He did nothing.*

Precisely parallel atrocities took place in Riga shortly following its capture by the 18th Army about 1 July 1941. An Einsatz report, dated 7 July 1941, proves that units of Einsatzgruppe A had entered the city and instigated a pogrom. "All synagogues have been destroyed; 400 Jews have already been liquidated." (NO-2935, Pros. Ex. 958.) It also pointed out that, as a result of the alleged shooting of a German soldier by a Jew, "100 Jews were shot on the very same spot by a Kommando of the Security Police and SD." But this was only the beginning. A report of 16 July 1941 stated (NO-2938, Pros. Ex. 924):

"At Riga, the Einsatzkommando 2 assorted the entire material, searched all offices, arrested the leading Communists as far as they could be found, and, headed by SS Sturmbannfuhrer Barth, conducted in an exemplary manner all actions started against the Jews. Six hundred Communists and 2,000 Jews are under arrest at present. Four hundred Jews were killed during pogroms in Riga, and since the arrival of Einsatzkommando 2, 2,300 by the Latvian auxiliary police and partly by our own men. The prisons will be emptied completely during the next days. Outside of Riga an additional 1,600 Jews were liquidated by the Einsatzkommando 2 within Latvia."

A report of 6 July 1941 establishes the murder of 526 persons by units of Einsatzgruppe A in Gargzdai, Kretinga, and Palanga. "During the three large scale actions, mainly Jews were liquidated. Among the number of executed, however, there were also Bolshevik officials and snipers, some of whom, for this purpose, had been handed over by the armed forces to the Security Police."

Up to 16 July 1941, a unit of Einsatzgruppe A had killed 1,150 Jews in Dvinsk. "The arrested Jewish men are shot without ceremony and interred in already prepared graves * * *." (NO-2938, Pros. Ex. 924.) Between 22-25 July 1941, 229 persons designated as Communist Jews and Jewish women, Russians, Lithuanian Communist functionaries, and a Politruk were murdered by a unit of Einsatzgruppe A in Pagiriai, Kedainia, and Mariyam-pole. (NO-2849, Pros. Ex. 959.)

The mass murders thus far discussed occurred in Lithuania, Latvia, and Estonia between the beginning of the attack on Russia and 25 July 1941. Throughout the whole of this period, the places in which such massacres occurred were under von Leeb's jurisdiction in the operational area of Army Group North—which ex-

tended from the border of the Reich to his front line. The Reich Commissariat Ostland was first established on 25 July 1941 and extended to the Duena River. (*Tr. p. 2516; NOKW-3150, Pros. Ex. 1480; NOKW-3151, Pros. Ex. 1481.*) Most of the cities where the massacres took place were at the time located in the rear area of Army Group North, while Kovno was, for part of the time von Leeb's own headquarters.

When Tartu [Dorpat] and Tallin [Reval] in Estonia were captured by troops of Army Group North, "A Kommando of the Security Police was always with the first army units". (*L-180, Pros. Ex. 956.*) The same report showed that up to 25 October 1941, 474 Jews and 684 Communists had been executed in Estonia. (*L-180, Pros. Ex. 956.*) A report of Einsatzgruppe A covering its activities up to the end of 1941 states, "Today there are no longer any Jews in Estonia." (*2273-PS, Pros. Ex. 957.*)

During the time when these atrocities occurred, Estonia was part of the operational area of Army Group North. (*Tr. p. 2515.*) The cities of Tallin, Tartu, Narva, and Darnu in Estonia were in the rear of Army Group North during the month of October 1941. (*Tr. p. 2521; NOKW-3163, Pros. Ex. 1493.*) Martin Sandberger, a defendant in Case No. 9, was chief of Sonderkommando 1a of Einsatzgruppe A. His conviction and sentence of death in that case was based upon murders committed during 1941, when he was at all times active within the operational area under von Leeb's jurisdiction. Of particular interest is the following finding by Tribunal II in that case* (*Case No. 9, Tr. p. 6819*):

"On 10 September 1941, Sandberger promulgated a general order for the internment of Jews which resulted in the internment of 450 Jews in a concentration camp in Pskov * * *. The Jews were later executed."

Pskov was von Leeb's headquarters prior to September 1941 until he resigned in January 1942. How much greater was the power and responsibility of Field Marshal von Leeb and his commanders of the 16th and 18th Armies, Panzer Group 4, and the rear area of Army Group North than that of the insignificant SS Colonel Sandberger? One might as well liken the "blazing glory of the noon day sun to the tiny flicker of the firefly".

The murderous collaboration between von Leeb's troops and Einsatzgruppe A continued.

The localities mentioned in a series of four reports, covering the period from the middle of October to the end of November and proving the murder of approximately 1,300 persons with the active participation of von Leeb's subordinates, were in the

* United States vs. Otto Ohlendorf, et al., Vol. IV.

very front area of Army Group North as shown by the operational maps in evidence. (*NOKW-3160, Pros. Ex. 1490; NOKW-3165, Pros. Ex. 1495; NOKW-3166, Pros. Ex. 1496*). It should also be pointed out that Sonderkommando 1a under Sandberger or Einsatzgruppe A established an office in Pskov as early as 10 July 1941. (*NO-3401, Pros. Ex. 906*). It was still there on 16 January and during substantially all of that period von Leeb had his headquarters in Pskov. (*NO-3405, Pros. Ex. 901*).

A report of the 281st Security Division of the rear area of Army Group North dated 1 August 1941 states that "200 Communists and Jews from the district of Rezekne [Rositten] were shot in the morning hours by the Latvian Home Guard." (*NOKW-2150, Pros. Ex. 962*.) The slaughter of Jews at Rezekne was repeated 4 days later; the same document reports:

"In the early morning of 5 August, several hundred Jews were shot by the Latvian Home Guard. In order to forestall any misinterpretation the division has established by inquiry of the commanding general that this special operation was ordered and carried out by order of the Security Service.

"The divisional commander presented the facts of the case to the officers on the divisional staff at an officers' conference, and added the grave reminder that every soldier had to abstain from criticism of, and comments on these matters."

The commander of the 281st Security Division knew the slaughter of Jews was official army policy, and put these incidents in his report to higher headquarters, but the field marshal who commanded him testified he didn't know. The city of Rezekne, Latvia, was in the rear area of Army Group North before and after this mass murder, the units of the 281st Security Division were stationed there during that time. (*Tr. pp. 2517-2518*.)

Another example of blissful ignorance is the defendant von Roques. From his headquarters was issued an order which reads (*NOKW-2594, Pros. Ex. 1575*):

"Executive measures against certain parts of the population (in particular against Jews) are expressly reserved to the forces of the Higher SS and Police Leader, especially in those districts which have already been pacified."

On 29 and 30 September 1941 about 34,000 Jews were slaughtered by units of Einsatzgruppe C in Kiev (*NOKW-2129, Pros. Ex. 951*), which was occupied by troops which were subordinate to von Roques. His chief of staff visited the unit which registered these killings on the day after the unprecedented

massacre occurred. Nevertheless, von Roques denies that he ever heard of the killing of the Jews in Kiev from his chief of staff or anyone else. (*Tr. pp. 5492-5493.*)

During the month of August 1941, 44,000 Jews were killed by units of the Higher SS and Police Leader. (*NO-3146, Pros. Ex. 943.*) This dignitary was the representative of the Security Police and the SD in von Roques' area. (*Tr. p. 5294.*) He usually had his headquarters in the same locality as the defendant and frequently dined with him and his officers. (*Tr. p. 5471.*) But, strangely enough, von Roques did not learn what the tasks of this man were. Twenty-three thousand of those 44,000 victims of von Roques' dinner partner were killed in Kamenets Podolsk during 3 days. (*Tr. p. 1145, NO-3154, Pros. Ex. 940.*) On 2 September von Roques' chief of staff had a conference at the headquarters of Army Group South in which the figures "concerning the settlement of the Jewish question in Kamenets Podolsk" were discussed. (*NOKW-1554, Pros. Ex. 938.*)

The Higher SS and Police Leader, however, was in no way as reluctant and secretive as von Roques wants us to believe. A report of his, a copy of which was forwarded to the defendant, states unequivocally that 1,658 Jews had been killed in a mopping-up operation. (*NOKW-1165, Pros. Ex. 81.*) Does it need to be said that by a happy coincidence von Roques never learned about the contents of this report? It should further not be assumed that the Higher SS and Police Leader, having executed 44,000 in August, did not proceed to murder in September. A report of 19 September 1941 reveals that 1,303 Jews, among them 875 Jewesses over 12 years old, were executed by units subordinated to him. The place of the massacre, Berdichev, was at that time the headquarters of von Roques. (*NOKW-3155, Pros. Ex. 1485.*)

On 19 September 1941 the Jewish district Zhitomir was evacuated and all Jews of the place, 3,145 in number, were transported by 12 trucks, which had been placed at the disposal of the Einsatzgruppen by the Feldkommandantur and the city administration of Zhitomir, outside the city limits. The 3,145 Jews were registered and executed. Fifty to sixty pounds of underwear, clothing, etc., were transferred to the National Socialist People's Welfare Organization. This execution was carried out on the basis of decisions which were made at a joint conference between the representative of the Einsatzkommando and the Feldkommandantur. There it was decided "to liquidate the Jews of Zhitomir completely and radically". (*NO-3140, Pros. Ex. 945.*) Zhitomir at that time was located in the rear area of Army Group South, thus the Feldkommandant by whom these killings were approved was subordinate to von Roques. (*Tr. p.*

5487; NOKW-3152, *Pros. Ex. 1482*; NOKW-3159, *Pros. Ex. 1489*.)

Von Roques' own witness admitted having watched an incident at the very outbreak of the war, when the Jews of Dobromil were herded together in the market square by the SD, and the Ukrainian militia. This happened in the immediate vicinity of the defendant's headquarters. Officers of von Roques' staff were present and observed this incident. (*Tr. p. 8944*.) The witness was under the impression that the defendant suffered a mental shock as a result of this experience. (*Tr. p. 8927*.) One of the incidental effects must have been amnesia, as von Roques maintains that he never learned about the task of the SD.

When approximately 90,000 Jews were murdered by units of Einsatzgruppe D (*NO-3359, Pros. Ex. 914*), Woehler was chief of staff of the 11th Army. In his capacity as chief of staff, he wielded no executive power, but had command authority over the members of the staff. These officers collaborated closely with Einsatzgruppe D.

Ohlendorf testified, as a witness for Woehler, that the orders for the commitment of Einsatzgruppe D and its subordinate units were issued by the defendant. Woehler's immediate subordinates, the intelligence and counterintelligence officers, had complete knowledge of the extermination task of the Einsatzgruppen and worked with them every day.

Woehler asked Ohlendorf to turn over to the army all watches obtained from "actions" against Jews (*NOKW-631, Pros. Ex. 568*), and when Ohlendorf complied with this request and reported that a further shipment of watches from the "drive against Jews" could be made available to the 11th Army if they were needed, Woehler answered with an emphatic "yes". (*NOKW-3238, Pros. Ex. 1606*.)

Woehler's defense is that he was of the opinion that these watches were obtained from Jews who had been "resettled". There is an answer in the record to the question of what such "resettlement" meant. There are many documents in evidence where a word in connection with the treatment of Jews is crossed out and replaced by the word, resettlement. One of these reports bears clear proof what the original word was. It reads (*NOKW-1628, Pros. Ex. 891*):

"The (original word is crossed out and replaced by the handwritten word 'resettlement') of the Jews, numbering about 2,500, was carried out on 1, 2, and 3 December. Subsequent executions are to be expected since part of the Jewish population fled, is hiding, and has to be apprehended first."

Woehler received reports which stated that the indigenous population was liberated "from the Communists and Jews who had remained behind" (*NOKW-3236, Pros. Ex. 1607*); that Sonderkommando 11a, a subunit of Einsatzgruppe D, was "straightening out the Jewish question" in Nikolaev (*NOKW-3234, Pros. Ex. 1609*), and that the "Crimea was free of Jews" (*NOKW-628, Pros. Ex. 916*).

On 3 July 1941, the defendant issued an order that an Einsatzkommando of the Security Police should proceed to Beltsy. (*NOKW-3453, Pros. Ex. 1605*). This Einsatzkommando promptly killed the Jewish council of elders and 45 other Jews there. It further directed the Rumanian police to shoot an unidentified number of Jews. (*NO-2952, Pros. Ex. 928*).

On 9 July, an Einsatzkommando of Einsatzgruppe D reported through the 11th Army (*NOKW-3453, Pros. Ex. 1605*):

"On the basis of available wanted lists and newly compiled records, on the 7th of this month the arrest of Jews and Communists began. On the 8th of this month a large scale operation was conducted in the course of which it was possible to catch all the leading Jewish elements with only a few exceptions. On the following day about 100 Jewish Communists were shot by the Kommando. Counting also the executions of Jews carried out by the Rumanian Armed Forces and police, a total of over 500 Jews were shot in the course of the 8th and 9th of this month. A detachment was sent to Hotin to screen that place."

Woehler's counterintelligence officer received and copied the report.

Woehler himself ordered the Einsatzkommando to remain in Chernovitsy. 3,105 Jews and 34 Communists were liquidated in this place by the Einsatzkommando. (*NO-2837, Pros. Ex. 858*.)

On 4 August 1941, Einsatzgruppe D reported to the 11th Army that 68 Jews and a number of Jewish hostages had been shot by Sonderkommando 11a in Kishinev. Woehler read this report. (*NOKW-3233, Pros. Ex. 1594*). He previously had sent the Sonderkommando to Kishinev with the order to seize Jews and politically undesirable elements. (*NOKW-3557, Pros. Rebuttal Ex. 113*). On the same day Woehler received a report that in Kodyma 97 Jews had been executed by a unit of Einsatzgruppe D. (*NOKW-3237, Pros. Ex. 1595*). These Jews had been shot with the approval of the defendant von Salmuth by an execution squad consisting of 12 members of Einsatzkommando 10a and of 24 soldiers who belonged to units subordinated to von Salmuth (*NOKW-586, Pros. Ex. 741*). Von Salmuth in turn was subordinated to the 11th Army.

On 14 November 1941, the Ortskommandantur of Simferopol reported to the rear area of the 11th Army that "the 10,000 Jews remaining are being executed by the SD". (*NOKW-1573, Pros. Ex. 883*). At that time Woehler's headquarters was 15 to 20 miles away from Simferopol. (*Tr. p. 6054.*) The Oberquartiermeister of the 11th Army, Woehler's direct subordinate, was located in the city itself. Nevertheless, Woehler wants the Tribunal to believe that he never heard of the killing of Jews in the area of the 11th Army. Einsatzgruppe D reported on the 12th of December 1941 from Simferopol (*NO-2828, Pros. Ex. 893*):

"Shootings, 2,910 more Jews and 19 Communist officials were shot after summary proceedings. Thus the sum total of executions has risen to 54,696."

The final answer to this contention of all the defendants was given by a young medical officer, the witness Dr. Fruechte (*Tr. pp. 9115-9117*):

"For every officer and for every enlisted man it was, at that time, a matter of course that every Jew was shot. This subject was discussed with almost everybody with whom one talked for more than three minutes. At least it was brought up, and I have not talked to anyone who said, 'That is completely new to me. I don't know anything about it. What are you telling me'. It was a completed fact for everybody."

If Your Honors please, General Taylor will read the conclusion.

GENERAL TAYLOR: This concludes our discussion of the evidence under the charges of the indictment. Many serious accusations have not been dealt with: the "Nacht und Nebel" Decree formulated by Lehmann; the orders and practices for the execution of hostages which played such a large part in the Hostage Case*; the plunder of property and the wanton destruction and devastation of towns and villages; the forced labor of women and children on trenches and fortifications under the most rigorous conditions of work; and the conduct of von Leeb and von Kuechler outside Leningrad. We have endeavored to select material for discussion today with respect to which defenses have been raised which are common to several or all of the defendants, in the belief that such a selection would be most helpful to an appraisal of the case as a whole.

In conclusion, we would like to deal briefly with the question of mitigation. In some instances, the defendants were acting in accordance with orders or decrees issued by superior military authorities, and Control Council Law No. 10, like the London

* United States vs. Wilhelm List, et al., Case No. 7, this volume.

Charter, provides that such a circumstance "may be considered in mitigation".* In the cases of Keitel and Jodl, the International Military Tribunal was unable to find any circumstances which could be considered in mitigation. Are the principal defendants in this case in any better situation?

In his opening statement on behalf of the defendant von Leeb, his counsel declared that these defendants were "unprepared for the means with which Hitler fought", that they "were not equal to or able to cope with his demoniac personality", and that "it was too late when they recognized the true nature of this man". (*Tr. p. 1761.*) Assuming the truth of these observations, do they indeed constitute a true measure of the defendant's guilt? Should these circumstances be allowed to mitigate responsibility for this most terrible of all wars, for the overrunning of harmless neutral neighbors, and for the countless deaths of commandos, commissars, Jews, and other victims whose miserable fate the evidence of this case has unfolded?

Again, the defense tells us repeatedly that these men were caught up in an impossible situation which allowed of no solution whatsoever; as Dr. Laternser put it, "it has been their fate to arrive at situations and in particular to be brought into situations by the leadership for which, even today, the prosecution cannot suggest an escape that might have been open at the time." (*Tr. p. 1775.*) And the defendant von Leeb himself, after testifying concerning his conduct with respect to the Commissar Order, declared (*Tr. p. 2353*):

"I have had ample time and opportunity to think about this order and about what we did at that time under the pressure of responsibility, and here I must admit I don't know even today any better way * * *, I really don't know how we could do it differently today."

Were these men—these field marshals and generals—really so enmeshed that it was impossible for them to avoid crime?

We should observe, at the outset, that it is not the duty of a prosecutor in drawing an indictment, or of a tribunal in determining guilt or innocence, to tell the defendant how he should have ordered his life. The man who has no problems—whose material wants are satisfied, whose domestic life is contented, and whose personality is in harmony with the circumstances of his environment—such a man is rarely found in the defendant's dock. Crimes are most often committed when men find themselves in difficult situations, subject to pressures, temptations, and fears. The pangs of hunger, the lust for wealth and comfort, a dark and

* Paragraph 4 (b) of Article II, Control Council Law No. 10, vol. X, this series, p. XVIII.

violent upbringing, the frustration of emotional needs, pressures and fears—all these things help us to understand the criminal, and why he became such. It is not part of the function of the prosecution at the bar or the judge on the bench to explain to the defendant what turn he should have taken at each fork in the road in order to avoid the temptation or the fear which ultimately led him into crime. Primarily, these are problems for the psychiatrist and the penologist. But they do play a part, and rightly—within the limits of the discretion vested in the judge—when he comes to impose sentence, and for that reason we deem it appropriate to make a few observations on this score. What is the measure of the guilt of these defendants?

In approaching this problem, we suggest that there are at least three questions, the answers to which will help to guide us toward a wise solution. How strong were the pressures on the defendants, and what paths were open to them? What is their present attitude in retrospect toward their own conduct? How will the decision as to the measure of their guilt affect other persons in related situations, and what effect will it have on organized human society?

On the first point, we must bear in mind that we are not dealing here with the ordinary soldier who, in the company of his comrades and subject to all the pressure of group behavior and the violent atmosphere of combat, is ordered by his commanding officer to commit a criminal act. That is the ordinary situation, to meet which the doctrine of mitigation by virtue of superior orders was devised. Such a soldier is not accustomed to responsibility or the resolution of difficult problems, is trained to instantaneous and instinctive obedience, has no time for reflection, and is in imminent and mortal peril if he disobeys or even hesitates. These defendants were not in that situation. Where their crimes were instigated by orders from above, the orders came in writing from a distant place, were received by the defendants at a headquarters of which they were in command, and there was full opportunity for reflection on the course of action to be pursued.

To see what paths were open to these men, let us once again look at the Commissar Order as an example. At bottom, von Leeb's defense comes down to his contention that he could not openly oppose the order because, had he done so, his opposition "would have become known immediately to the highest quarters and * * * in any case, Hitler would have found out about this strong opposition". (*Tr.* p. 2351.) Therefore, since he disapproved the order, his only avenue of escape was what he called "tacit sabotage".

A moment's reflection will show that this is utter nonsense and a post-fabricated excuse. It is perfectly obvious that the Commissar Order had to be opposed openly or not at all. The order had been announced at a meeting with Hitler at which all of the principal commanders in chief were present. A number of people participated in drafting it, and copies were dispatched to all the principal headquarters on the eastern front. Hitler's intention to issue such an order, and subsequently the existence of the order itself, immediately became known throughout the higher circles of the army. Himmler's SS also had functions to perform in connection with the Commissar Order, and its existence was known throughout the SS and SD on the eastern front. Let us assume that von Leeb and the other defendants, when they passed the order down, actually did what they now say they did. Let us assume that they personally passed down firm instructions that the order was not to be complied with, and the information that the commander in chief of the army and all the field commanders in chief were opposed to the order and had directed that it not be observed. What would have happened?

The answer is perfectly clear—the order would not have been carried out by the troops of the German Army, and their failure to carry it out would have soon become known to Hitler and the OKW. Hardly a week could have passed before the Einsatzgruppen and the screening teams of the SD would have observed that the army was not carrying out the order, and reported their failure to Himmler. Hardly more time could have elapsed before ordinary military channels of information—intelligence reports, visits to Berlin by officers on leave from the front, reports of liaison officers from the High Command of the Army and the OKW—would have made it apparent to Hitler and the OKW that the order was not being obeyed. Indeed, in the happier days before the documents established that the Commissar Order was in fact passed down and was in fact executed, counsel for the generals took the position that the Commissar Order was not passed down, or was passed down with directions to disobey it—and, exactly in line with what we are now saying—that this pattern of conduct constituted *open* opposition to the Commissar Order:* “The commanders in chief of the army groups and armies either did not pass this order on to their troops at all, or they ordered, on their own authority, that it should be circumvented. They did so in full consciousness of the danger that they might be heavily punished for open disobedience in war to an order of the Supreme Commander.”

* Closing Statement of Dr. Latenser before the IMT. Trial of the Major War Criminals, *op. cit. supra*, vol. XXII, p. 77.

When we say that the Commissar Order had to be opposed openly or not at all, we of course refer to the general pattern of conduct of the commanders in chief as a group. It probably would have been possible for one or two individual commanders secretly to disobey the order by merely throwing it in the waste basket and not passing it down to their subordinates. That is what Dr. Laternser tells us Field Marshal Rommel did with the Commando Order. That is what the defendant von Leeb told us he did with respect to the Fiftieth Corps and the army group rear area, and that is what the defendant von Kuechler told us he could not do with respect to his subordinate units. This device of secret disobedience might have furnished a personal solution for a few of the commanding generals, but if adopted by all it would, of course, speedily have attracted attention and amounted to the equivalent of open disobedience.

In short, the idea of "tacit sabotage" of a widely-known, highly controversial order such as the Commissar Order is as apocryphal as the Phoenix or the unicorn. That is precisely why the defendants were led into such a maze of self-contradictions and absurdities in their desperate efforts to make the unicorn come to life. That is why we hear in one breath that most commissars committed suicide or ripped off their insignia in fear of what they knew would be their fate, and in the other that the order was not carried out. That is why we are told one minute that the reports of executions were concocted to deceive higher headquarters, and the next minute that the reports prove so small a number of executions that disobedience to the order must have been the rule.

Secret disobedience, accordingly, was impossible for more than a few and "tacit sabotage" is a myth. When von Leeb and the other defendants received the Commissar Order they could either have swallowed it or refused to obey it. The proof clearly establishes that they swallowed it, and the defense evidence proves only that when they swallowed it, it may have tasted bad. And he who swallows an order such as the Commissar Order must be prepared to take the consequences. It is all very well to talk about the necessity for obedience to orders and the maintenance of discipline, but when we are concerned with an order such as the Commissar Order which, instead of promoting discipline, undermines it, an order which the defendants all claim constituted an egregious example of military stupidity, an order which directs the commission of murder on a vast scale, and an order which the defendants well knew was a shame and a blot on the army to which they had devoted their lives, there is but one conclusion. No man could serve his army or his country by obeying such an order.

It is academic to debate the question whether, if all the com-

manders in chief had openly declared their unwillingness to obey the Commissar Order, the result would have been a modification of the order, or their dismissal and replacement by other generals. It is academic and speculative to debate whether they would have had a better chance of changing Hitler's mind by a less ostentatious manifestation of disagreement which might better have enabled him to save his face. In any event, there is absolutely no basis to assume that a dignified expression of unwillingness to comply with an order which was not only criminal but stupid would have had no effect on Hitler. Whatever may have been Hitler's other faults, he was not totally without intelligence, and, at least until the later stages of the war, there is no indication that he felt he could get along without generals to lead his troops. Throughout the war, Hitler never turned to anyone but the generals to lead his troops, except in two or three instances out of hundreds.* Why was the defendant von Leeb himself called back from retirement in 1938 and again in 1939 although, according to his own testimony, he was in disfavor with Hitler and Himmler because of his religious convictions and other manifestations of opposition to nazism? As the defense witness Halder testified, Hitler was unable and unwilling to replace even the generals whom he mistrusted "because at least at the beginning, he did not think that he could forego the expert knowledge of these generals", and this attitude on Hitler's part continued "approximately until the end of 1941 and the beginning of 1942", many months after the issuance of the orders involved in this case. (*Tr. p. 2026.*)

The defendants have told us that they would have been reluctant to resign in protest against such orders as the Commissar Order, because that would have involved an abdication of their responsibility towards their troops and would merely have led to their replacement by others who would have been more willing to conform to Hitler's desires. Yet, when Hitler began to interfere seriously in tactical matters at the time Halder mentions, the generals resigned in droves. Von Leeb and Hitler came to a parting of the ways because of a disagreement on tactical matters and 3 years later the same thing occurred between Hitler and von Kuechler. If it was abdication of responsibility towards the troops, and an invitation for replacement by weaker men, to come to an open break with Hitler over the Commissar Order, or the Barbarossa Jurisdiction Order, or any of the other criminal orders, it was equally an abdication to come to a break because of tactical disagreements. And whether or not it was theoretically possible to resign one's command voluntarily, it was perfectly easy, as von

* During the last years of the war, Himmler, Sepp Dietrich, and one or two other SS leaders were given high military commands.

Kuechler put it, to "make demands in such a way that a break must occur". (*Tr. p. 2982.*) The records of the German field marshals and generals are full of just such instances where a resignation was accepted, or where Hitler on his own initiative relieved a commander, because of tactical disagreements. It is perfectly plain, in short, that the German generals thought that tactical matters were sufficiently vital to warrant forcing matters with Hitler to the breaking point, but did not so regard the criminal orders and policies which are the subject of this proceeding. It is not for the prosecution to say whether any particular defendant should or should not have resigned, or have openly declared his refusal to obey an order such as the Commissar Order, or adopted some other solution of the problem. The choice between these several alternatives would, for any individual, be governed by his temperament and his estimate of the over-all situation at the time. But that there were solutions to this problem other than that which the defendants adopted is perfectly plain.

To conclude on this point, we must not forget that one can find no basis for mitigation in a superior order, if there is no evidence that the defendant's will was affected and coerced by the order. If the defendant's will coincided with that of the superior who issues the criminal order, or if, having full opportunity for reflection and choice, he makes no serious effort to avoid the commission of crime, there is no basis for mitigation and we find the defendants—such as Hoth—actively furthering the objectives of these criminal orders by stirring up the troops to hatred of the Jews, we must conclude that these are circumstances not in mitigation but in **aggravation**.

To turn to the second question, have the defendants demonstrated here an attitude in retrospect toward their own conduct which invites judicial clemency to find circumstances in mitigation? There are many new roofs in Nuernberg: can we see reconstruction under way in this courtroom? Regretfully, such is not visible from where we sit. The defendants have not hesitated to resort to inconsistent and implausible excuses, and have denied knowledge of things which must have truly assailed all their seven senses. The defendants are not sleepy, unobservant, or insensitive men. The defendant von Leeb, for example, is a cultured and highly intelligent person, fully alive to the moral factors in a situation; to see this we need look no further than his correspondence with von Brauchitsch concerning the offensive in the West and the violation of the neutrality of the Low Countries. He distrusted Hitler, and was disgusted with Himmler's policies and—to say the least—suspicious of his organization. He knew of the atrocities of the SS in Poland. He heard Hitler in March 1941,

outline a barbaric and terrible program of warfare in Russia. He saw the Commissar Order and the Barbarossa Jurisdiction Order emerge. He knew that units of Himmler's SS were coming with his own troops for special political tasks. He says that he complained about these matters to his commander in chief and to his fellow commanders, and his staff must have been aware of this. His headquarters received orders for the screening of prisoners and the liquidation—the murder—of "undesirable elements". His headquarters received reports of the murder of commissars. Thousands upon thousands of Jews and others were murdered in his operational area. It is quite incredible that such a man as von Leeb under all these circumstances would have known nothing about these murders and atrocities. We do not believe that his denial of such knowledge furnishes the basis for mitigation or leniency.

Finally, we cannot fix our gaze exclusively on the defendants' dock. The acts of the defendants profoundly affected millions of other men, and the decision in this case is not to be rendered in a vacuum. The judicial process is a social process. There are others to be considered beside the defendants, and I do not refer to the millions who lie buried because of the events related by the record of this case. They, too, have their claim to make here, but their strongest claim is that these things should not be repeated.

The doctrine of mitigation by virtue of superior orders is a doctrine, the purpose of which is to protect those whose opportunity for reflection, choice, and the exercise of responsibility is non-existent or limited. In modern military organization, the chain of command runs up from the ordinary soldier through his officers to the military commander in chief and then to the Supreme Command, which may be lodged in a chief of state, a president, a cabinet, or other civilian agencies. Within this structure, everyone is subject to orders, even if he is a field marshal. Obviously, the doctrine of mitigation by superior orders is not intended to give a blanket protection to anyone, no matter how highly placed, merely because he is in the military hierarchy and responsible to someone else. Otherwise, the entire doctrine of individual responsibility would be destroyed, and the chief of state himself would be the only one who could not claim mitigation.

That is why, may it please the Tribunal, the prosecution firmly believes that it would be unwise, and unfair to the millions of troops who served under these defendants, to give weight to the doctrine of superior orders as applied to such defendants as von Leeb, von Kuechler, Hoth, and others whose positions were at or near the top of the military hierarchy. Countless criminal outrages occurred in the sphere of command of these defendants.

Somewhere, there is unmitigated responsibility for these atrocities. Is it to be borne by the troops? Is it to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that that is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige, authority, the power of example, and soldiers are bound to be powerfully influenced by the examples set by their commanders. That is why we said, in our opening statement, that "the only way in which the behavior of the German troops in the recent war can be made comprehensible as the behavior of human beings is by a full exposure of the criminal doctrines and orders which were pressed upon them from above by these defendants and others". Who could the German Army look to, other than von Leeb and the senior field marshals, to safeguard its standards of conduct and prevent their disintegration? If a decision is to be rendered here which may perhaps help to prevent the repetition of such events, it is important above all else that responsibility be fixed where it truly belongs. Mitigation should be reserved for those upon whom superior orders are pressed down, and who lack the means to influence general standards of behavior. It is not, we submit, available to the commander who participates in bringing the criminal pressure to bear, and whose responsibility it is to ensure the preservation of honorable military traditions.

C. Extracts from Closing Statement for the Defendant Reinhardt*

DR. FROHWEIN (Counsel for the defendant Reinhardt) : May it please the Tribunal.

On 8 June of this year a representative of the prosecution gave an interview over the German radio concerning this trial, which is now drawing to a close. In this interview he stated, among other things, that hardly any of the trials held previously in Nuernberg were "so well substantiated by documentary evidence" as this one.

I concur with the statements of the representative of the prosecution in that, at the beginning of this trial, the prosecution did, in fact, submit great numbers of document books. However, I am of the opinion that in no way is the course of a trial contingent upon the number of document books. For in the final analysis it is not the number of document books, but rather the weight and

* Complete closing statement is recorded in mimeographed transcript, 11 August 1948, pp. 9743-9778.

probative value of the individual documents which are of decisive importance.

Even in looking through the document books of the prosecution, I discovered that the documentary material submitted by the prosecution against General Reinhardt revealed serious deficiencies in every respect.

The prosecution was not even able to offer proof at all for some overzealously advanced allegations against General Reinhardt. If, in some cases, the prosecution could not, with the best of intentions, construe a connection of a certain document with General Reinhardt through oral statements when the documents were submitted, it at least connected General Reinhardt with documents by recording his name in the index of the document book, in order in this way to imply his incrimination. In other cases in which, at first glance, a document consisting of several parts indicated that General Reinhardt, contrary to the allegation of the prosecution, could not possibly have had anything to do with the incidents described in this document, the prosecution simply omitted the exonerating parts of the documents in the English document books, which alone were comprehensible to the Tribunal.

Apart from such cases of a varying nature, a large portion of the prosecution's evidence contained only extracts from original documents. If in the case of particularly long documents or comprehensive armed forces records, the prosecution had restricted itself to submitting pertinent and relevant extracts, omitting the immaterial parts, this would have been acceptable. However, when excerpts are submitted in such a way—as was often the case—that only isolated sentences or paragraphs were taken out of context, then the Tribunal is deprived of the possibility of recognizing the association which is so very important for the evaluation of the document. This is of particular importance in assessing military orders or military entries in war diaries.

My objections to the prosecution material, however, were especially strengthened through an examination of the original records from which the prosecution took its evidence material. I am grateful to the Tribunal for making it possible for me to look through at least a part of these original records. Although this great amount of work had to be done in a comparatively short period of time during the trial, and in view of the fact that I did not have as many assistants at my disposal as did the prosecution, I can, at least, state that a perusal of these Washington records in the case of General Reinhardt led to especially informative results which were of great importance for the defense.

In many cases the complete documents from which the prosecution submitted only a fraction, presented quite a different pic-

ture, and constituted an exoneration of General Reinhardt rather than an incrimination. This is particularly true with reference to the entries in activity reports, war diaries, and the like, if one only makes the effort to read the previous and subsequent entries. In those cases I submitted the necessary supplementary parts of the documents as defense documents with reference to prosecution documents.

Further, I found a large number of orders issued by General Reinhardt among the Washington documents which the prosecution, in making its completely one-sided selection of material, did not wish to consider, and included these in my document books. These documents, for the most part, show quite clearly that the statements of the prosecution concerning General Reinhardt are not in their entirety consistent with the facts; that rather his attitude in all decisive cases was quite different from that which the documents selected by the prosecution purport to show. If there still existed any doubt as to whether the prosecution employed these methods for the express purpose of confusing the true facts, then yesterday's plea by the prosecution dispels any such doubt. I shall demonstrate this particularly at two points.

Moreover, in looking through the original records I feel compelled to state that the prosecution proceeded in a manner which goes beyond all my powers of comprehension. The Chief Prosecutor, General Taylor, in his opening statement laid particular stress on one case, and quoted portions of a document thereby purporting to characterize General Reinhardt as a murderer of many innocent men, women, and children. This was a report in which the murder of the entire population in the Slutsk area by the Security Service was described. This report was enclosure 2 of a document consisting of three parts. By submitting this enclosure 2, the prosecution wanted to prove that this killing of the population had taken place upon the instigation or, at least, with the sanction of General Reinhardt. The main document and enclosure 1, however, show quite clearly that when General Reinhardt learned of this case he was induced not only to inform the army group of this outrageous incident, but at the same time he, himself, made a detailed recommendation for the decent and humane treatment of the Russian population. I only mention here in passing that this incident occurred hundreds of kilometers outside his army area, and that the killings were carried out exclusively by the Security Service and the police and not by the troops of General Reinhardt.

The entire document, that is, the main portion and the enclosures 1 and 2 were photostated together at the time by the American investigation authorities, as is proved quite clearly

by the photostat numbers. Therefore, there *can* have been no doubts as to the actual connection between the documents; and yet in spite of this fact, the prosecution used this partial document as the chief incriminating document against General Reinhardt.

Thus, in the case of General Reinhardt we see how the "trial so particularly well substantiated by documentary evidence" appears in reality. I must leave it to the Tribunal to arrive at its own judgment in this respect, but permit myself to call attention to a remark made by the Chief Prosecutor, General Taylor, himself in his opening **statement**:

"The issues in this case are far too grave to warrant any tricks of advocacy; the evidence is sufficiently compelling and will provide its own eloquence."

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D. Extracts from Closing Statement for the Defendant Warlimont¹

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DR. LEVERKUEHN (counsel for defendant Warlimont): The prosecution made some remarks which were astonishing because they were advanced with the authority of the uniform of the United States Army. They relate to superior orders. The prosecution emphasized repeatedly: no mitigation by superior orders.

The prosecution starts from the concept, evolved around the IMT, its charter, its decision, and the law following this decision, that obedience to orders is not a valid excuse. This concept as now propagated belongs to the same nonstatic character of international law which I mentioned in connection with the problem of aggressive war. If a vote were taken today on this subject and the Russian vote not counted, there is very reasonable doubt as to what the result would be.

The British vote as voiced before this Tribunal was "most emphatically, no".² No—that means no breaking of the tradition.

And this tradition is expressed by the greatest American authority on military law as follows (*W. Winthrop, Military Law and Precedents, 2d Edition 1920, p. 571*):

"Obedience to orders is the vital principle of the military life—the fundamental rule, in peace and in war, for all inferiors through all the grades from the general of the army to the

¹ Complete closing statement is recorded in mimeographed transcript, 12 August 1948, pp. 9895-9910.

² Cf. testimony of Captain Russel Grenfell in Section VI D vol. X, this series.

newest recruit. This rule the officer finds recited in the commission which he accepts, and the soldier, in his oath of enlistment swears to observe it. As in the British system, all military authority and discipline are derived from one source—the Sovereign, so in our army every superior, in giving a lawful command, acts for and represents the President, as the Commander in Chief and executive power of the nation, and the source from which his appointment and authority proceed. Hence the dignity and significance of a formal military order, and hence the gravity of the obligation which it imposes upon the inferior to whom it is addressed. The obligation to obey is one to be fulfilled without hesitation, with alacrity, and to the full; nothing short of a physical impossibility ordinarily excusing a complete performance.”

The consequence of this rule is (op. cit. supra, p. 296–297)—

“That the act charged as an offense was done in obedience to the order—verbal or written—of a military superior, is, in general, a good defense at military law.

“* * * for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.”

The author therefore advises the officer—

“Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.”

The basic rule is obedience to order, the exception is the duty to disobey. The Tribunal will undoubtedly examine very carefully in each of the innumerable incidents brought before it as criminal acts, whether the subordinate was able and bound to recognize that a superior order was illegal, and what he did or could do to avoid obedience.

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E. Closing Statement for the Defendant Lehman¹

DR. VON KELLER (counsel for the defendant Lehmann): Your Honors, I have ventured to give an unofficial translation of the plea to the Marshal of the Court for the benefit of the Tribunal. The official translation will be rendered through official channels via the translation branch.

PRESIDING JUDGE YOUNG: We appreciate that and we will use that to follow your argument generally in this manner with the understanding that the other translation will be the one that is incorporated in the record.

DR. VON KELLER: Mr. President, Your Honors!

Some weeks ago the Military Governments of the United States of America, Great Britain, and France ordered a number of measures for the three Western Zones of Germany which they designated as currency reform. Apart from the—perhaps final—political and economic division of Germany in two parts, these measures comprise devaluation of the ready money and of the bank accounts, in relation of 1 to 10. The three military governments expressly took over the full responsibility for these measures. On occasion of the Peace Conference in Paris in 1919, the same states ordering this currency reform compiled a report in which a number of actions are listed as war crimes. Military Tribunal III in its judgment against Altstoetter and others expressly refers to this declaration (Lehmann 452, Lehmann Defense Ex. 311). Count 16 of this list mentions as a war crime “dépréciation du système monétaire”, devaluation of money.

In a trial in which rules of international law are under discussion it will not be unnecessary to premise this fact as an example for the changeability of considerations of international law, before dealing with the material of this case and the charges against my client.

The factual and legal material of this trial is enormously extensive. I shall not be able on this spot to deal with all the charges of the prosecution against my client. The Tribunal prescribed a limited time for the final pleas and ordered that the further argumentation is to be summed up in a closing brief.² The Tribunal ordered furthermore that—contrary to the previous custom in the Nuernberg trials—between the close of the evidence, which took more than 6 months, and the final pleas, only one day of recess could be granted. These two restrictions are binding for me, so that I can submit to you only a part of what

¹ Tr. pp. 9947-9977, 13 August 1948.

² Dr. von Keller later filed a final brief on behalf of the defendant Lehmann, extracts from which are reproduced in Section F 6.

seems to me of importance in the case of Lehmann. As to the incriminating facts I shall confine myself to four main points.

1. The decree concerning the jurisdiction in the area Barbarossa.

2. The Commissar Order.

3. The Commando Order.

4. The Night and Fog Decree with the so-called terrorist order replacing it later.

I shall pay special attention to the position and the sphere of tasks of the defendant Lehmann.

But before discussing these particular points, I must point once more to the basic problem of the Nuernberg trials, the problem of the historical background.

Who is to judge as to whether or not the captain of a ship acted correctly in the discharge of his duties cannot but examine in detail the circumstances to which this man had been subject. He has to take into consideration the location of the ship, power of the wind, motion of the sea, visibility, seaworthiness of the ship, and many other points which were of importance for the captain and his actions. He must visualize the roaring of the storm, the turbulence of the waves, the danger of suddenly running ashore, the necessity of immediate decisions, in order to understand the reasons for which the captain took this measure or that. He must be aware of the psychological pressure on a man who bears highest responsibility, whose superstructure is removed by the storm and who must abandon perhaps a part of the cargo in order to save the ship itself. The obligation to imagine this situation will be the greater, if he never experienced the force of the elements.

For this reason, Your Honors, during the evidence I endeavored to go beyond the narrow frame of the orders with which my client has been charged. I endeavored to draw the picture of the chaotic time during which the former Chief of the Legal Department of the Wehrmacht had to be active in order—like the captain of a ship—to steer and to save the sphere of activity entrusted to him from the dangers of a merciless totalitarian era. I will not repeat here to what an extent the administration of justice was relegated to the position of an unwanted intruder within the Third Reich, to what extent Hitler, the Party, the Gestapo, and the SD tried to snatch one field after the other from the Wehrmacht administration of justice. I may remind you of the general attacks directed against the Wehrmacht administration of justice with regard to the so-called political crimes of the Wehrmacht members as well as offenses of inhabitants of the occupied countries; I may remind you of the personal inter-

ventions of Hitler in specific trials, testified to by my client and by other witnesses of the defense, which prove sufficiently how strong the forces were against which the administration of justice of the Wehrmacht had to contend. To these internal curtailments of competence are to be added the problems which the development of modern warfare brought about. The activity of the francs-tireurs, organized on the part of our adversaries to an unprecedented extent, the sabotage, the underground resistance in the occupied countries, the use of means exterminating big masses and the bombardment of practically defenseless dwelling places on the part of the Allies, created formerly unknown situations and problems which required immediate answers. Not only Hitler fought the foundations of law which had been valid up to then, but in the whole world things had gone so far that people denied the binding force of custom and law, degraded "law" to a mere word, and used it only as means of propaganda and as a camouflage of brutality.

This historical background must not be forgotten when a judgment is to be pronounced on men from this era. The activity of the defendant Lehmann can only be seen in the frame of these historical relations, and this manner of considerations alone can lead to a just judgment.

First of all I shall deal with the decree concerning the Barbarossa jurisdiction.

The defense is quite aware of the fact that in view of the insufficient means at its disposal, it is quite impossible to convey a clear idea of the explosion of forces engendered by the clash of two totalitarian systems, two systems determined to fight with all their might and in the clear perception that this struggle could only end with the complete extermination of one of the two adversaries. At the beginning of the war against Poland, Hitler had declared, "Let us burn the boats. We are no longer concerned with the problem of right or wrong, but with the question of the existence or nonexistence of 80 million people." And in the radio speech of 3 July 1941, Stalin used the following words: "The war against Fascist Germany cannot be considered as an ordinary war, it is not only a war between two armies, it is the great war of the entire Soviet people against the Fascist German troops."

And the course of this war proved in reality that it was a struggle of the peoples for life and death and that the warfare of the Soviet Union, especially the illegal guerrillas, constituted an entirely new and extremely severe danger for the German Wehrmacht.

"The Army has to defend itself by the same means by which

it is attacked", and "that is no problem concerning the courts martial", this was declared at the meeting of 30 March 1941. The defense against these new methods of warfare was therefore considered as a task of a purely military operational character, and nobody—not even today—would deny the right of the German leaders to fight guerrilla-infested areas by means of air raids, even though the bombs might hit innocent persons. The cases of Dresden, Hamburg, Hiroshima, and of hundreds of other towns show that the Allied military leaders also deemed such actions admissible, even in cases where no guerrilla-infested areas were concerned, but dwelling places of noncombatant civilians.

If these things are placed in their proper perspective, it can be seen now how unimportant Dr. Lehmann's endeavor was—if the storm once unleashed could not be fought—to steer his small vessel, the jurisdiction of the Wehrmacht, through the clash of two worlds. He was only insufficiently informed of the situation, of the methods of warfare to be expected from the enemy, and of the German intentions. He was not called in for the discussion of the commanders of 30 March 1941, which proves the small significance attributed to his part in the frame of the whole matter. When he learned from Keitel of Hitler's decision that the Wehrmacht judges should not be taken along in case of war against Russia, and when he got the order to phrase this decision in the form of a command, this idea seemed to him so inconceivable that he reacted with open opposition. Only in this sense can his proposal be understood, to exclude all the jurists from Wehrmacht jurisdiction and to employ them—including the heads of the legal departments of the four High Commands—as soldiers; and authoritative quarters thus interpreted the proposal. Only after, in the following discussions with Keitel, endeavors to preserve military jurisdiction had failed and further proposals to this effect failed, Lehmann resolved to achieve at least a clear definition of responsibilities between army and courts. Such a clear distinction had to be achieved, because the distrust of the political leaders against Wehrmacht administration of justice had already taken such forms that there was a danger of immediate radical encroachments.

The jurists concerned took it for granted that the decree was considered only as preliminary measure for the first phase of the war, the phase of mobile warfare. Therefore, very soon they asked for reestablishment of jurisdiction.

These considerations formed the basis of the interoffice remarks of Dr. Lehmann as to the last drafts for the Barbarossa Jurisdiction Order. The prosecution documents might convey the impres-

sion that the decisive questions were discussed in them. But in reality the submitted documents, as proved by the evidence, date from a period after Lehmann's fundamental objection had already failed and the struggle for the full preservation of Wehrmacht jurisdiction had been lost. The prosecution apparently wants to attribute all events in the East, which in their opinion are contrary to international law, to the Jurisdiction Order, and to charge Dr. Lehmann with the alleged authorship thereof or instrumentality therein. As a result of the abrogation of jurisdiction—so the prosecution states—hundreds of thousands of civilians were killed deliberately and without any trial.

That the abrogation of the courts martial by Hitler is to be considered as a war crime, is very honorable for German military jurisdiction. But how can this remark of the prosecution be reconciled with the events in the Balkan countries? There, a Barbarossa order did not exist. And in spite of this the same charges have been made against German warfare in the Balkans. As to the Russian area, it must be expressly emphasized that the activity of the SS and actions against political Commissars are not to be considered in evaluating the real significance of the Barbarossa Jurisdiction Order, because the courts martial was expressly excluded from these two fields.

Only the procedure against *francs-tireurs* is to be examined here. The evidence has proved that the guerrillas were contrary to international law in Russia as well as in the Balkan countries. According to the judgment of military Tribunal V,* members of illegally fighting groups, when they fall into the hands of the enemy, have no claim to treatment as prisoners, but have forfeited their life. This is also the opinion of important writers on international law. Never and nowhere has a trial been required. The Hague Convention of 1907 prescribes trials in land warfare only for the punishment of spies. Oppenheim concludes from this provision that no trial is necessary for spies in sea warfare. If this interpretation is correct, then the same must be true of all other cases of war crimes, the punishment of which is not mentioned in the Hague Convention. In the German war-time rules of penal procedure it was determined—beyond the regulation of the Hague Convention—that foreigners were not to be punished without previous trial. But this regulation depended on the reservation of reciprocity, and this reciprocity was not assured in regard to Russia. The German leadership was therefore entitled to entrust to an officer—instead of a court—the decision on punishment of Russian civilians, who had been found guilty of guerrilla activity, of sabotage or similar attacks against

* United States vs. Wilhelm List, et al., Case No. 7, Vol. XI.

the German Wehrmacht. This was no invention of Hitler's; the authority of every commanding officer to proceed against *francs-tireurs* taken in the very act, according to the custom of war, that is, without a trial, had been valid law in Germany until the time after the First World War, according to an imperial decree of 1899; and it is remarkable that this provision based on war customs was not questioned at the Hague Conference in 1907 by the states participating in it.

I reserve the right to deal in detail with the problem of reprisals in this connection. Now I shall confine myself to the statement that the Jurisdiction Order was not directed against peaceful civilians, but only determined the measure to be taken if *illegal* attacks occurred on the part of the civilians. Up to now I examined the procedure against hostile actions by civilians only from the point of view of the Hague Convention. But in the case of the Soviet Union, the Soviet domestic conditions must also be taken into consideration. In order to avoid repetitions I refer to the expert opinion of Professor Maurach submitted by the entire defense. The opinion of the expert leads to the following result:

"The position of the Soviet civilians in legal respect had not become worse by reason of the Barbarossa Jurisdiction Order. Guarantees for the procedure as provided for in the trial before the courts martial—which as such is a summary one—(hearing, defense in open trial, petitions for pardon) had not been granted to the Soviet civilian by Soviet domestic law. It makes no material difference whether the sentence is pronounced by an officer or by a functionary of the political police.

"The order of 13 May 1941 cannot be presumed to have encroached on the so-called elementary rights of the civilians."

If Dr. Lehmann—contrary to every reasonable expectation—had succeeded in making his objections prevail against Hitler's will and in maintaining the competence of the courts martial against civilians in Russia, as was the case in other occupied countries, developments would have submerged such a regulation. A clear proof is offered by [Document NOKW-068] Prosecution Exhibit 651: When courts martial called to account members of the army because of their conduct in guerrilla warfare and when Hitler was informed of that, a Fuehrer order set aside the courts and excluded them with one stroke of the pen, without Dr. Lehmann or his department having been consulted. But also all the orders which the OKH and the OKW gave to the army for the proceeding in guerrilla warfare are proof for the irresistible power of development. The numerous reports submitted

by the prosecution with the number of *francs-tireurs* and of persons who had supported *francs-tireurs* furnish a further clear proof. Dr. Lehmann and his department did not participate in one of the aforesaid orders for the army, Dr. Lehmann did never see such a report. The counter measures against seditious movements of such an extent—that must be admitted if one looks back now—were not a task of the courts martial.

As to the second part of the Jurisdiction Order, concerning the obligation to prosecute crimes committed by German soldiers against civilians of the occupied countries the prosecution declared this part to be more wicked. It considers it a privilege for German soldiers to commit crimes against civilians without punishment. If Hitler had had such an idea when issuing the order to rescind the obligation to prosecute, then Dr. Lehmann is fully entitled to point out that he, Lehmann, succeeded in preventing such an intention. He included in the decree the provision that courts martial had to enter into action, if the maintenance of discipline required it. In practice, as has been proved during the evidence, this provision opened a wide field and gave to every commander and Gerichtsherr the possibility to pronounce the well merited punishment in every case which required such a measure. In this whole complex and especially regarding this point Dr. Lehmann collaborated closely with the chiefs of the legal departments of the three Wehrmacht branches. It is true that his suggestion to induce the high commanders of the Wehrmacht branches to fully contradict Hitler's decree was unsuccessful, but it was planned that the army—the branch of the Wehrmacht which was most interested in the matter—should issue supplementing regulations which practically would bring about the contrary of the intended rescindment of the obligation to prosecute. This really happened, the additional order of the army issued at the same time as the Jurisdiction Order, the so-called discipline decree of von Brauchitsch, was anything but a privilege for crimes against civilians. After the beginning of the war Dr. Lehmann without any authorization made his personal opinion prevail with a number of higher command authorities in the East to the effect that jurisdiction should be maintained, and all crimes committed against Russian civilians should be prosecuted in the same way as in other theaters of war. In reality this part of the Jurisdiction Order did not come into effect at all. Crimes of German soldiers against Russian civilians were persecuted in the same way as in other occupied countries. Numerous testimonies of commanders and judges from different parts of the front and from different periods prove this state of facts.

As to the legal qualification of the obligation to prosecute, I may

point out the fact that also in Allied countries no obligation to prosecute criminal actions exists on principle, but that prosecution is left to the discretion of the competent authorities. Numerous Germans, especially women, experienced this after the end of hostilities.

Summarizing the part of my client in the jurisdiction order, the essential points in my opinion are the following:

From the beginning he strongly opposed Hitler's idea, as well as the commanders and the other jurists dealing with it. He made his objections unequivocally clear and went so far as to put his office at Keitel's disposal. He could not do more than make suggestions, and this only as far as jurisdiction was concerned. If these suggestions were rejected, he had no further possibilities.

At any rate he achieved important and partly even decisive restrictions of the original Hitler order, and this was a result which he could advocate from the point of view of international law.

In addition to the "Barbarossa Jurisdiction Order", the prosecution wants to bring my client in connection with the Commissar Order. The prosecution states that this order had been drafted and distributed with the assistance of Lehmann. At another passage—that Lehmann agreed to the draft. Both statements are incorrect. The evidence proved the following: Lehmann had learned of Hitler's intention that the Russian Commissars should not be recognized as prisoners, but should be killed. On the occasion of the already mentioned discussion at Berchtesgaden in April 1941 to which Lehmann had been ordered because of the Jurisdiction Order, he tried to submit to Keitel his objections against the intended treatment of the Commissars. But he met with a rough rebuke. Keitel told him that he, Lehmann, should not bother with this matter, that it did not concern the legal department. Lehmann informed the chiefs of the legal departments of the branches of the Wehrmacht about his answer, the same gentlemen with whom he discussed the Jurisdiction Order some days later. He talked to General Mueller of the OKH about this matter; shortly afterwards the Wehrmacht Operations Staff sent him a draft for this Commissar Order together with a draft concerning the Jurisdiction Order. These two drafts came from the OKH and had been sent to the Wehrmacht Operations Staff with a covering letter dated 6 May 1941. Lehmann returned the draft for the Commissar Order without giving his own opinion on it; he confined himself to propose another and clearer couching of the last paragraph of the draft, according to which the courts martial and the drumhead courts martial had nothing to do with the execution of this order. At the same time he

phoned the deputy chief of the Wehrmachtfuehrungstab [Warlimont] and informed him of the answer which he had received from Keitel and that therefore he could not deal with the real contents of the order.

This telephone call has been mentioned in the prosecution document itself. General Warlimont confirmed its contents.

Dr. Lehmann therefore did not participate in the drafting of this order. He did not express his opinion about its contents. After the rebuff by Keitel he had no possibility to do so. He had nothing to do with the distribution either.

It is remarkable that the Chief of the Legal Department of the Army High Command, Generalstabrichter Neumann, who was interrogated here as a witness of the prosecution, received from his Commander in Chief, Field Marshal von Brauchitsch, the same answer to his objection against the Commissar Order as Lehmann received from Keitel.

As to the Commando Order of 18 October 1942, the prosecution states that Lehmann had prepared and drafted this order. But no proof could be produced for this statement.

As to the preparation it must be pointed out that this matter did not belong to the sphere of tasks of the Legal Department of the Wehrmacht, since it had no connection whatsoever with the Wehrmacht jurisdiction. The Legal Department was only one of the offices which in the very first stage had been asked for its opinion by the Wehrmacht Operations Staff. But the documents show that it had no opportunity for a final opinion because of Hitler's and Jodl's immediate intervention.

For the first formulation of the drafts—and only in this first formulation did an expert of the Legal Department participate—the experts of the Legal Department and of the Wehrmacht Operations Staff had only Hitler's radio speech of 7 October 1942 at their disposal concerning the treatment of the terror and sabotage groups, "who did not act like soldiers, but like bandits".

The two experts started from the assumption that these measures concerned francs-tireurs. The draft which the expert of the Legal Department passed on to the Wehrmacht Operations Staff on the telephone included an important restriction, according to which the order applied only to such members of terror and sabotage groups "who are proved to have disregarded the rules of honorable combat".

When submitting this formulation a reservation was made that only such facts had been taken into consideration as could be seen from the newspapers.

In the further course of this matter, Dr. Lehmann repeatedly and urgently asked for a general discussion calling in also the

Chief of Office Foreign Counterintelligence, Admiral Canaris, and this "for clearing up preliminary questions * * * only after then could the troops be given instructions as to what sabotage troops could be considered as bandits." As Dr. Lehmann was aware of the fact that reference to legal reasons would be unsuccessful with Hitler, he—when he requested a general discussion—emphasized practical viewpoints, such as possible repercussions on their own [German] methods of warfare.

As the documents show, Lehmann's intention was to reach by way of this discussion an order, unobjectionable under international law which would be suitable for dissemination. But the demanded discussion did not take place, instead of it some days later the final order, signed by Hitler himself, arrived. This final order does not contain any clue to the effect that the activity of the Legal Department of the Wehrmacht had been of any, not even direct, influence on the formulation as issued by Hitler himself. The prosecution documents do not show that the ideas which Dr. Lehmann had submitted to the operations staff and to the Office Foreign Counterintelligence for discussion had come to Hitler's knowledge. In my closing brief I shall come back to the distortion of facts in the final plea for the prosecution. Dr. Lehmann did not participate in the distribution and execution of the Commando Order.

If I am now to deal with the "Night and Fog" Decree, first of all I must draw the attention of Your Honors to the historical development which induced Hitler to oppose new measures to the ever increasing underground movements in the occupied western zones. As to the extent of the French and Belgian resistance and the degree of their danger I can refer to the files sent over from Washington. They furnish valuable proof and—although being only fractions of the entire material—convey an impression of the systematic espionage and sabotage of the underground movements against the occupational power. (*Lehmann document book 5.*) Several affidavits and the testimony of the witness Boetticher complete these documents. We are here concerned with a method of fighting which occupational powers in a quiet country like Germany cannot imagine. Nobody will pretend that the underground movements were legal. Even the French prosecutor with the IMT, M. Dubost, admitted the illegality with the following words:

"We do not contest that in many cases they may have been *francs-tireurs*, and we admit that they could be sentenced to death."

I must emphasize here that a consideration of the "Night and Fog" Decree, must clearly distinguish between the decree issued by the Wehrmacht and the quite independent measures taken by the police, circumventing the Wehrmacht, in the occupied countries on its own initiative. Frequently the police used the words "Night and Fog" in arrestations and transfers carried out on their own initiatives. These arrests of the police not covered by the NF [Night and Fog] Decree of the Wehrmacht, but caused by instructions of Himmler, formed the emotional perhaps also propagandistic basis for the evaluation of the NF Decree. By reason of documents and distinct testimony the defense in this trial succeeded for the first time in clearing up the difference between the NF of the police and the NF of the Wehrmacht, or, as it is mentioned in one of the prosecution documents, between the new NF and the old NF. These are two entirely different matters.

As to the NF Decree of the Wehrmacht, in the course of the evidence it has been proved, and it has not been contested by the prosecution, that Hitler himself gave the order to work out such a decree and that this order was passed on to the OKW offices concerned via Keitel. This Hitler order contained already the essential points of the final decree, namely: exclusion of the Wehrmacht courts in those cases in which a death punishment was not to be expected, removal of arrested persons to Germany and secrecy about their later fate. Thus, the order as such was already an established fact, and the defendant Lehmann took no part at all in this original Hitler order.

The defendant Lehmann together with the Office Foreign Counterintelligence, an office praised by the prosecution in another context, took part in the final couching of the Night and Fog Decree, as it can be seen from the prosecution documents. Because of Lehmann's intervention this final text differs essentially from the original Hitler order. It is to be examined therefore whether or not the final NF decree with its implementation regulations and the supplementing provisions which were issued later corresponded to international law. For this purpose it seems to be necessary to subdivide the complex into particular questions and to analyze them separately. The defense see themselves in a difficult position in as far as the prosecution neither in their final plea nor otherwise made clear as to what provisions of the NF Decree they consider criminal. International law was frequently mentioned in this trial. It may be attributed to the kind of this trial that nobody made the attempt to examine precise questions on the basis of international law and the practice of states. But I deem it important to point out the fact that international law is not a question of feelings, but—as it is suggested

by its name—a question of law. Although these questions cannot be answered in precisely the same way as a problem of mathematics, the legal argumentation should not rely on vague conceptions and personal wishes. The solution of such questions can only be found by means of codified law and if this is insufficient, through the recognized practice of states.

The questions which the night and fog complex—quite apart from Lehmann's participation in particular—raises in legal respect are the following:

1. Is an occupational power authorized to pronounce death sentence in cases as listed in paragraph 1 of the first and second implementation regulation to the NF Decree?

2. Is an occupational power authorized to have inhabitants of occupied countries who have been found guilty of criminal actions against the occupational power tried by civil courts?

3. Is an occupational power authorized to have inhabitants of occupied countries who have been found guilty of criminal actions against the occupational power tried by special courts?

4. Is an occupational power authorized to have inhabitants of occupied countries who have been found guilty of criminal actions against the occupational power tried in its own country or is it authorized to perform such trials only in the occupied country?

5. Is an occupational power authorized to arrest and isolate from the external world such inhabitants of occupied countries who are suspected of having committed criminal offenses against the occupying power?

6. Are the secrecy provisions of the NF Decree such an impediment for the defense of the defendant, especially with regard to the presentation of evidence, that they represent an unnecessary hardship, that is a hardship which affects the interests of the defendant to a greater extent than it is justified by the aims of the occupational power?

7. Is an occupational power authorized to isolate from the external world such inhabitants of an occupied country who form a danger for the safety of the occupying power, even if a court has acquitted them from a special charge or—in cases that they were sentenced to a certain punishment—served this sentence?

8. Is an occupying power authorized to have persons who are suspected of having committed criminal offenses against the occupational power or who constitute a danger for the safety of the occupational power handed over not to the courts, but to the police for detention?

9. Is an occupational power authorized under certain circumstances to order intimidating measures which are directed not only against the delinquent or dangerous persons, but also against the members of their families and the population as such?

10. Constitute the measures of the NF Decree ordering the isolation of suspected persons or convicts from the external world an unnecessary hardship, is that a hardship affecting the interests of the family members and of the inhabitants to an unreasonable degree composed with the aims of the occupational power?

I regret very much that in view of the time granted to me I cannot deal in more detail with these problems.

But as an example I will discuss a question to which the prosecution apparently has attributed special significance; as to the facts I shall make some additional remarks in my closing brief. It is the question whether or not an occupational power is authorized to have inhabitants of occupied countries tried by special courts. This question is to be answered in the affirmative, if the legislation and the practice of the Allies are considered as legal. For the Nuernberg courts established by virtue of the Control Council Law No. 10 are special courts, established not only for special crimes; but—in a more restricted way—for special trials. The appointment of three judges corresponds to that of German special courts, their procedure is not adapted to the law of the occupied country, appeal against their judgments is not possible, just like in the trials before the German special courts.

From my closing brief I may anticipate that an examination of the Night and Fog Decree based on the codified international law, as well as on the practice of the states, leads to the result that the decree is not contrary to international law. As to the legal aspects of my argumentation, the prosecution maintains the following against the defense arguments referring to the practice of the Allies, stating firstly: If the Allies did wrong, this does not lessen the guilt of the defendants. That is true in the main. I therefore refrain from extending my evidence to such particulars which in my opinion seem to be criminal from the point of view of international law. I leave it to the prosecution to examine such events on the basis of the penal law and I will do it with the same ardor with which they prosecuted the alleged crimes committed by Germans. But I rely on the general orders issued by the Allies, since, unless the contrary will be proved, I must consider them as unobjectionable in a legal respect. As to these general orders the prosecution refers to a second argument: It states that the present measures of the Allies cannot be compared with the former German measures. It bases this opinion on the

German capitulation, on the fact that no armies are operating any longer, and that a German Government does not exist. Therefore the occupational power, so concludes the prosecution, is no longer bound by the restrictions of the Hague Convention. I shall deal briefly with this argument.

1. According to the clear wording of the capitulation document the German *Wehrmacht* capitulated and not the German Reich. A neutral court, the Supreme Court of the Swiss Canton Zuerich, stated in a judgment in December 1945, that Germany continues to exist as a subject of international law and that it can be partner of international agreements.

2. No provision of the Hague Rules for Land Warfare Order confines its own validity to that effect that it applies only to states with an army or a free government. On the contrary, the sense of the Hague Order shows that it intends to support the feeble partner, and that the guarantees entered in its provisions represent the minimum of what is under all circumstances to be reserved for the defeated partner in his relation to the occupational power.

The argumentation of the prosecution would lead to the grotesque result that a victorious state would have to abolish in the first place the army and the government of a defeated enemy in order to get rid of all the binding provisions of the Hague Rules for Land Warfare. It would be left to the discretion of the victorious power in full command of its superiority to abolish all remaining guarantees of the defeated and to create in this way a state of uncontrollable arbitrary power and to maintain this state at its pleasure. Such an argumentation is either based on a fallacy or on considerations of political expediency which have nothing to do with legal standards.

I therefore arrive at the result that the present measures of the Allies must be based on laws of humanity as well as on the provisions and customs of the Hague Rules for Land Warfare and that consequently these measures must be considered as manifestations of a state practice important from the point of view of international law, and that they can be compared with the former German measures. The prosecution tries to construe a factual contradiction in the statements of the defendant Lehmann by asserting that it is impossible to say: This or that measure is unobjectionable in legal respect, but I fought it or I was endeavoring to mitigate it.

In this way of argumentation the prosecution wants to prove that the defendant was quite aware of the unlawfulness of his actions. But such argumentation seems somewhat too primitive to me. If somebody opposes a measure in any recognizable way,

this does not mean at all that he considers this measure unlawful or even criminal, even then, if a jurist is involved or matters are concerned which are of a legal character. There are thousands of reasons to oppose a certain intention; they can be in the field of expediency; it may be that the person concerned does not consider it suitable or adequate; but also reasons of a pure humane character may play a part. It is just the chief prosecutor in this case who will certainly still remember the criticism voiced by Judge Wennerstrum among other things also against the prosecution after the end of the first trial against German generals. I do not believe that the prosecution would interpret the disapproving attitude of Judge Wennerstrum to that effect that his criticism might include a legal qualification of his own activity or of the activity of the prosecution. The innermost refusal of a thing in which somebody is participating means, therefore, that something better is wished for, but it does not mean that the action as such is considered illegal or even criminal.

For these reasons I included in my document books a number of documents containing a moral judgment on Allied measures, e.g., of the automatic arrest. Among these documents there are declarations of high ecclesiastical dignitaries of both denominations whom I should like to consider as experts in the field of public morality. I did not introduce these declarations in order to prove these measures illegal, but in order to show that moral judgment and political expediency can widely differ. Now somebody may perhaps make the primitive demand: If a man recognizes that his government asks for his cooperation in a form which he wants to refuse on ethical or other nonlegal considerations, then he should refuse any cooperation at all.

Whoever has lived under a tyranny is quite aware that for a man who is opposed to the totalitarian power of state there are three possibilities—

He opposes in an open manner. This would seal his fate before he could attain the slightest success. His sacrifice would be futile.

Or the second possibility, he abandons his activity if he can, withdraws to another sphere of activity, and leaves the matters entrusted to him to the zeal of unscrupulous men in power. In this case he would have saved his life, but would have failed his duty.

And the last, the third possibility, he remains in his office and endeavors to preserve what can be preserved. This way is not very easy. It is not without danger. It requires as much courage as prudence and a high degree of self-denial.

General Taylor stated in his closing statement that neither the

prosecution nor the Tribunal are obliged to tell the defendants which way they should have gone. This statement reveals the shocking fact that in spite of the fact that they have been busy with German problems for three years, the prosecution did not yet enter into the main problem of the Nuernberg Trials, the problem of conflict of duties. The superficiality of the indictment may be admissible in consideration of the historical and political background, but it is impossible in an evaluation of facts from the point of view of penal law. Nobody can be punished if, in case of a conflict of duties he chose that way which, weighing seriously all interests concerned, he considered the most just. In this case he is not criminally guilty. But the prosecution must prove this guilt, and the question cannot be solved by ignoring it.

In the so-called Justice Case judgment, State Secretary Schlegelberger was charged with not having prevented the judge's gown from being defiled. Dr. Lehmann succeeded in averting this danger from the armed forces administration of justice. He had no power to prevent Hitler's more far reaching plans. Nobody will deny that in such a position the preservation of the judiciary may justify even the abandonment of other interests. I may be allowed to mention an authority whose moral integrity and historical greatness are generally recognized. Abraham Lincoln wrote in August 1862, during the Civil War* :

“My paramount object in this struggle is to save the Union.
* * * If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it, and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race, I do, because I believe it helps to save the Union”.

In this connection the question necessarily arises as to the rights and duties of the defendant Lehmann as head of the Legal Department of the Wehrmacht and as to his sphere of tasks; for these establish his responsibility. The Chief WR (Wehrmacht Legal Department) was subordinated to the Chief OKW, Field Marshal Keitel. He was an administrative official with military obligation of obedience. Since summer 1944, he was a general with special assignment (Truppenonderdienst), with the same military obligation of obedience which Keitel pointed to on certain occasions in an unmistakable manner. The connections with Keitel concerned exclusively the field of military criminal jurisdiction. Other subject matters, especially questions of military leadership, were not dealt with, because the defendant

* Extract from letter to Horace Greeley, 22 August 1862.

Lehmann did not learn of them by reason of the secrecy provisions. When an exceptional case occurred, and therefore a reason to discuss such problems, he was expressly relegated to his own restricted competence.

The prosecution compares the position of Lehmann with that of the American Judge Advocate General. I am not able to verify if such a comparison is tenable. But it seems to me that the following comparisons prove its incorrectness: The American Rules of Land Warfare, the Basic Field Manual of the American Army were compiled under the directions of The Judge Advocate General. The German Wartime Manual for the General Staff (*NOKW-1878, Pros. Ex. 42*) with its regulations of international law had been kept secret from the Chief of the Legal Department during the whole war; he saw it in this trial for the first time. In other orders, too, which were important in legal respects such as "Service Instructions for the Units of the Wartime Field Army," with regulations as to conduct in enemy countries, hostages, and so on (*Lehmann 202, Lehmann Defense Ex. 74*), WR did not participate.

Dr. Lehmann was not the highest judge of the Wehrmacht. He was not a judge in the proper sense. The administration of justice of the Wehrmacht—although this sounds very strange—was not subordinated to him; but to the particular branches of the Wehrmacht. Lehmann had no command authority towards the legal departments of the three branches of the Wehrmacht. He could not issue any order to the troops. There is no single order which Lehmann signed and which exceeded the sphere of his department. Where his signature can be seen, we are always concerned with proposals, communications, opinions, informations, and so on.

The main activity of WR was in the field of penal law. But as the responsibility for a correct execution of the penal jurisdiction was with the branches of the Wehrmacht, the task of the Legal Department of the OKW was limited to coordinating the jurisdiction of army, air force, and navy by way of negotiations. The defendant Lehmann had no right to command. He could only make suggestions and requests. In this field which was his proper and most extensive sphere of activity, no reproach could be made against Lehmann. Here the prosecution does not attack. Where the prosecution attacks—and this is the shocking point in this trial—it is in a field where Lehmann had nothing to suggest, but only to obey and to carry out. And this field of activity was the work on decrees concerning the military penal law. There could be two sources of such decrees: They could be suggested by the Wehrmacht branches, then discussed in joint sessions, and

submitted to Field Marshal Keitel for his decision, or—the second possibility—they were already orders coming from Hitler or Keitel. The contents of these orders were fixed, in frequent cases also the formulations. Practically speaking, these orders were already issued, before they were sent to the Legal Department of the Wehrmacht. WR, the other departments, and the commanders in chief had to resign themselves to them, and it would be an error to assume that an officer in the OKW had to obey less than a soldier at the front. To what an extent Dr. Lehmann, also in these nearly hopeless cases, fought to mitigate hardships and to create expedients in order to achieve results based on the law was one of the main points of this trial.

In these remarks a parallel emerges, the parallel to the chief of staff. But here some differences are remarkable. The competence and the rights of the chief of staff were much more extensive than those of the Chief of the Legal Department. Chief WR, for instance, was not the first advisor of the Chief OKW. to deputize for the Chief of the OKW as it was usual for the chief of a staff in case of temporary absence of his superior was out of consideration. Informations which the chief of staff could ask for were not given to the Chief WR. Apart from special cases, the defendant saw his superior only rarely, once a month. In all other cases official matters were submitted to him in writing. Dr. Lehmann's office was in Berlin, Hitler and Keitel were in the Fuehrer Headquarters. During the whole war the defendant Lehmann did not talk once to his supreme Gerichtsherr.

Such things are not formalities; they are based on questions of organization for which Lehmann was not responsible; they prove furthermore the deplorable contempt for jurisprudence and jurisdiction in the Third Reich. Hitler, Himmler, and Keitel made their basic decisions without consulting a jurist. The defendant to whom the decrees concerning his field of activity necessarily were sent had only to fix the wording and to pass them on; he had no right and no authority to issue or to prevent such decrees on his own initiative, even if he wished to do so.

In this connection I may remind you that Military Tribunal V acquitted two defendants in Case No. 7 only for that reason that the nature of their position gave them no command authority. As to one of the defendants the Tribunal has stated, "that he initialed or signed orders * * * which were unlawful when viewed in the light of the applicable international law."

And that it belonged to his duties to work out and to sign such orders; as to the other defendant the Tribunal has stated, "that he exercised this power and influence upon his various

commanders in chief in such a manner as to incriminate himself * * *.”

The decisive point for the acquittal of both defendants had been that the defendants “lacked the authority to issue such an order on their own initiative”.

In conclusion I quote from this judgment and from the reasons concerning the defendant Foertsch (*Case No. 7, Tr. p. 10498*):

“The nature of the position of the defendant * * * his entire want of command authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others as well as the want of direct evidence placing responsibility on him, leads us to conclude that the prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.”

These statements are of decisive importance for the evaluation of the responsibility and the competence of my client and their application would lead to the same result. The prosecution has failed to make a case against the defendant. If I endeavored to clarify the actions and the responsibility of my client, if I endeavored to prove that his actions were unobjectionable in legal respect, I will not contest that recent years saw great crimes. But it is the task of this honorable Tribunal to establish the *personal* guilt or nonguilt of the defendants. I am quite aware of the difficulty of this task. We are concerned with a tribunal of victors over the vanquished, with laws and procedure which victors created to apply to a defeated people. But this judgment must not consider the question of victory and defeat, the trust of humanity is at stake, the hope that sovereign judges, free from generalizations, from feelings of revenge, and uninfluenced by propaganda are able to distinguish between the actions of these defendants and the demoniac character of the perished regime.

May your judgment be based on the understanding that standards of civil jurisprudence do not apply to revolutions and war, for powers are at work, the source and the end of which are unknown to us. Inescapable historical facts, however, determine the framework and the standards in judging actions and omissions of an individual.

Your Honors, may these ideas guide your considerations and lead you to the conclusion that my client, during a time which was stronger than himself, fought with a clean character, with his best will and with all his might for the maintenance of justice.

Dilexit justitiam et odit iniquitatem. (He loved justice and abhorred iniquity.)

I move that the defendant Lehmann be acquitted from all the counts of the indictment.

F. Extracts from Closing Briefs of the Defense

I. EXTRACT FROM THE CLOSING BRIEF FOR DEFENDANT VON KUECHLER

* * * * *

This defense of necessity or duress is closely related to the plea of "superior orders". I am glad to agree with the views of the Tribunal as far as that is concerned, and take the liberty of quoting extracts from the statements of the prosecution presented in its closing brief in the Krupp Trial* on 24 June 1948:

"The reason that superior orders are sometimes given weight in military cases, * * * is based upon two quite distinct ideas. The first is that an army relies strongly, in its organization and operation, on chain of command, discipline, and prompt obedience; the soldier is in duty bound under ordinary circumstances, and also under very extraordinary circumstances, to carry out his commander's orders immediately and unquestioningly. The second reason is that the soldier stands in fear of prompt and summary punishment if he fails to carry out orders, or obstructs their prompt execution by over-much questioning." (*Case No. 10, Tr. pp. 12496-12497.*)

Unfortunately, so far the prosecution did not take the same view in *this* case. On the contrary, in this trial where it indicts soldiers, it would have none of these principles. It does not even know now the U. S. Field Manual, published by the War Department, "Rules of Land Warfare, Washington 1940 (FM 27-10)", where it says under paragraph 347:

"Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders."

Also the British Manual of Military Law declares in its Amendment of January 1936, under paragraph 443:

"It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their government, or by their com-

* United States vs. Alfried Krupp, et al., Case No. 10, Vol. IX.

mander, are not war criminals and cannot therefore be punished by the enemy."

In connection with these regulations, the authoritative work by W. Winthrop, "Military Law", second edition (1920), states that as a rule it is not up to the subordinate to determine whether an order issued to him is legal; in practice, this would destroy military discipline.

In the fact that the prosecution overlooks these opinions, which are obviously known to it (the prosecution), I see a further proof for my opinion, already presented in my opening statement, i.e., that the prosecution presents the subject matter of the trial always one-sidedly in the manner which seems most suitable to serve their purposes. I leave the evaluation of such "chameleon tactics" to the Tribunal.

Now it is rather a poor argumentation if the prosecution argues that for all practical purposes any military penal code of the civilized nations contains the rule that a soldier is not obliged to comply with criminal designs of his superiors. In doing so, the prosecution is overlooking reason and purpose of this provision. The meaning of this rule surely is that the legislator himself, or the holder of the supreme state authority, rises in defense of a soldier if the latter believes he is unable to comply with an unlawful order of his superior. The presupposition of this is therefore that the legal basis is unobjectionable, the individual order, however, is unlawful. In that case of refusal to obey an order, the soldier receiving the order may thus refer in the face of his superior to the protective law introduced by the prosecution, and justify his refusal. This legal protection fails however, if the head of the State himself issues an unlawful order, since in that case, as the witness [Franz] von Roques rightly stated during his interrogation of 30 July 1948 (*German Tr. p. 8662*), no earthly power exists which can protect the soldier who refused to comply with the order.

* * * * *

Measures constituting military necessities (evacuation and destruction)

I now turn to the events directly connected with the front line fighting which have been introduced by the prosecution under the headings "evacuation and destruction". In paragraph 59 of the indictment the prosecution attempts to represent these measures as part of a premeditated plan and program. Paragraph 68b of the indictment reads literally:

"In the fall and winter of 1943 in the U. S. S. R., in territories being evacuated by Army Group North commanded by Kuechler,

in order to force an evacuation or elimination of the population, villages, houses, wells, mills, cellars, and furnaces were destroyed; and all movable items including milling stones, tools, carts, etc., were carried back or destroyed by the troops; resulting in innumerable civilian deaths and the destruction of a tremendous amount of property.”

Before dealing in detail with the charges preferred by the prosecution I wish to comment on the legal aspect of the problem.

Legal Appraisal

The basis of a legal appraisal is the Articles of the Hague Convention on Land Warfare. It lays down in Article 23g—

“In addition to the prohibitions provided by special conventions, it is especially forbidden—

* * * * *

“g. To destroy or seize the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.

* * * * *

“A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country even if they were in the belligerent’s service before the commencement of the war.”

* * * * *

A destruction, then, is justified if and when a military necessity exists. However, if military law justifies such destruction, then the evacuation of the civilian population in the course of these justified measures must be permissible as well, since the devastation of a territory automatically gives rise to the question of evacuating the population settled there.

Before dealing with the problems in detail, I wish to call the attention of the Tribunal to a basic decision in this matter. I refer to the judgment of Military Tribunal V in Case No. 7 against the defendant Rendulic who was charged with wanton destruction of private and public property during the retreat in the Finmark [Province of] Norway of the 20th Mountain Army commanded by him. The judgment reads as follows (*Case No. 7, Tr. pp. 10512-14*):*

“The evidence shows that the Russians had very excellent troops in pursuit of the Germans. Two or three land routes were open to them as well as landings by sea behind the German lines. The defendant knew that ships were available to the Russians to make these landings and that the land routes were avail-

* United States *vs.* Wilhelm List et al., Vol. XI.

able to them. The information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible. It was with this situation confronting him that he carried out the 'scorched earth' policy in the Norwegian province of Finmark which provided the basis for this charge of indictment.

"The record shows that the Germans removed the population from Finmark, at least all except those who evaded the measures taken for their evacuation. The evidence does not indicate any loss of life directly due to the evacuation. Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted.

"Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication and transport facilities was had. This was not only true along the coast and highways, but in the interior sections as well. The destruction was as complete as an efficient army could do it."

* * * * *

"The Hague Regulations prohibited 'The destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war.' (Article 23g). The Hague Regulations are mandatory provisions of international law. The prohibitions therein contained control, and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destructions of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in Article 23g. We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts, or want thereof, which furnished the basis for the defendant's decision to carry out the 'scorched earth' policy in Finmark as a precautionary measure against an attack by superior forces. It is our considered opinion

that the conditions as they appeared to the defendant at the time, were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.

“This being true, the defendant may have erred in the exercise of his judgment, but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.”

This decision of the Tribunal in Case No. 7 furnishes the legal foundations on which to base the appraisal of Field Marshal von Kuechler's action in this respect.

The evacuation and the “scorched earth” policy is justified not only if it is objectively proved to be a military necessity, but even if it presented itself as such subjectively in the opinion of the defendant “at the time of its occurrence on the basis of the conditions prevailing at the time.”

Discussion of the various charges

* * * * *

I now turn to the other prosecution documents which refer to the time after 5 September 1943. They refer to measures on the basis of Fuehrer Order No. 10 which provided the construction of an Eastern Wall (Panther Line) behind the German lines, and a withdrawal of the front to this line, as a military necessity.

* * * * *

In order to prevent an enemy break through in the course of such a large scale withdrawal to a position deep in the rear, it was imperative at the beginning of such a retreating movement to ensure that—

1. The defensibility of this position, i.e., its construction should be as complete as possible.

2. The terrain between the previous and the new positions should be so prepared as to thwart or at least to slow down every break-through movement of the enemy.

The achievement of this aim presupposes the destruction in the intervening terrain of everything which might help the movements and the gaining of footholds by the pursuing enemy. This meant the radical destruction of all communications (roads, railroads, bridges) and the rendering uninhabitable of all settlements with their vital installations. With the execution of these measures, strategical necessity thus made it impossible for the resident civilian population to remain here. They had to be evacuated.

It must, therefore, not be overlooked that in the course of such withdrawals—as experience has shown—a large part of the civilian population stampedes into the disengaging movement of the troops, thus constituting a danger for its successful execution.

From this consideration there resulted another military necessity, namely, to make carefully thought out preparations for the evacuation of the civilian population and to carry it out according to plan and under humane conditions.

* * * * *

In conclusion to this complex I want to make this clear. The evacuation of the civilian population was militarily necessary and thus justified for the following reasons:

1. Military law does not prohibit the evacuation of the civilian population at the approach of the military opponent, if there is a certainty that the latter would use the civilian population ruthlessly against one's own armed forces. In particular, the compulsory recruitment of the population by the partisans demanded energetic counter measures.

2. Furthermore, military law does not prohibit a belligerent from making all preparations for his retreat, in order to secure his own forces. Because of the particularly dangerous band concentrations between the front line and the Panther position, the success of a retreat depended not least of all on the behavior of the partisans, therefore, Field Marshal von Kuechler was obliged and entitled to make the necessary preparations to meet this danger.

3. Military law also does not prohibit the destruction, justified by military necessity, of dwellings and material, as far as these could be used by the enemy after his advance. A necessary sequel of this destruction is the evacuation of the civilian population affected by it, since the population would otherwise be homeless and drawn into the retreat fighting.

4. Finally, military law excuses an unlawful action based on the principle of self-defense. At that stage of the war it was not a question of to be or not to be for the armies of the northern flank of the eastern front, but a question of the existence of the entire German front. In view of the then existing situation in the northern front, both the destruction and the evacuation are thus justified from the point of view of self-defense.

This was also the view of Military Tribunal V in Case No. 7, *United States vs. Wilhelm List et al.*, in which the evacuation of Finmark was not considered a crime, and Rendulic was acquitted of this charge.

* * * * *

* * * The prosecution, by a complete distortion of the actual causes, attempts to present the military necessity of the evacuation as a mere means of procuring labor for the Reich. By this it wants to establish a connection between the Sauckel program and the military agencies of Army Group North.

The work of the recruiting commissions and the economic agencies

* * * * *

The recruiting commissions were not under the command of Field Marshal von Kuechler, but carried out their recruiting action on the basis of the Fuehrer decree which I submitted to the Tribunal in Document von Kuechler 119, von Kuechler Defense Exhibit 119. According to this, Hitler had appointed Sauckel as Plenipotentiary General for Labor Allocation on 21 March 1942 and had authorized him to carry out the mobilization of required labor on his own competency and responsibility. For this purpose the Plenipotentiary General for Labor Allocation appointed recruiting commissions, which were to recruit Russian labor also in the area of operations on a voluntary basis. For the execution of his task Sauckel was directly subordinate to Hitler and was authorized by him to give direct instructions also to the military agencies. * * * Thus, Sauckel's direct competency for the area of operations contradicted the position of the commander in chief as holder of executive power in the traditional sense. Through Hitler's order and Sauckel's direct competency for the problem of labor allocation also in the area of operations, as well as the right to issue factual instructions also to military agencies, the alleged holder of executive power, namely the commander in chief, was intentionally robbed of part of the full power in the occupied territory by the supreme state power. This part Hitler reserved for himself and had it carried out by a Plenipotentiary General for Labor Allocation, Sauckel, appointed particularly for this purpose.

* * * * *

The organization of these economic agencies in the area of operations was arranged as follows:

Hitler also intentionally limited the power delegated to the commanders in chief by transferring this part of the power over the occupied territory directly and on his own competency to a special plenipotentiary directly subordinate to him. In this case it was Goering whom Hitler appointed as plenipotentiary for all economic questions in the newly Occupied Eastern Territories and whom he authorized in this capacity to issue direct instructions also to agencies of the armed forces (*Document von Kuechler 60, von Kuechler Defense Exhibit 60*). (Hitler decree of 29 June 1941 concerning the economy in the newly Occupied Eastern Territories). This shows convincingly that the commander in chief was no longer the holder of the supreme state power for these questions, but that they were withdrawn from his competency. It is a complete misunderstanding of the facts, when the prosecution, in spite

of innumerable documents and testimonies, maintains—even on the last day of the presentation of evidence—its assertion that it was different. The Hitler order, which appointed Goering, and under him a specially created economic administration for the area of operations, shows quite clearly that the “holder of the supreme state power”, the “supreme holder of executive power”, or the “supreme judicial authority”, withdrew another important part of the supreme state power; i.e., the economic department, from the holders of the so-called executive power in the operational area—the commanders in chief—by creating an economic organization directly subordinate to him. Anyone who is familiar with the conditions knows that such a measure corresponded to Hitler’s deeply rooted distrust of the military and his contempt for their economic and political abilities. It was Hitler’s intention to regain the economic leadership under all circumstances in order, after the previous bad experiences, with the Quartiermeister machine of the armed forces under the commanders in chief, to exclude the latter. For this purpose Goering created the economic organization for the newly Occupied Eastern Territories and with it the economic commands and economic inspectorates which carried out his instructions in the area of the army group. * * * It emerges that the economic organization had its own competency, had at its disposal its own official channels, and did not receive its factual instructions and orders from Field Marshal von Kuechler. The economic inspectorate and the economic leader were subordinate to the Economic Staff East, and the latter to the Economic Control Staff, and in the next higher authority to Goering. In practice, this completely separated the economy in the area of operations from the military command agencies. Thus, they were coordinated and not subordinated agencies.

The prosecution does not want to accept this fact. Even in the rebuttal it still asserts that the economic organization was subordinate to the Commander in Chief “in every respect”; with that, it knowingly contradicts the contents of the documents. When the documents mention a subordination to the commander in chief of the army groups, it always means only a territorial subordination and not a subordination in “every respect”. This has been shown by the evidence. Prosecution Exhibit 48, [Document NOKW-1501], does not contradict this either; it only shows that a confusion of command in the area of the army group was to be avoided by coordination and by the referral of the economic organization to the area of its competence. The same emerges from Prosecution Exhibit 435, [Document NOKW-2410], which Field Marshal von Kuechler discussed in detail in his interrogation (*Tr. pp. 2863-2864*). This order also clearly differentiates be-

tween the competency of the economic organization and its task which it had to carry out on its own responsibility. Thus, the *coordination* and not the *subordination* of this economic organization in the area of command of Field Marshal von Kuechler is clearly proved by all the documents. If the economic organization had actually been subordinate to the commander in chief, then neither the appointment of Goering, nor the establishment of a special organization, nor the express order, that it was directly subordinate to Goering, nor special departmental official channels or a separate departmental responsibility would have been necessary. Thus, the prosecution was unable to prove that the economic organizations were subject to operational instructions from Field Marshal von Kuechler.

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2. EXTRACT FROM THE CLOSING BRIEF FOR DEFENDANT HOTH

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Control Council Law No. 10 provides in its Article II 4 (b) :

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

Now the question is whether one is able to bring the Commissar Order under this provision at all. This necessitates a study of the constitutional conditions in the Third Reich. A division of power in the sense of Montesquieu no longer existed. Hitler was simultaneously supreme legislative authority, supreme judicial authority and highest executive authority. So-called “Fuehrer orders” and to these belonged the “Directives concerning political functionaries (Commissars)” issued by the High Command of the Armed Forces, frequently corresponded in countries without a dictator to the decision of a government of many people, or even to a law passed by parliament with hundreds of representatives. The institution of the “Fuehrer” as triple and exclusive supreme authority in the German Reich, was known abroad. Treaties were made with the Reich thus constitutionally formed, and therefore this form of dictatorship was recognized insofar as this matters at all. Positive doubts on account of this form were not voiced at that time, on the contrary: The smooth functioning of the machinery of state in contrast to the slow lumbering apparatus of the democracies was often lauded by foreign statesmen in the initial period of the Third Reich. If on the other hand, the Commissar Order had been passed as a formal law by a parliament, then the recipient of this order would also have had to carry out this order, even if it

had contained an offense against international law. But one cannot punish the subordinate who carries out an order, and let the members of parliament go unpunished. But the form of the supreme government leadership cannot cause the subordinate to deviate from the principle that his relation to his government leadership, and to it alone, is one of superiority and subordination, but never to any super-state creations which are—at least at present—not yet in existence. It is a generally accepted doctrine in international law that for the individual national law breaks international law. On the basis of the above considerations, the prosecution's so frequently repeated reference to section 47 of the German Military Penal Code does not apply either. Whoever carries out an order issued by the "Fuehrer" as supreme authority of the entire Reich executive cannot be punished by the same "Fuehrer" in his capacity as supreme judicial authority. Or objectively expressed, whoever carries out an order by the Fuehrer does not transgress the principle of the internal order of the State, for the sake of which this very rule was drafted, having entirely different cases in view.

For these reasons the provisions of Control Council Law No. 10 cannot include so-called "orders" from Hitler at all. Otherwise this provision would also be opposed by the principle "*Nulla poena sine lege*"; for during the period under consideration, an appeal to superior orders was generally recognized in international law. For the details on this question I refer you to the arguments in Dr. Laternser's final plea.

Over and above this I refer to the conception of *necessity*, which was clearly established by Military Tribunal IV in Case No. 5 against Flick and others, and thereby to the question of *what cannot be expected of a person* [*Unzumutbarkeit*], which can claim validity as a general principle of international law despite the provision of Control Council Law No. 10 mentioned above. For the details I refer to the verdict itself. (*Case No. 5, Tr. 10995*). I likewise refer to the verdict of the Military Tribunal VI in Case No. 6 against Krauch and others. There it is stated (*Case No. 6, Tr. p. 15787*):

"From a consideration of the IMT, Flick and Roechling judgments, we deduce that an order of a superior officer or a law or governmental decree will not justify the defense of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where

his participation went beyond the requirements thereof, or was the result of his own initiative.”

None of these prerequisites were present in the case of General Hoth. That a condition of necessity and a question of how much a person can be expected to do existed for him in the transmission of this order, can easily be seen from the situation which existed at that time. He knew that the order came from Hitler personally, and he knew that open opposition to such an order would have had very serious consequences for him. It was also clear to him that nontransmission of this order signified rebellion against the Supreme Commander of the Armed Forces himself, whom he knew placed particular value on the execution of the order. Therefore, the only thing left for General Hoth to do was to dilute the order to the point where he considered it acceptable for application in individual cases. This, in turn, could not be done in writing, since he had to assume that the consequences would be the same as in the case of nontransmission. Therefore, the only possibility was to inform the subordinated commanding generals orally about the intentions of diluting the order.

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3. EXTRACTS FROM THE CLOSING BRIEF FOR DEFENDANT REINHARDT

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I shall now turn to the legal question as to whether or not the employment of Russian prisoners of war, especially the employment for the construction of field fortifications in the rear area outside the combat zone, can be objected to from the point of view of international law.

I. According to the view held by the prosecution [indictment of 28 November 1947, par. 50] the employment of prisoners of war for labor is considered a war crime and crime against humanity, if such work is involved as is expressly prohibited according to the “Geneva Convention of 1929, concerning the treatment of prisoners of war”. The first vital question then is: Was the Geneva Convention applicable at all in the relationship between Germany and Russia? This question can be answered only with a clear “no”. For—

1. The Soviet Union has not ratified the “Geneva Convention of 1929 concerning the treatment of prisoners of war”.

2. From the very beginning of the last World War the Soviet Union did not abide by the rules of the Geneva Convention.

3. The Soviet Union has not observed the rules of the “Geneva Convention of 1929 concerning the improvement of the lot of the

wounded", which she signed and ratified under the title of the U. S. S. R.

4. In its verdict of 30 September 1946 the IMT has stated that the "Geneva Convention concerning prisoners of war" was not valid as far as Germany and Russia were concerned.¹

In the face of these incontestable facts, the document presented in this connection by the prosecution in rebuttal loses any significance. Here the 72d Infantry Division quotes a contrary opinion given in an enemy information bulletin, the origin of which has not even been ascertained. It might have been taken even from a misleading source of enemy propaganda, which is likely in view of the announcement in the enemy information bulletin. If, however, the Geneva Convention was not applicable, then the employment of the prisoners of war for labor was more or less permitted in as far as it did not violate the most elementary human rights of prisoners of war. It cannot be alleged that the construction of fortifications outside the combat zone constituted a violation of the most elementary human rights of the prisoners of war. This did not involve the employment of prisoners of war in "war operations against their own country", nor did this work expose the prisoner to greater danger than any other work that prisoners of war have to perform in war time. The idea will never occur to anyone to consider the employment of prisoners of war for farm labor in the Reich illegal, although these persons were exposed to much greater danger in view of the enormous numbers of low flying Allied planes which, in the course of their operations, used to fire with all their weapons even on civilians who were peacefully working in the fields.

II. But even assuming for a moment that the Geneva Convention is directly applicable in the judgment of the legality of such an employment, one cannot arrive at any other conclusion. According to chapter 3, Article 31, of the Geneva Convention—² only

¹ The excerpt from the IMT judgment of 30 September 1946, (Trial of the Major War Criminals, *op. cit. supra*, vol. 1, p. 232) reads as follows: "On 15 September 1941 Admiral Canaris protested against the regulations for the treatment of Soviet prisoners of war, * * *. He then stated: '*The Geneva Convention for the treatment of prisoners of war is not binding in the relationship between Germany and the U.S.S.R.* Therefore only the principles of general international law on the treatment of prisoners of war apply. Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill or injure helpless people * * *. The decrees for the treatment of Soviet prisoners of war enclosed are based on a fundamentally different view point.' This protest, *which correctly stated the legal position*, was ignored." [Emphasis supplied.]

² *Geneva Convention concerning the treatment of prisoners of war, dated 27 July 1929.*

Article 31: "Labor furnished by prisoners of war shall have no direct relation with war operations. It is especially prohibited to use prisoners for manufacturing and transporting arms or munitions of any kind, or for transporting material intended for combatant units."

* * * * *

Article 32: "It is forbidden to use prisoners of war at unhealthful or dangerous work."

the use of prisoners of war for the "production and transportation of material designed for the fighting troops" is expressly prohibited.

Article 32 prohibits the use of prisoners of war for "unbearable or dangerous work." The construction of field fortifications outside of the combat zone is not included in this article on the list of expressly prohibited work.

I have endeavored to come to a clear interpretation of this provision. In doing so I found the minutes of the Second Commission which at that time dealt with these questions in Geneva. Chapter C of the "Files of the diplomatic conferences for the improvement of the lot of the wounded and sick and for the treatment of the prisoners of war, Geneva, 27 July 1929", contains the "minutes of the session of the Second Commission, Provisions for Prisoners of War." Because of the great importance of the records, the exact wording is stated below in the footnote.*

* Extracts from the "Record on the Diplomatic Conference * * * regarding the Treatment of Prisoners of War", Minutes of the Meetings of the Second Commission, Geneva, 1-24 July 1929, pp. 479-80.

Colonel Vertejano (Rumania)—"The Rumanian Delegation wishes to suggest that at the end of the first paragraph it should be inserted: 'As well as for the transport of material intended for combat units', and to add: 'As well as to the work on trenches and fortifications'. While in the first part it is stated that the work of prisoners of war is not to have 'a direct connection with the operations of war', the Rumanian Delegation nevertheless submits that it would be advisable to bring this out more precisely in the manner suggested.

Lieutenant Colonel de la Harpe (Switzerland), reporter—"We are faced with the Rumanian proposition, the terms of which have already given cause to an extensive change of opinions. We have abided faithfully by the principle that the regulations for prisoners of war constitutes, if you permit me to say so, the minimum of the maximum and the maximum of the minimum. It is very difficult to go into detail if one wishes to avoid new discussions on this question of fortifications. It would be better not to talk of it. As far as trenches are concerned this nevertheless strikes me as somewhat extraordinary, since the regulations provide that the prisoners of war are not to work in the line of fire. Does one have in mind a withdrawal? Or perhaps there might be the case, for example of prisoners of war being utilized for digging trenches in the line under fire? That is possible and personally I do not dare to make a statement on that subject."

Colonel Vertejano (Rumania)—"I uphold our proposal. Inasmuch as there is mention made of munitions and armaments in connection with operations of war, I think it perfectly logical and normal that one adds the words 'fortifications' and 'trenches'. As a matter of fact, if the regulations for prisoners of war are the expression of this experience gained in the war, then such experience has demonstrated that prisoners have been utilized for building trenches and fortifications. That is the reason why the Rumanian Delegation insists on the point which it has just set forth.

"The Rumanian Delegation makes all reservations as regards acceptance on the part of the Rumanian Government of the first paragraph of Article 31, which refrains from stipulating that the prisoners of war will not be used for work on trenches and fortifications."

Lieutenant Colonel de la Harpe (Switzerland), reporter—"We have a first paragraph which seems to allow for the necessary flexibility. Shall we now go into new details? We have considered for example, men who work in forests who cut the trees which will be sent to the front. Would you prevent prisoners of war from carrying out that work? I do not believe so. One cannot prevent the detaining powers from sending men into forest to work, and that is why I feel one should leave a certain flexibility. I understand the Rumanian proposition very well, but I feel that one should not make a wording cumbersome which appears to me sufficiently comprehensive, as it insists on the words, 'no connection with the operations of war'.

These records, to which I should particularly like once more to call the Tribunal's attention, unambiguously show that the employment of prisoners of war for the construction of field fortifications outside the combat zone is not prohibited by the Geneva Convention. During the deliberation of the problem a unanimous opinion in the form of a prohibition could not be attained.

By a majority of votes it was agreed not to include in the Geneva Convention a prohibition of the employment of prisoners of war for the construction of field fortifications outside the combat zone. How can one try, in view of this state of facts, to indict a German general as a war criminal because he did not attain during the war the conception of law which was maintained by a minority, and which the prosecution tries to set up today, so to speak in a dictatorial manner, as solely valid and solely justified?

How many German prisoners of war were employed in England during the war for the construction of air fields from which later on the bombers took off. Nobody would think of considering this employment as being in direct connection with the operations of war (*Geneva Agreement, Article 31*). How then, can one do so with respect to the employment of prisoners of war for the construction of field fortifications if these field fortifications were in many cases constructed 100 km. and more behind the combat zone and many of them were not even used later on.

III. If one goes still further and assumes that the Geneva Convention not only applied, but that it even had the meaning alleged by the prosecution, and consequently also prohibited the employment of prisoners of war for the construction of field fortifications outside the combat zone, the charge made against General Reinhardt is nevertheless still unfounded. For, in this case, the legal principle on "*tu quoque*" must be applied, which has approximately the following meaning:

"A state cannot blame another state for having violated the law by an action which it commits itself."

Probably not a single German who participated in the fighting against the Soviet Union will have the slightest doubt that the Soviet Union employed her German prisoners of war to a much larger extent for the construction of field fortifications, particularly even for the construction of field fortifications within the combat zone. I may in this connection be allowed to remind the Tribunal

"Mr. President, as this question was discussed at very great length in the subcommission, it seems unnecessary to me to return the Rumanian proposition to the subcommission which would come to a conclusion no different from the one at which we are arriving today.

"The only thing we can do is to vote.

"One will vote by remaining seated and by standing up. The Rumanian proposition is rejected by 22 votes against 8. Article 31 is adopted with the amendment of the Swiss Delegation."

of how General Reinhardt described on the witness stand so impressively how he personally observed in the foremost front line, through his field glasses, that on the other side the Russians employed German prisoners of war in the foremost position, within the range of our own fire, for the construction of field fortifications. This personal observation was confirmed by observations of others, by reports of numerous agents and by interrogation of numerous German soldiers who had escaped from captivity. (*Tr. p. 3384.*)

If, then, this is a fact, this circumstance—even if the Geneva Convention applies and its provisions are interpreted in a most narrow, literal way—must benefit General Reinhardt. Especially with regard to the legal principle of “*tu quoque*” the IMT made a fundamental decision in the case of Admiral of the Fleet Doenitz by recognizing the application of this principle as a legal excuse.* The IMT indeed found that Admiral Doenitz had violated international law on this point, but nevertheless it did not convict him because of this violation, because the same breaches of international law had been committed by the enemy.

The application of the same principle to the case of General Reinhardt must result in his acquittal, even if the validity of the Geneva Convention is affirmed and its interpretation by the prosecution is accepted as binding. For the Soviet Union not only committed the same violation, but went much further by employing prisoners of war even within the range of enemy fire for the construction of field fortifications.

* * * * *

At a time in which the Soviet Union is daily engaged in the forceful deportation of German citizens—numerous cases of this kind have attracted considerable notice also in the press of the Western Powers—at a time in which the Soviet Union compels German citizens to perform slave labor on a large scale in the true meaning of the word beyond the borders of Germany, it is difficult, especially for a German, to keep faith in international law. While all this happens 3 years after the termination of the war, without any world power taking steps to bring these cases before an international tribunal under the charge of war crimes, German generals are being taken to account here for having compelled the Russian civilian population to perform absolutely necessary work

* In the judgment of the IMT it is stated (*Trial of the Major War Criminals, op. cit. supra*, vol. 1, p. 818):

“In view of all the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.” [Emphasis supplied.]

in the midst of the most critical emergency of the war—the population of a country which in peacetime had already enacted a law providing for compulsory labor.

Never will the conquered German nation accept this as justice unless equal law is made the principle for all. The German people can only look at these trials with the deepest bitterness, if, on the other hand, it is so clearly demonstrated how differently the law is applied as soon as acts committed by Germans are not in question.

One should not tell against me that a criminal does not escape punishment just because some other criminal has committed the same crime for which he has not yet been punished.

It is certain, however, that the idea will occur to none to make the other criminal the legislator, the prosecutor, and judge of the defendant. In international law, however, it is supposed to be “justice” for a nation which itself commits crimes against peace and acts which are branded here as crimes against humanity, to be permitted at the same time to set itself up legislator, prosecutor, and judge of the very same acts. For the Soviet Union participated in the drafting of the rules which are valid here, and this Tribunal is acting on the basis of an authorization which was also given by the Soviet Union.

* * * * *

The fact that, in principle, the civilian population of an occupied territory may be compelled by the occupying power not only to make payment in kind but also to render services of any kind has already been acknowledged in Article 52 of the Hague Regulations for Land Warfare. That the rendering of services may be required from individual residents as well as from the communities is expressly mentioned in the same passage. A limitation of this compulsory service is prescribed by the Hague Regulations for Land Warfare only to the extent that the services “must be in proportion to the resources of the country”, and that the population will not be subjected “to participate in war operations against their own country”. Consequently, even according to the Hague Regulations for Land Warfare, no fundamental objections could be raised against the labor conscription of the population by the commanders in chief of the army, not even in cases where this conscription was effected by tasks imposed on the communities. The only factor in doubt could be the extent or the kind of work admissible for the employment of the population. In this connection I refer to the basic legal arguments propounded in regard to this question by Professor Maurach in his legal expert opinion.*

* Here, quotes from the expert opinion of Professor Maurach, contained in the brief, are omitted. They are reproduced in Document General Defense 79, General Defense Exhibit 79, reproduced in Section VII C2.

* * * * *

In conclusion I should like to stress a final argument. When so many doubts are left concerning the validity of the Geneva Convention and the interpretation of its provisions, when the supreme authorities of the Reich stressed again and again during the war that the Geneva Convention did not apply to Russia and that Germany was not bound by it—how, then, can a personal guilt of General Reinhardt be inferred from the fact that he considered “right” at that time what now, years later, is supposed to be considered “wrong”. Finally, a Panzer general is not an international lawyer who during the war would be in a position to make investigations lasting several months, or to ask international lawyers for expert legal opinions about the correctness of his conception of law and whether it could also be maintained in face of the consequences of a lost war.

During the First World War prisoners of war were employed on both sides for trench digging. The Geneva Convention drew from this the practical conclusion that trench digging outside the combat zone should no longer be prohibited. In view of these facts, how could it occur to soldiers during the Second World War that the prosecutors of a victor state would consider this a war crime *after* the termination of the Second World War! In a modern war which implicates the nations as a whole, which entails the total labor service of all nations participating in the war, which affects an entire nation by the hunger blockade, which with bombs or atom bombs erases whole towns or parts of countries within a few hours or minutes, no employment can finally be imagined which does not have a certain connection with military operations.

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4. EXTRACT FROM THE CLOSING BRIEF FOR DEFENDANT HOLLIDT

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The problem of a command by a superior, as expounded by the prosecution, seems to me to be an example of how, within a few years after the Control Council Law No. 10 was promulgated, a development has taken place which shows that this regulation is in contradiction to the needs and fundamental principles of military life. If, on the other hand, this existing legal regulation is not regarded as being the standard for the meting out of justice, then this standard must no longer be applied. Instead of stating my own views on the *actual* situation from the aspect of the fundamental importance of the problem of orders by superiors, and the views held by the experts in the Anglo-American countries, I

would like to quote the opinion held by the British naval officer and author, Mr. Grenfell, which was published in the British newspaper "The Spectator" on 23 June 1948.

The Implications of Nuremberg

"As the international situation deteriorates and the accusation of aggression begins once more to be bandied about among the nations, we can no longer, without cowardice, refuse to face the implications of the judgment by the International Military Tribunal in the Nuremberg trials. It was laid down by the Tribunal that subordinates are not absolved by the plea of superior orders from personal responsibility for the planning and waging of aggressive war. To quote the Tribunal:

'Hitler could not have made aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats, and business men. When they, with the knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.'

"This judgment, whatever it may be in law, plays havoc with the British Constitution, a cardinal principle of which is the subordination of the military to the civilian authority. The Nuremberg judgment impugns that subordination. In future, the chiefs of staff, on receiving orders from the Cabinet to prepare plans for war against another country, will be able to say, 'Oh, no; we don't like the look of these orders. They smack to us of intended aggression'. Nor will the chiefs of staff themselves be master in their own house. Not only have the German service chiefs been condemned for obeying their political leaders the lesser service men are now on trial for obeying their senior officers. As well as undermining the British Constitution, the IMT has loosened the foundations of the naval discipline and the army and air force acts.

"It is no way out of this difficulty to contend that British staff officers will never be asked to plan aggressive war. Since the IMT did not define aggressive war, it is left to the victors in a war to interpret that phrase as they please, and were we to lose a future war, there is little doubt that the inevitable counter parts of such basically defensive measures as the British occupation of Iceland and the invasion of French North Africa could be used to send hundreds of our staff officers to the scaffold. How, then, can a staff officer tell if he is or is not planning what may later be called aggressive war? The assurances of

his political superiors will avail him nothing if the war goes the wrong way. In fact, so doubtful are the data on which he has to decide, and so dire are the penalties for a mistaken guess, that the only real safe course for a modern staff officer is to refuse to do any planning at all.

“Would such a refusal command the respect and acquiescence of the British Parliament and public. How could it, since a refusal to plan involves grave danger to the national security? Is it not inevitable that the British public, if presented with such a situation, would very quickly decide that, whatever the Nuremberg Tribunals might have said, staff officers are paid to plan as they are told, and will refuse at their peril? But, if this is what is likely to happen, how can we, as honest men, justify it to our consciences that German officers are in prison with our knowledge and by our order for doing their duty in just this way?”

So much for the impressive statements of Mr. Grenfell,* who lives at present in Campden House, Burley, near Ringwood, England. His words clearly show how important it is to revise the sentences pronounced to date, not only in Nuernberg, but in all trials for war crimes. Numerous examples show that his views are shared not only by soldiers and officers within and without the Anglo-Saxon world, but also by others.

As far as the legal aspect is concerned, it should be pointed out that the Control Council Law violates the principle of the prohibition to establish a penal law afterwards, * * *. German law does not accept the principle of mitigating circumstances which is all that the Control Council concedes.

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5. EXTRACTS FROM THE CLOSING BRIEF FOR DEFENDANT VON ROQUES

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1. *The extent of the executive power in the Eastern Campaign*

As I already stated in my opening statement, it has the most serious consequences for my client as well as for all the other defendants that the old term “executive power” as known to the German armed forces and probably also to the armed forces of all other countries was retained in the Russian territory, although it is hardly appropriate to use this term of executive power in its true meaning in this area.

* Captain Russel Grenfell appeared as a defense witness. Extracts from his testimony are contained in Section VI D1 vol. X.

What executive power actually meant in the beginning and what the prosecution wants to be understood by that term in this case and with respect to the Russian territory has been clearly shown by the documents submitted. Article 22 of the [German] Army Manual No. 90, "Supply of the Field Army", reads as follows (NOKW-2708, Pros. Ex. 41) :

"Within the area of operations the CinC of the [German] Army and the CinC's of the armies are given authority to exercise the executive power.

"The executive power contains the exercise of all state authority in the area of operations within the directives issued by the Fuehrer without prejudice to the independence of the judges.

"Commanders invested with executive power for a part of the area of operations of the German army shall be considered to be on the same level as the commanders in chief of the armies."

A supplementary specification pursuant to these provisions exists in the "Service Regulations for Armed Forces Commanders", issued by the OKW on 15 April 1941. (NOKW-1471, Pros. Ex. 43.) In the enclosure, under the heading of "The relationship of the armed forces commanders to the political plenipotentiaries", in section IV, paragraph 4, it states: "According to the Reich Defense Law—not published—and according to Army Manual 90, the executive power is the supreme power (*summum imperium*), which is limited only by the will of the Fuehrer".

Therefore, the following must be stated: In its proper, original meaning, the executive power is the supreme state power as a whole. In the Third Reich, as a dictator state, the entire state power was embodied exclusively in the person of Adolf Hitler. He alone had claim to it and he alone was authorized to delegate it to others, to the extent and to the circles of persons to whom he wanted to delegate it. Therefore, it must be determined how much of this supreme state power in the Russian area, this *summum imperium*, embodied in the person of Adolf Hitler, was delegated to the Commander in Chief of the Germany Army, and how much of it he in turn delegated to his subordinate commanders. Only if the evidence showed that Hitler actually delegated the full executive power to the formal holders in the area of operations, could it be established that the latter had also to take the full material and personal responsibility resulting from the full rights. For only the person who can claim for himself the full rights of a legal concept can also take the responsibility connected with this legal concept. In this connection, however, the hearing of evidence has shown beyond any doubt that there could never be any question of a delegation of the full state power to the

holders of the executive power in the operational area in Russia. It is true that according to the original provisions Hitler formally delegated the executive power to the commanders in the operational area, but materially he only allowed them a small percentage of the resulting rights according to the principle "*divide et impera*", in order not to let anyone become too powerful. For the delegation of the actual executive power to a military commander would have meant that in his area the latter would have held in his hands the entire state power. Such a concentration of power in a subordinate position, however, contradicts the spirit of any dictatorship. Only the dictator himself is in possession of the full power. His subordinates are merely to be his executive organs for certain parts of areas.

The concept of executive power includes not only the right to make laws, but also the police execution, the administration, the carrying out of economic measures, and in the field of the administration of justice, at least the right to pardon. All these factors make up the supreme state power. Particularly these decisive factors, however, were almost completely taken away from the commanders in the East, or else they were restricted in the decisive points. This, involuntarily, brings up the question of why, in view of these circumstances, the Commander in Chief of the German Army used the concept of executive power at all in the orders and instructions he issued. I believe that this can only be explained by the struggles for power carried on between the individual organizations behind the scenes in the Third Reich. The armed forces, the Party, Himmler with his police organization, Goering with his economic agencies, Sauckel in his capacity as Plenipotentiary General for the Allocation of Labor—all these forces strove for power and tried to create for themselves their own spheres of power even in the rear parts of the operational area. In the face of them the Armed Forces tried to remain the master in its own home, and believed it could perhaps attain this end by having the executive power delegated to it, at least as far as outward appearances were concerned: Possibly, however, the forces working in the background, i.e., Himmler, Goering, and other Party groups, were interested in outwardly placing the responsibility on the armed forces, in order to be able to follow their own purposes incognito in the background. Be that as it may, one thing has been established beyond any doubt—apart from the empty form and the old name, almost nothing remained of the concept of executive power.

2. *Restrictions for the Commander of an army group rear area in Russia by the authority of the army group to issue instructions*

In order to explain more fully what I have just said, may I briefly discuss the basic order of the OKH, dated 3 April 1941, (*von Roques 2, von Roques Defense Ex. 5*) which General von Roques in his examination called the "Bible of the Army Group Rear Area". With these special regulations for the supply, part C, entitled "Regulations on military sovereignty rights, security, and administration in the rear area and matters pertaining to prisoners of war", for the first time in the history of the German armed forces an army group rear area was created, and the executive power delegated to the Commander of the army group rear area. The contention of the prosecution that with Rebuttal Document 77, (*NOKW-3550*) it presented a new definition of executive power in the army group rear area, in face of the defense presentation, is absurd. In the above-mentioned Army High Command Order dated 3 April 1941, which I introduced, paragraph I3, reads as follows:

"He (that is, the commander of the army group rear area) exercises executive power in compliance with the directives of the Commander in Chief of the army group, and is responsible for the security and the exploitation of the country in his area."

The definition presented in paragraph 10 of Rebuttal Document 77, reads as follows:

The Commander of the Army Group Rear Area 103 exercises executive power in the army group rear area in compliance with the directives of the Commander in Chief of the Army Group, and is responsible for the security and exploitation of the country in his area."

Thus, this supposedly new definition corresponds not only to the meaning but even corresponds literally to the definition introduced by the defense, and it is completely incomprehensible why the prosecution burdened its rebuttal with it.

Already in this basic order of 3 April 1941, the executive power of the Commander of the Army Group Rear Area, i.e., of my client, is decisively restricted. While, according to paragraph I2,* the commanders in chief of the armies, in exercising executive power, were bound only by the directives of the Commander in Chief of the German Army in compliance with the provision of Army Manual 90, section I3, states that the Commander of the army group Rear Area, in the army group rear area to be taken over by the

* Paragraph 12 of von Roques 2, von Roques Defense Exhibit 2 states: "In the army area the commanders in chief of the armies exercise executive power and are responsible for the security and the exploitation of the country".

army group, had to exercise executive power according to the directives of the Commander in Chief of the Army Group. Thus, he was in addition, subject to the authority to issue directives of his superior commander in chief of the army group.

This meant—I quote here the testimony of the Ib of Army Group South, Colonel Schall—(*Tr. p. 5030*):

“That the army group had the right of intervention if executive power was not handled in the manner desired by him; for instance, if it was either done in an inadequate fashion or if it was handled too strictly. At any rate, as far as I recall, that was the view of the commander in Chief of the Army Group South and his chief of staff.”

The fact that use was made by the army group of this authority to issue directives, was described by the same witness.

3. Restrictions in the administrative field

The above-mentioned order by the Army High Command, dated 3 April 1941, however, also results in restrictions in the executive power in the administrative sphere. While otherwise the administration of an occupied enemy territory represents the main task of the military commander, here, for the Russian area, it is stated already in the introduction [of the order] that the planned administration and exploitation of the country “will be a later concern. It is not the task of the German Army.” This restriction mentioned in the introduction is explained as follows in section II under the heading “Administration and Exploitation of the Country”:

“The conquered enemy territory will only be taken over into a planned administration after it has passed out of the army group rear area. Up to this time, only such measures are to be undertaken which are absolutely necessary for the security of the rear area and the exploitation of the country for the troops.”

Thus, according to this order, the Commander of the Army Group Rear Area was not even in a position to establish a long term planned administration, but he had to take over the administrative measures already instituted by the armies and, if necessary, to supplement them. I must point out here that this was also inevitable because of the constant change of his area of command. Parts of the area, which were subordinated to him on one day, he frequently had to relinquish again after 10–14 days—as proved by the maps of the prosecution (*NOKW 3151 through 3166, Pros. Exs. 1481 through 1496*)—to the agencies of the civilian adminis-

tration of the Government General which followed him, and later to the Reich Commissariat Ukraine. It is clear that in these circumstances no long term administrative measures could be taken, and that frequently improvisation was necessary.

4. *Restriction in the judicial field*

Nor was the military commander unrestricted in the field of the administration of justice. One of the basic rights of the holder of the supreme power, i.e., the head of State, is the right to pardon in every penal proceedings. Likewise he has the right to establish courts and special courts, as provided in Article XII B, 77, Section II of the Manual for the General Staff Service (NOKW-1878, *Pros. Ex. 42*). In Russia, on the other hand, the Fuehrer decree of 13 May 1941 concerning the execution of military jurisdiction in the Barbarossa area (C-50, *Pros. Ex. 594*) excluded the entire administration of justice for the Russian area, and with that, took away from the commander the right to establish courts and to exercise the right to pardon. In the entire judicial field, the military commander retained only the right to issue legal regulations.

5. *Exclusion in the economic field*

If one can still speak of executive power, even if only in the most restricted sense, I now come to the fields, which really would have belonged to the sphere of tasks of a holder of the executive power, but which, however, for the Russian area as a matter of principle were not delegated to the formal holders of executive power. Both in the economic field and in the sphere of police powers, Hitler, as the sole holder of supreme power, had divided it in the operations area, delegating the economic measures to Goering and the police powers to the Reich Leader SS.

* * * * *

6. *Exclusion in the police field*

I am now going to deal with the last—and in this trial—decisive point in the sphere of executive power, namely, the fact that the entire executive police power to deal with the civilian population was not delegated to the military commander as holder of the executive power, but to the Reich Leader SS. This restriction is evidenced by a number of documents introduced by the prosecution and by myself.

The nontransference to the holder of the executive power of the executive police power in the operational area was already laid down on principle in the OKW order of 13 March 1941 (447-Ps, *Pros. Ex. 588*) the directives for special areas pursuant to

Instruction No. 21 Case Barbarossa. There, it is stated in section I 2 that in the operational area of the German Army, the Commander in Chief of the German Army has the right—"to exercise executive power and may transfer his authority to the commanders in chief of the army groups and armies."

In section I 2(b) it continues:

"In the operational area, the Reich Leader SS is, on behalf of the Fuehrer, entrusted with special tasks for the preparation of the political administration * * *. Within the scope of these tasks, the Reich Leader SS shall act independently and on his own responsibility. The executive power vested in the Commander in Chief of the German Army and in agencies determined by him, shall not be affected by this."

This means nothing more than that the Reich Leader SS with his officials is entrusted with the execution of tasks which, strictly speaking, belong to the sphere of the holder of the executive power, and that the nominal holders of the executive power only receive what remains of the executive power after the Reich Leader SS has been assigned his tasks. Thereby, a clear line of distinction is drawn between the tasks of the German army on the one hand and those of the Reich Leader SS with his officials on the other.

The corresponding arrangement for the army group rear area is to be found in the Army High Command order dated 3 April 1941. In this order, which thoroughly explains the activity and the range of tasks of my client, police tasks are mentioned only in one passage, namely, in section I 6(d) where it says:

"The Feldgendarmarie [Military Police] and police units are to be assigned to police service (traffic control, regular police service)."

It was only in this sphere, then, that police tasks were delegated to my client, and judging by the place this provision has in this order it is obvious that only military police tasks can be meant. Not until section 7 of this order is there any mention of the civilian population, and the subsequent section 8 states:

"The Reich Leader SS with his own officials carries out special tasks in the army rear area and the army group rear area independently and on his own responsibility. A special order will be issued in regard to this."

The special orders pertaining to this matter have been submitted by the prosecution, that is to say the Army High Command order concerning the regulation of the commitment of the Security Police and the Security Service within the organization of the German Army dated 28 April 1941 (*NOKW-2080, Pros. Ex. 847*)

and the order of the Reich Leader SS dated 21 May 1941 (*NOKW-2079, Pros. Ex. 848*) issued in agreement with the High Command of the Army.

Contrary to the claim made by the prosecution in paragraph 46 of the indictment, that the Einsatzgruppen of the Security Police and the Security Service "worked with the support and under the command of the armed forces", it is evident from these prosecution documents and from the result of the hearing of the evidence, that the SS and Police forces were directly subordinated to the Higher SS and Police Leader for the tasks entrusted to him directly by the Reich Leader SS. It has been proved beyond doubt that these units were not subordinated to my client, neither as regards their tasks, nor from a disciplinary or judicial standpoint, but only as regards territorial supervision. Under paragraph 1 of Prosecution Exhibit 848 it is stated:

"The Higher SS and Police Leader with his command staff, is subordinated with regard to marching, rations, and quarters to the commander of the army group rear area concerned. The SS and Police troops and special task forces of the Security Police are subordinated to the Higher SS and Police Leader for carrying out the missions assigned by me directly."

Under paragraph 2 of the same document it is further stated:

"The SS and Police forces committed are subordinated to the commander of the army group rear area with reference to marching, rations, and quarters. All legal and disciplinary affairs will be handled under their own competence."

According to 3(b) of this order, the regular police had to carry out their task exclusively in accordance with the basic instructions of the Reich Leader SS.

The Einsatzgruppen of the Security Police and the Security Service were subordinated in accordance with paragraph 2 of the Army High Command order dated 28 April 1941 (*NOKW-2080, Pros. Ex. 847*) to the Chief of the Security Police and the Security Service, from whom they received pertinent instructions which they carried out on their own responsibility. Through this document it is established beyond any doubt that police tasks were carried out inside the sphere of power of my client, and that the executive power entrusted to him did not extend to this field of activity.

Cooperation between the armed forces and the police according to paragraph 2 of the Army High Command order, dated 28 April 1941, was limited to the field of counterintelligence and the anti-partisan warfare. As regards the armed forces, the counter-intelligence officer appointed to the staff Ic/AO (*NOKW-256*,

Pros. Ex. 845) and the Secret Field Police were commissioned to handle this field of activity, and the Security Police had to deal with civilian matters. This was the only cooperation between the armed forces and the police provided for in the Russian territory.

As shown by the evidence, a cooperation, even though a loose one, was actually established in the field of counterintelligence and the antipartisan warfare. However it must be stated, that the police supervision of the civilian population in the Russian territory was not entrusted to the armed forces, but to the units of the Security Police and the regular police under the command of the Higher SS and Police Leader. The units of the Higher SS and Police Leader had—in accordance with paragraph 1 of the Prosecution Exhibit 847—to carry out the following tasks with the forces of the Security Police in the occupied area of the East (*NOKW-2080, Pros. Ex. 847*):

“In the army group rear area (that is to say in the area of my client): Investigating and combating efforts directed against the State and the Reich, as far as they are not connected with the enemy armed forces.”

“In the army rear area: Securing certain objects before the commencement of operations (material, archives, files, pertaining to organizations, associations, groups, etc., hostile to the Reich or the State), as well as of particularly important individuals (leading emigrants, saboteurs, terrorists, etc.).”

The forces of the regular police subordinated to him had to carry out the normal tasks were similar to those carried out by the police of all countries in the world. Any special tasks outside the police executive power is not mentioned in any order.

In summary the following can be stated in regard to the field of the police executive authority: The orders, submitted as prosecution documents, refute the charge of the prosecution that the Einsatzgruppen worked under the command of the armed forces, for they show beyond any doubt that the police officials were under the command of the Higher SS and Police Leader and that he, in turn, was directly subordinated to the Reich Leader SS with respect to the field of his tasks. The military commander was only the territorial superior, to whom they were subordinated in matters pertaining to marching, food, and quarters. As regards his power of command he had no influence on their actual activity.

* * * * *

7. *Responsibility on the basis of the limited transfer of executive power*

The division of the supreme state power in his area, however, excludes any responsibility on the part of the military commander for the fields which were not expressly entrusted to his care, and in which he had neither the rights nor the obligations which are nominally those of the supreme state power.

According to the principles described here, my client was restricted as military commander in his area of command by orders which were issued before he took office and in the drafting of which he took no part whatsoever. Therefore, the question here is, to what extent does the superior order exclude guilt on the part of a defendant before the Nuernberg Tribunals.

As I have already mentioned, my client was not familiar with the tensions existing behind the scenes of the Third Reich. What he could gather from these orders (*von Roques 2, von Roques Defense Ex. 2; von Roques 48, von Roques Defense Ex. 4; NOKW-2080, Pros. Ex. 847; NOKW-2079, Pros. Ex. 848*) was the fact that the State tasks in the occupied area—contrary to the principles known to him—were no longer to be carried out exclusively by the actual military command authorities, and that, therefore, they were no longer complete masters in their own sphere of activity with regard to their rights as well as to their duties.

The rights and obligations of an occupying power towards the civilian population of an occupied territory are based on the provisions of the Hague Rules of Land Warfare. But the latter does not apply to the war between Russia and Germany, for, according to Article 2 of the Agreement pertaining to the Laws and Customs of Land Warfare dated 18 October 1907, the provisions of the Hague Rules of Land Warfare are applicable only if all the belligerents are partners to this pact. But the U. S. S. R., did not join in this agreement. In this case under consideration therefore the provisions of the Hague Rules of Land Warfare cannot be applicable, but only the generally acknowledged provisions of international law.

But even according to the provisions of the Hague Rules of Land Warfare it cannot be established that it is the army of a belligerent state which has to carry out the obligations of an occupying power. Article 43 of the Hague Rules of Land Warfare merely states that after the legal power has actually been taken over by the occupiers, they have to take all necessary steps to restore public order. Article 44 speaks of "a belligerent" who is not permitted to force the population to make statements. Article 46 mentions that the honor and the life of the citizens are to be

respected. This obligation, which one can very well consider automatically as international law, applies however, as is evident from the wording of this provision, to the occupying, the belligerent power. But the army is not the belligerent party, *the army is not* the occupying power, the occupying power in the sense of this provision is *the state*, for only states are objects and subjects of international law. The state, as such, has the obligations towards the civilian population as stipulated by international law. But whom the state entrusts individually to carry out the occupation tasks is entirely its own affair. There is no obligation based on international law to commission the armed forces exclusively with these tasks. In my opinion it is the concern of the occupying state whether it wishes to entrust the tasks stipulated by international law to the armed forces, or whether it carries them out through its civilian agencies. Undoubtedly, the occupying state must maintain peace and order, must establish an administration, must take over the supreme state power exercised previously by the enemy. However, whether the occupying state does this through the establishment of a military administration or a civilian administration, or even through a combination of both, in my opinion, there are no stipulations laid down by international law in this respect.

The witness Hans Boetticher, Chief Judge Advocate with the Military Commander in France, was questioned by the Tribunal with respect to this very problem. The presiding judge asked him (*Tr. pp. 8692-93*):

“Now as the accredited German authority for maintaining order and security in the occupied country, do you think it is valid under international law for the army to abdicate as to a part of its authority and turn that over to the civilian police, not only within its area, but to return a part of a conquered population for trial before civilian courts? I am just asking for your opinion, if you think it proper.”

His answer was the following:

“As far as I know, the occupation power is authorized to institute a military or civilian administration at its will. Hence it must be possible to delegate some of these tasks which are more suitable for treatment by civilian agencies, to delegate such tasks to a civilian agency.”

Hitler, because he alone embodied the supreme state power in the dictator state of the Third Reich, actually split up the occupation tasks in the Russian area from the very beginning. In particular he already transferred the police executive authority in the operational area to a civilian agency, to wit to the Reich

Leader SS, on the basis of a Special Directive No. 21 which I mentioned just now, to pave the way for the political administration. There is no reason why such a division of tasks must be considered contrary to international law. All the more reason why the military commanders could not discern and could not be expected to discern that this division was contrary to international law or even criminal.

If, therefore, their head of state gave an order which transferred the police and economic tasks to other authorities of the same state, this order was binding for them, because it was neither criminal nor was there anything to show a criminal nature. Under the rules which are also valid here in Nuernberg, they were only entitled to refuse obedience to criminal orders.

The Tribunal in Case No. 7 against the Southeast Generals* stated the following in its judgment:

“We are of the view, however, that if the illegality of the order was not known to the inferior and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the inferior will be protected.” (*Case No. 7, Tr. p. 10428.*)

In this case, beyond any doubt, it was a matter of orders which my client could not presume to be illegal. But if the military commanders complied with the order, as they could and had to, any control with respect to the police measures was withdrawn from them and, therefore, they had neither a possibility nor an obligation to interfere, since these were the orders.

On the basis of the evidence it is impossible to uphold any longer the assertion that General von Roques was the sole bearer of executive power in his area, and that he, therefore, could be made responsible for everything that happened in this area. But if the prosecution were to assert that General von Roques, in spite of such binding orders, was responsible on account of his position as Commander of the Army Group Rear Area and because he neglected his duty to control everything that happened in his area, which duty was incumbent upon him by virtue of his position and by virtue of international law, then the prosecution would even go further than the well known decision in the Yamashita case.

In that case, the responsibility of a military commander in an occupied territory with respect to occurrences which were unknown to him, was based on the neglect of the duties of control incumbent upon him. I may be permitted to point out that this decision has already been challenged by the majority of the judges of the [U. S.] Supreme Court itself, and that, furthermore, the

* *United States vs. Wilhelm List, et al.*, Vol. XI.

judgment was rejected by many American jurists, because it was said that it was an exaggeration of the duties of a military commander to such an extent that it became intolerable. But if we compare that case with the pending one, there is a difference which I want to point out in particular. General Yamashita was made responsible exclusively for actions of units subordinate to him. I quote the following from the indictment against Yamashita:¹

“The charge, as far as now relevant, is that petitioner, between 9 October 1944 and 2 September 1945, in the Philippine Islands, ‘while commanders of armed forces of Japan at war with the United States of America and its Allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the *members of his command*, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its Allies and dependencies, particularly the Philippines; and he * * * thereby violated the laws of war.’

“Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by *members of the forces under petitioner’s command*, during the period mentioned.” :

The “crucial point” of the charge was—²

“* * * the unlawful breach of duty by petitioner as an army commander to control the operations of *the members of his command* by ‘permitting them to commit’ the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his powers to control the *troops under his command* for the prevention of the specified acts which are violations of the law of war * * *.”

The same document³, therefore, established the following presupposition:

“Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.”

The charge was based on this viewpoint, and only in consideration of this viewpoint can the decision of the Tribunal be understood which stated that Yamashita, as the military governor and

¹ United States Reports, vol. 327, October term 1945, pp. 13-14.

² Ibid, pp. 14-15.

³ Ibid, p. 15.

commander, would have had the absolute duty "to take such measures as were within his powers and appropriate in view of the situation" in order to protect prisoners of war and the civilian population.

The conviction of General Yamashita was thus based on the charge that he did not properly control the forces under his command; while the charge in the pending case would have to be, that a military commander wrongfully allowed other agencies not subordinate to him and not even belonging to the armed forces to operate at will without supervision. Such an extension of the responsibility of a commander for the guilt of another, in my opinion, does not find the least support in international law.

A formal responsibility is no proof of actual criminal guilt, it must be supported by a criminal element of action or omission. A judgment in a criminal case must be pronounced only on the basis of the fundamental principles of penal law, and not on the basis of faded, empty slogans.

If the prosecution in the indictment has contended that the police forces did their job under the actual supervision of the armed forces, the orders hitherto discussed here fail to show the existence of either a right or duty of the military commanders to exercise any such control. According to the Army High Command order dated 28 April 1941 (*NOKW-2080, Pros. Ex. 847*), the officials of the Reich Leader SS were obliged to impart general information about the political situation to the commanders of the army group rear areas. According to the order of the Reich Leader SS dated 21 May 1941 (*NOKW-2079, Pros. Ex. 848*), the Higher SS and Police Leader was to inform each time the commander of the army group rear area of the tasks devolved on him by the Reich Leader SS. This information served the purpose of giving the military commanders a possibility of avoiding any disturbance to future military operations; for only in this respect were they granted the authority at all to issue directives to the officials of the Reich Leader SS. But at no time were the military commanders authorized to issue directions in the [SS] operational field, or to exercise any control over measures which the police had to carry out on their own competency. The reports which my client received from the Higher SS and Police Leader, and the subject of these reports will be discussed in detail later on. For the moment we can confine ourselves to saying that he learned from these reports only such things which referred to the co-operation fixed by the orders.

It seems to me absolutely misleading to derive a general obligation to exercise control from the fact that cooperation in certain fields, did exist. Such an obligation could consist merely in the

checking of whether this cooperation was effected in an orderly fashion.

* * * * *

In the course of this trial the duties of the occupying power toward the indigenous population of the occupied territory have been discussed many times. The prosecution in particular has always very emphatically maintained that an occupying power has to guarantee the protection of life and property of the population. This took up a large part of the entire trial proceedings on the part of the prosecution. But very little was said, on the other hand, about the obligations of the population of the occupied country. With all means at its disposal the prosecution has tried to prove that the German troops in Russia did not fulfill their obligations towards the indigenous population. Nothing, or almost nothing, was said about the fact that at least parts of the population right from the start failed to fulfill the obligations, which, according to the rules and principles of international law, are held to be the duty of the population of an occupied country. If on the one hand it is stated that the occupying power has to take over all constitutional obligations toward the indigenous population, it must, in my opinion, be made perfectly clear that the inhabitants of an occupied country too have the same duties towards the occupying power as they previously had towards their own state. Of the limitations which result as a matter of course from a state of war I need not speak here; they do not concern us in this respect. In my opinion, however, it must be pointed out emphatically that rights and obligations must in this respect be mutual. Only a population which on its part fulfills its obligations, can demand that the occupying power should treat it in the manner demanded here by the prosecution of the German occupation forces in Russia.

From this point of view it is important that the U. S. S. R., incited the population of the areas occupied by the German troops, right from the beginning of the war, to take an attitude which certainly was not in accord with the principles of international law. When Stalin in his well known proclamation of 3 July 1941 (*Hoth 58, Hoth Defense Ex. 58*) called upon every man, woman, and child to fight the invaders with all means, when he declared that the Russian territory must become the grave of every German, and that the life of the invaders should be made hell for them, the population who answered this call, on the other hand, must not complain that the occupying forces, holding executive power, use all means at their disposal to put a stop to such illegal acts. When the prosecution claims that the Russian population

was forced to defensive actions in face of the behavior of the German occupation troops, and that this gave origin to the fierce partisan struggle, this allegation is a clear distortion of the facts. The German leadership knew that such behavior would have to be expected from the population in Russia; it therefore gave orders right from the start to enable the troops to defend themselves against such behavior by the civilian population which violated international law. Those orders, however, were only enforced when and only insofar as the civilian population acted in violation of international law and endangered peace and order in the area as partisans, saboteurs, and guerrillas.

All orders issued for and in Russia must be understood and evaluated from these points of view, which were predominant.

However, before entering into a discussion of the individual orders and incidents which form the subject of the indictment, it is necessary to comment on a decisive point of view, which, in my opinion, has not been given sufficient emphasis in the course of the proceedings so far, and which refers to the principles underlying the treatment of the civilian population.

The Hague Rules of Land Warfare of 1907, as was explained to the Tribunal by Professor Dr. Maurach's (*General Defense 79, General Defense Ex. 79*) expert opinion, do not apply to the Russian area. Soviet Russia had not joined the Hague Convention on Land Warfare. As a matter of fact the provisions of the Hague Convention on Land Warfare could not claim applicability in Russia, since the U. S. S. R. herself had placed herself outside the community of nations observing international law. This being the case, in Russia only that minimum of unwritten rights was applicable which every civilian population of an occupied country has always had to be accorded by the occupying power throughout the ages.

But even under the provisions of the Hague Convention on Land Warfare, the population of an occupied country may demand of the occupying power only the observance of that legal state which it has been accorded under its own national laws. Article 43 of the Annex to the Convention on the Application of the Laws and Customs of Land Warfare requires the occupying party to make all provisions for the restoration and maintenance of public order and public life, unless there exists an unsurmountable obstacle, under observance of the national law.

In other words, no national of an occupied country may claim better treatment under an occupying power, than he enjoyed under his national government prior to the occupation. Accordingly in going into the question whether measures taken by the German occupying power in Russia constituted violations of international

law, it will be of decisive importance to ascertain whether or not the legal state under the occupation implied a considerable deterioration compared with the legal state prior to the occupation. In his opinion, Professor Maurach gave the following standard formulation of this legal principle (*General Defense 79, General Defense Ex. 79*):

“In determining the limits of permissible conduct in a war against a state which stands outside the community of nations observing international law, the following two points must be taken into consideration:

“a. The methods of warfare employed by the states bound by the conventions may in principle be adapted to those employed by the state which stands outside international law. There is, however, a definite limit which must not be overstepped. This limit is set off by the so-called elementary rights of the non-participants and innocent parties (soldiers, prisoners, wounded, and the civilian population). These rights must not be violated. The adaptation of the methods of warfare thus does not mean the admissibility of methods based solely on wartime expediency * * *.

“b. The nature of the so-called elementary rights is not determined in accordance with the law of the state accused of violating these rights, nor in accordance with the regulations of the war conventions, but it is determined by the domestic (national) law of the state to which the categories of persons in question belong. In other words, whether or not the employment of prisoners of war for munitions production, the conscription of civilians for compulsory labor, etc., is permissible, *is determined in such a case only by the domestic law of the Soviet Union* * * * The occupying state has neither the occasion nor the legal possibility to impose its own legal system upon the population of the occupied enemy territory. The population continues in principle to be governed by its own national law. That is a generally recognized tenet of international law, which is also stressed in the occupation regulations of the Rules for Land Warfare. * * *

“The occupation regime may not cause the population being given more rights through the occupation than it possessed hitherto. All it [the population] can demand is that its position does not deteriorate essentially in comparison with conditions under the previous sovereignty.”

On these principles it must be examined and decided whether the basic orders, such as they were issued for the occupied Russian territory, brought about a considerable deterioration in the

position of the civilian population as compared with that under the law of its own national government. In posing this question I have consciously disregarded the subjective aspect.

In my opinion, these two legal points of view will have to be given precedence, if a correct decision in regard to the conduct of the indicted military commanders and, in particular, of my client is to be reached.

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6. EXTRACTS FROM THE CLOSING BRIEF FOR DEFENDANT LEHMANN

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A. *The Dictatorship*

I. Any evaluation of the attitude of the defendants must be considered from the point of view that Hitler was the holder of supreme power.

II. His orders were intra-state laws.

1. Under the regime of the Weimar Constitution not even the judge—a fact which is quite undisputed—had the authority to examine in court whether a law—

a. Was in accordance with moral demands.

b. Was in accordance with international law.

2. The natural conclusion follows, therefore, that under the changed state conditions of the Third Reich there was even less a question of obligation to resist those orders of Hitler which were materially laws.

III.1. Against this fact the objection is sometimes raised that, according to German law, not even the soldier was obliged to obey such orders which required him to commit a crime. This point of view is wrong. The pertinent Article 47 of the Military Penal Code stipulates that *above* the commanding superior stands a higher authority which protects the subordinate if he does not obey an illegal order, that is to say, a higher superior or an independent court, independent in the sense of division of power. These premises are not realized if the head of the state himself, the holder of the entire supreme power, gives an order which might be objectionable.

2. In addition, Article 47 is applicable only when the superior “intends” a “crime” with his order. According to the law of all countries a crime is an act of which the supreme power disapproves, and for this reason threatens with punishment. Even from the purely abstract point of view it is, therefore, impossible to consider the orders of this same supreme power as crimes in the sense of the internal penal code.

IV. It therefore follows: In the Third Reich when Hitler, as head of the state, gave an order, there was neither an obligation nor a justification to refuse obedience.

V. In particular, however, no actual possibility or practical means of *open* disobedience existed.

1. *Any contention to the contrary denies—*

a. *The fact of the dictatorship.*

b. *The omnipotence of this dictatorship which has never been disputed before* and which is proved by the documents of the prosecution.

2. *Open resistance* led, in practice, only to the opposite of what was to be prevented. This is proved by the statements and testimonies of all witnesses in high positions who, *themselves*, had to work in the Third Reich. Open resistance was, therefore, senseless.

3. Resistance of this kind exposed those resisting and their families to the harshest measures. The prohibition to appeal to superior orders, as stipulated by the Control Council Law, does not exclude—even if it should be presumed to be valid—the claim of *necessity*. This cannot be forbidden by any law. It should hardly be necessary to prove again the *seriousness of the situation of necessity*. I would like to refer only to the well known speech of Hitler on 23 November 1939 (789-PS, Pros. Ex. 1153), submitted by the prosecution, in which he proclaimed the extermination of all who offered him resistance. As regards the situation in the OKW, I refer to the affidavit of General Westhoff (*Lehmann 129, Lehmann Defense Ex. 36*) and the affidavit of Ministerialdirektor Tischbein (*Lehmann 433, Lehmann Defense Ex. 222*). From both affidavits it is evident that Keitel had threatened to hand over the closest members of his staff to the Secret State Police in case of disobedience. This corresponds to the testimony of Lehmann. (*Tr. p. 7974.*)

VI. *What ways were possible under these circumstances?* The prosecution contends in its closing brief that it is not its task to show what way would have been open for the defendants. The arrogance of this statement is surpassed only by its frivolity. This, in truth, is the real problem of this trial.

Whoever accuses another of having made a mistake need not have to show in *detail* perhaps how it should have been done better. If however, the accused raises the objection that another way would have meant certain death, or would have been senseless and could, therefore, not be expected for both reasons, then the critic *must* consider these points. If it were but a matter of political or historical observation, the opinion of the prosecution might *perhaps* be acceptable. But here we have to deal with the

establishment of criminal guilt, that is, the fact that the defendant can be accused of his attitude. Nobody, however, can be punished, if there is no way out of a situation and if no one else is able even to point out such a way.

The prosecution is perfectly aware of this fact. Because it also cannot find a reasonable way out, it solves the problem by denying its existence.

VII. If grave personal consequences were to be avoided in the Third Reich and at the same time something practical was to be achieved, *only the following was possible*:

1. Objection.

2. If that failed, delay.

3. If that did not help, weakening and modification within the limits of one's own possibilities.

VIII. Even the measures under VII had to be kept within the forms which the dictatorship—even then the gravest risks for those resisting—still left open.

In this respect it was not a matter of saving one's soul by writing ineffective protest notes and then washing one's hands in innocence. The point was to achieve something practical where it still seemed possible.

To this end, a man in a responsible position had to have the courage to work for the smaller evil if he could hope thus to prevent the greater evil. And in this case he had to make concessions where otherwise nothing could be achieved, and to choose his words so that it did not become impossible right from the start to achieve his goal.

IX. The clearest proof that no other ways were possible is that all the influential men of Germany, and among them the most powerful, only acted in this manner insofar as they offered any resistance at all to Hitler. In the armed forces three groups of higher leaders could be determined—

1. A small group of leaders, who were unconditionally loyal to Hitler.

2. A large middle group of those who agreed with much and disagreed with much.

3. The group of the actual resistance movement.

The groups 2 and 3 behaved exactly alike in the practical handling of affairs—they objected, they delayed, they modified but, when everything failed, they carried out their orders. Typical examples of this kind are General Halder and Admiral Canaris.

That some members of the 3d group took other courses also (preparation for a revolution, contact with countries abroad) is a matter on its own and must not be confused with the problem itself. First, there is no such thing as a legal obligation to bring

about a revolution. In addition, these measures had no success at all. They show only the following: that German generals employed such means in the midst of war is the strongest proof that this was a situation without precedent and example. They considered the situation so desperate that they took a road which previously would have been absolutely unthinkable for a German general even to consider, but at the *same time they carried out Hitler's orders simply because there was no other way out.*

X. Life creates everywhere situations which do not offer a satisfactory way out and which demand the sacrifice of discernment. This applies to the men who have the grave task of working today as Germans in high government positions under the military governments in the same manner as for their predecessors under Hitler. Objections will be raised against this comparison to the effect that the Allied commanders do not issue orders in violation of international law. The present German Government authorities hold a different opinion. This is shown by their numerous complaints published in the press based on violations of international law. When these complaints are rejected, the German Government authorities can do nothing more than Hitler's officials; they can voice their dissenting opinions, they can object, delay and modify. After that, they obey.

Proclamation No. 1 of General Eisenhower (*Lehmann 36, Lehmann Defense Ex. 267*) requires that all orders of the commander be obeyed "immediately and unconditionally". And if it should be said, later on, that—

"Proclamation No. 2 of the Control Council, dated 20 September 1945, about compulsory employment of Germans outside Germany and its implementation by Russia, was unlawful"—

was then the attitude of the German officials, the participation in the measures which they (the German officials) opposed but which were ordered by the Russians, *a crime?* Was it a crime if they stayed there, if they did not flee to the western zones? If, on the contrary, they tried with all their professional knowledge and experience to prevent even worse things? Was it a crime?

* * * * *

IV. How urgently necessary it is to deal with these facts is shown by a quotation from the closing brief of the prosecution of 10 August 1948 (*Tr. p. 9575*): "Lord Leicester hath not always spoken thus." These words show with terrible clarity that the prosecution has still not recognized the position of the German officers and officials in high positions. To stand aside without lifting a hand would have been for Dr. Lehmann, too, the least dangerous and the easiest way out. He would have risked nothing

and would not be in the dock today. But there have been many other men who deliberated which was the better way—to stand aside or to cooperate. Many of them paid for it dearly. Some who had to pay with their lives for their attitude would also stand in the dock today before German and international tribunals, because appearances speak against them.

In connection with those murdered after 20 July 1944, I may refer to the proposed Reich Chancellor of the resistance movement, Dr. Goerdeler. He considered his return into active civil service because he was able to offer more effective resistance there. I may also refer to the advice of Winston Churchill, given to State Secretary Kuehlmann, that Kuehlmann should join the NSDAP in order to use his influence to bring about more modified tendencies.

The Norwegian Bishop Berggrav testified in Case No. 11 that the Norwegian resistance movement decided to leave its members in the Quisling government. All those certainly did not think of open resistance. All of them had to speak differently than they thought. If Dr. Lehmann had only rebelled, his actions would, of course, have been open but would very soon have come to an end without benefiting anyone. This should always be kept in mind today when judging events during that time.

* * * * *

With reference to the Soviet Union, there are still some particular legal aspects which must be taken into consideration in a two-fold respect, and which justify the Barbarossa Order even without the considerations put forward hitherto. I refer in this connection to the legal opinion of Professor Maurach submitted by the joint defense.*

* * * * *

Penal Regulations of the Occupied Power

A. I. 1. The actions of the resistance movement outlined in the foregoing and covered by the Night and Fog Decree and its two implementation orders correspond to what the American Rules of Land Warfare likewise declare as illegal. The persons concerned are "war rebels", "war traitors", "unauthorized belligerents", and other war criminals within the meaning of paragraphs 349-351, 354 of the Rules. Such actions need not necessarily be connected in any way with battles or with combat actions.

2. It is admissible to create a *special occupation law* for the punishment of such actions.

* Here, quotes from the expert opinion of Prof. Maurach, contained in the brief, are omitted. They are reproduced in Document General Defense 79, General Defense Exhibit 79, reproduced in Section VII C2.

*"Nature of laws promulgated—*An occupant may create new laws for the government of a country. He will promulgate such new laws and regulations as military necessity demands. In this class will be included those laws which come into being as a result of military rule; that is, those which establish new crimes and offenses incident to a state of war and are necessary for the control of the country and the protection of the army.¹

3. In the event of such actions, *the death penalty is justified on principle.*

*"War crimes subject to death penalty—*All war crimes are subject to the death penalty although a lesser penalty may be imposed."²

II. This is also the opinion of the literature on international law.³

"The invader deals freely with the relations of the inhabitants of the occupied territory towards himself. He suspends the operation of the laws under which they owe obedience to their legitimate ruler, because obedience to the latter is not consistent with his own safety; for his security also, he declares certain acts, not forbidden by the ordinary laws of the country, to be punishable, and he so far suspends the laws which guard personal liberty as is required for the summary punishment of any one doing such acts.

"All acts of disobedience or hostility are regarded as punishable; and by specific rules the penalty of death is incurred by persons giving information to the enemy, or serving as guides to the troops of their own country, by those who, while serving as guides to the troops of the invader, intentionally mislead them, and by those who destroy telegraphs, roads, canals, or bridges; or who set fire to stores or soldiers' quarters. If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or en masse, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or if captured, be executed by sentence of court martial. Sometimes the inhabitants of towns or districts in which acts of the foregoing nature have been done, or where they are supposed to have originated, are rendered collectively responsible, and are punished by fines or their houses being burned."

III. *The American occupation authorities* themselves likewise issued such penal regulations. This is shown by Ordinance No. 1

¹ Rules of Land Warfare, U. S. Army Field Manual 27-10 (Govt. Printing Office, Washington, 1940), par. 288.

² *Ibid.*, par. 357.

³ Hall, W. E., *A Treatise on International Law* (Oxford, 1924, 8th Ed.), pp. 561-562.

of the Military Government for Germany (*Lehmann 324, Lehmann Defense Ex. 291.*)

IV. The enumerations of the criminal acts in the *implementation orders pursuant to the Night and Fog Decree (669-PS, Pros. Ex. 798; 836-PS, Pros. Ex. 804)* are a *catalogue*, not a repetition of the facts. The facts themselves are contained in the ordinances of the military commanders or in the German penal law, as far as this was applicable under Article 161 of the military penal code (*Tr. pp. 8109-8110, 8660*) in the occupied territories in the case of criminal acts against the occupation power.

V. A comparison between the *implementation orders pursuant to the Night and Fog Decree*, the Rules, and the *American Ordinance No. 1* shows a complete coincidence with respect to the facts and the threatened punishment—with the one exception that Ordinance No. 1, as regards the criminal facts, goes much further than the Night and Fog Decree.

The following survey shows this:

<i>Night and Fog Decree and Implementation Orders</i>	<i>Rules</i>	<i>Ordinance No. 1</i>
“Death Penalty on principle.”	357. “Death Penalty.”	Art. 1 “Crimes threatened with death.”
1. Implementation Order catalog I,1, “Criminal assault.”	349, 351.	Art. I, Nos. 4, 7.
2. Espionage	202, 350.	Art. I, No. 1.
3. Sabotage	350, 351.	Art. I, No. 14.
4. Communist activities.	349, last line; 350, middle and last sentence; 354 (disobedience to orders and directives of the military government).	Art. I, No. 6, moreover Nos. 2, 5, and 20, Art. II, Nos. 21, 43 (General clause.)
5. “Acts which are likely to cause disturbance.”	350.	Art. I, No. 18, Art. II, No. 40.
6. Giving aid and comfort to the enemy	349, 350, 351, 354.	Art. I, No. 2, 6, Art. II, 20.
7. Possession of arms.	354 (the right to issue ordinances) in connection with 284, 288.	Art. I, Nos. 9, 10.

* * * * *

Special features of the Night and Fog decree

A. The secrecy of the proceedings and the *exclusion of the perpetrators from the outside world was, according to Hitler's order, the chief aim of the decree.*

The measures were directed against the suspects themselves, at the same time, however, against their relatives, friends, and the public of the occupied country. This they had in common with any punishment which is intended as a deterrent measure. "The punishment should be deterrent * * *."* The special feature in this case was that the deterrent factor was also to be contained in the manner of the proceedings. The question is, *whether the harshness which this entailed was covered by international law.*

B. Regulations of the *written international law*, which expressly forbid such a measure do not exist.

But the question is whether the *principle of humanity*, generally acknowledged in international law prohibits this measure.

C. One look at the *American practice in Germany* shows, that this is not the case.

I. According to the secret "Arrest Categories Handbook" of the Allied Headquarters (*Lehmann 475, Lehmann Defense Ex. 334*), about 300,000 persons were to be taken into automatic arrest in Germany and Austria (no. 4 of the introduction). A criminal offense of any kind was not the determining factor for this procedure, but rather the membership in certain organizations or activity in certain offices was sufficient (part 2 of the handbook). In the introduction to the handbook (no. 3), the following was even stated in reference to the organizations:

"It is not possible to say, it is indeed unlikely, that the most serious danger to the security of the occupying forces will come from any of the organizations listed."

In spite of this fact the *security of the occupying forces* was given as a reason for this "Arrest Policy."

II. Those hundreds of thousands of Germans who thus fell into the category of automatic arrests were completely shut away from the outside world by the occupation authorities *after the capitulation until the end of 1945*, sometimes even longer. They were not permitted to send or receive letters or any other news in the camps.

Documents Lehmann 351 through 377 are submitted as Lehmann Defense Exhibits 156 to 182 which furnish exhaustive proof on this matter. The prohibition applied without exception to the hundreds of thousands of Germans who were kept in the intern-

* Rules of Land Warfare, *op. cit. supra*, par. 357.

ment camps, among them many mothers with small children and many pregnant women. It applied likewise to many thousands of German soldiers who came into internment camps, although they were entitled to the status of prisoners of war with the privilege of being able to write letters on the very first day. (*Lehmann 351, Lehmann Def. Ex. 156; Lehmann 352, Lehmann Def. Ex. 157; Lehmann 361, Lehmann Def. Ex. 166.*) The prohibition applied even to prisoner of war camps. (*Lehmann 365, Lehmann Def. Ex. 170; Lehmann 366, Lehmann Def. Ex. 171; Lehmann 367, Lehmann Def. Ex. 172; Lehmann 368, Lehmann Def. Ex. 173; Lehmann 369, Lehmann Def. Ex. 174; Lehmann 370, Lehmann Def. Ex. 175; Lehmann 377, Lehmann Def. Ex. 182.*) The prohibition existed also in British, French, and Norwegian camps. (*Lehmann 372, Lehmann Def. Ex. 177; Lehmann 373, Lehmann Def. Ex. 178; Lehman 377, Lehmann Def. Ex. 182.*)

The document book furnishes proof in this respect from 30 camps (among them 23 German, 2 French, 2 British, 3 Norwegian camps). More evidence has not been submitted for the sole reason of avoiding an accumulation of material. It certainly would not have been difficult.

III. 1. These measures of the Allies of separation from the outside world, were—as proved by the similar reports from the many various camps—decreed by order of *higher authorities*. And the internees were informed to this effect. (*Lehmann 359, Lehmann Def. Ex. 164; Lehmann 360, Lehmann Def. Ex. 165; Lehmann 362, Lehmann Defense Ex. 167.*)

2. All protests were without avail. (*Lehmann 351, Lehmann Def. Ex. 156; Lehmann 353, Lehmann Def. Ex. 158; Lehmann 356, Lehmann Def. Ex. 161; Lehmann 357, Lehmann Def. Ex. 162; Lehmann 359, Lehmann Def. Ex. 164.*)

3. Exceptions from the ban on writing were not permitted even in case of death. (*Lehmann 359, Lehmann Def. Ex. 164.*)

4. The internees were compelled to comply with this ban on sending or receiving mail by the threat of confinement or imprisonment. (*Lehmann 352, Lehmann Def. Ex. 157; Lehmann 359, Lehmann Def. Ex. 164; Lehmann 361, Lehmann Def. Ex. 166.*) People attempting to approach the camps from outside were fired on. (*Lehmann 353, Lehmann Def. Ex. 158.*)

IV. *Particularly notable is the following:* even the relatives and wives of the *internees* thus secluded from the outside world were threatened with heavy punishment if *they passed on or attempted to pass on information concerning the internees* by letter or by telephone.

On the basis of the censorship regulations of the Military Government, (*Lehmann 335, Lehmann Def. Ex. 302*), section I 6g, it

is forbidden to pass on the names of persons arrested, detained, interrogated, or interned by the Allied Forces as well as the location or description of places of internment.

Under number 7 of these censorship regulations, any completed or attempted circumvention or violation of this directive is threatened with any lawful punishment, including death. A mother telling her daughter by letter about the camp where she located her husband, may, therefore, be punished with any punishment.

V. This seclusion from the outside world was not generally abolished until the beginning of 1946, i.e., 8 or 9 months after the capitulation.

But the possibility of such a complete exclusion and of the ban on notifying relatives about an arrest continued in special cases. *It exists to this day.*

The directive from the State Department to General Clay dated 11 July 1947 states under section I 11 (d), that *in future*—

“Persons so detained will be permitted to communicate with their nearest relative or friend *unless urgent security considerations require an exception.*” (*Lehmann 331, Lehmann Def. Ex. 298.*)

D. The reason given for these Allied measures was the necessity of securing the Allied Forces, i.e., *military necessities*. Thus: Handbook for Arrest Policy, Introduction No. 3; thus: Directive to General Eisenhower, dated April 1945, Part I, 2 b (*Lehmann 329, Lehmann Def. Ex. 296*); thus also the directive to General Clay, section I, 11(d) already quoted: “You will by regulation limit arrests for security purposes to cases where overriding considerations of military necessity require such procedure.”

E. The term “military necessity” has been defined by written international law and by the customs of war.

I. As regards the *object of war*, the Rules of Land Warfare (par. 22) state the following:

“The object of war is to bring about the complete submission of the enemy as soon as possible by means of regulated violence.”

II. The following is stated in the preamble of the Hague Convention on Land Warfare, 5th paragraph:

“According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as *military requirements permit*, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.”

This 5th paragraph is a clause maintaining the military necessity against the protecting stipulations of the Hague Convention on Land Warfare and, therefore, also against any guaranty relating to life, liberty, and property of the citizens of occupied territories.

This legal view is common property of the science of international law. The Handbook on International Law by Hyde, volume 2, page 301, for instance, reads as follows:

“If the term military necessity implies great latitude, and is invoked by way of excuse in justification of harsh measures, it is because the law of nations itself permits recourse thereto in case of imperative need, and allows a belligerent commander to be the judge of the existence of the need.”

Oppenheim-Lauterpacht, 5th Edition, volume II, page 179, reads as follows:

“Apart from restrictions imposed by the law of nations upon belligerents, all kinds and all degree of force may be used in war in order that its purpose may be achieved, in spite of their cruelty and the utter misery they entail.”

The Rules of Land Warfare (par. 23) state the following:

“Military necessity justifies a resort to all the measures which are indispensable for securing this object and which are not forbidden by the modern laws and customs of war.”

Bonfils, the French Professor of international law, voices quite similar views. (*Lehmann* 321, *Lehmann Def. Ex.* 288.)

III. *But this extension of the military necessity is not unlimited.* It has been restricted by the principle of humanity which likewise dominates the written and unwritten international law, according to the preamble of the Hague Convention on Land Warfare. The preamble likewise forbids the abuse of the discretionary powers of the military commanders.

The principle of humanity has been defined in the Rules of Land Warfare to the effect that it forbids “employment of any such kind or degree of violence as is not actually necessary for the purpose of war.” (Par. 4b.) Not admitted, therefore, is cruelty—“that is, the infliction of suffering merely for spite or revenge” (*Rules of Land Warfare*, par. 25).

F. There are no set standards for defining what must be considered abuse of discretion, cruelty, or inhumanity. Some indications have been supplied by the wartime measures adopted by the states taking a leading part in the progressive development of international law.

For the entire complex of this case it is impossible, therefore,

to separate the analysis of the German measures in any field of warfare from a contemplation of the measures which the Allies considered justified by military necessity.

It makes no difference in this respect whether such measures by the Allies are connected with the progressive development of weapons or not. In a war during which it was considered compatible with international law to kill within 24 hours 180,000 German civilians in one city immediately before the end of the war, other standards than those deemed appropriate 40 years ago apply generally and in the entire sphere of the treatment of civilians. The claims of humanity cannot look any different from the air than they do on land. Whoever—to the detriment of the civilian population—extends the concept of military necessity with respect to the effect of weapons as far as the Allies did, must grant the same right to the enemy with respect to other spheres of this war. And defensive measures against a resistance movement and against partisans are also war. They also serve to bring about victory, they also save one's own and enemy blood (which, according to the declaration of Secretary [of War] Stimson, was the purpose of the use of the atom bomb in Japan). (Lehmann 323, Lehmann Def. Ex. 290.) Neither is it possible to say that international law is flexible only with respect to the war measures of the one party, i.e., *of the victors*, and to maintain that the same international law is *inflexible* with respect to the war measures of the vanquished and to stick to the views which, allegedly, prevailed when the Hague Convention on Land Warfare was created. If somebody had asked the delegates at the Hague in 1907,

“Is it possible, in consideration of the progressive development of weapons, to imagine a situation in which 180,000 civilians are killed in compliance with international law during one single day's fighting?”

he would have been swept away by a storm of indignation. Supposing if now, during a war in which the killing of these 180,000 civilians is considered permissible, resistance movements and partisan fighting arise which dwarf everything known in the history of war, and if this development coincides with the general tendency of the war to mass extermination of the civilian population with weapons, then it is unfair to restrict the enemy in his defense against such resistance movements, to principles which, allegedly, prevailed in 1907.

If it is possible to kill hundreds of thousands of peaceful civilians in the course of fighting, then it cannot be forbidden to treat a few thousand civilians, strongly suspected of having committed

criminal acts, according to other and more severe principles than usual in former times.

Secretary [of War] Stimson and the Interim Committee were of the opinion that the use of the atom bomb could not but result in a "tremendous shock". "Such an effective shock would save many lives."

Whoever believes it to be compatible with international law to destroy in one second the lives of nearly 100,000 noncombatants through such "a tremendous shock" cannot regard it as an illegal "*program of terror*" if, in the course of 3 years, about 7,000 persons were shut off from the outside world because, after careful investigations, they were strongly suspected of having participated in a highly dangerous movement which violated international law.

G. The Allied measures, therefore, provide us with a *criterion* for what may be considered admissible within the sphere of military necessity. In the course of my final plea (*Tr. pp 9968-9969*) I have already briefly discussed the arguments of the prosecution, to the effect that any such *comparison* is inadmissible because the occupation of Germany disregards the Hague Convention on Land Warfare. I refer to my statements, but want to stress in particular the following: *from whatever angle of international law the situation of Germany is considered*, irrespective of whether the Hague Convention on Land Warfare applies to this occupation directly, indirectly, or not at all, no occupation power is exempt from the application of the principles of humanity. Just as there cannot be "legal custom of war" which, if applied by another, becomes "inhumane", so there cannot be any "legal occupation measures", which, if ordered by *another* occupation power, could be considered "inhumane". There should be no need to motivate this statement in detail.

From that we may infer: What the occupation authorities are now doing in Germany—disregarding criminal excesses of individuals which can be left out of the consideration—is legal under international law and complies with the claims of humanity according to the opinion of the Allies.

By this standard established after the war, therefore, the activities of the Allies during the war can be judged. This is all the more permissible because the following facts are self-evident: Actions in time of war directed against a resistance movement which is a deadly menace to the very existence of the occupation power *need not be weaker than actions after the war* in an occupied country where scarcely a hand has been lifted against the occupation power.

* * * * *

G. Extracts from Final Briefs Concerning the Responsibility of a Chief of Staff

I. INTRODUCTION

In the Hostage Case, Tribunal V found that on the facts established by the proof in that case the defendants Foertsch and Geitner were not guilty for conduct committed while acting as chiefs of staff to a superior military commander. (See opinion and judgment in *United States vs. Wilhelm List, et al.*, Case No. 7).

However, on the facts established in the High Command Case, Tribunal V A found defendant Woehler guilty of conduct committed while acting as a chief of staff. Because the decision in the Hostage Case preceded the High Command trial, both the prosecution and the defense took pains to deal with the question of the responsibility of a chief of staff under different circumstances.

Below is an extract from the closing brief for the defendant Woehler (section 2) followed by an extract from the closing brief of the prosecution against the defendant Woehler (section 3).

2. EXTRACT FROM THE CLOSING BRIEF FOR DEFENDANT WOehler

* * * * *

Now the only question is whether Woehler, without such knowledge, is also responsible for the actions of others—namely the staff officers—under any circumstances.

This is impossible according to general criminal law. However, we have to discuss the Yamashita judgment which establishes the responsibility of the commander in chief for war crimes and crimes against humanity committed in his sphere, and which was already applied repeatedly as precedent by the Nuernberg Military Tribunal. In my opening statement and the final plea I already explained that the very far-reaching argumentation of the Yamashita judgment—which I should like to question in any case—cannot under any circumstances, even according to this judgment itself, be applied, over and above its application to the commander in chief, to the chief of staff as well, to whom the staff officers are subordinated solely in internal disciplinary staff matters (compare also my final plea). The documentary evidence submitted against Woehler, insofar as it refers to the 11th Army, nowhere reveals any activity in connection with which he

might have assumed the authority of the commander in chief. On the contrary, he at no time held an independent position. It was not his own decision—which alone would be important in regard to criminal law—that induced him to give marching orders to the Einsatzkommandos, but the above mentioned OKH order, and the directives of his commander in chief to carry out the details of this order on his instructions. This brings us close to the plea of superior orders. I consider it necessary to point out that there is a decisive legal difference between the action based on superior orders—which according to Control Council Law No. 10 is to be only of mitigating value, but not to serve as an excuse—and implementations effected by a chief of staff. The commander who carries out the order issued by superior authorities, i.e., orders his subordinates to implement it, is after all acting on the basis of his own decision, namely the decision to carry out the superior order in his sphere of command. The chief of staff, however, who drafts instructions and orders and partly also signs them personally by order of his commander in chief does not act in the sense of criminal law at all. Not what he wrote, but the decision of his commander in chief alone, is causal for the consequences arising from this order in writing. The chief of staff is not faced with the problem whether he is to induce other persons to carry out a superior order, for he is not entitled at all to give orders to anybody on his own authority. The only thing he could do would be to go to his commander in chief and advise him not to pass on the order issued by higher quarters or, taking the case of the Einsatzgruppen as an example, to evict the Einsatzgruppen from his area. Then it is again up to the commander in chief whether he wishes to follow this advice or not. Thus, the fact that such advice was not given can never be held against the chief of staff as a default in violation of his duty, which is of significance under criminal law. The following is to be added in this respect: Assuming that, in order not to render himself punishable, the commander should have refused to carry out orders issued by higher authorities, there is still no legal maxim stating that one is obliged to request another person—who alone is answerable for the consequences—to refuse to implement such orders. This would apply with regard to the relationship between chief of staff and commander in chief. Of course these questions are actually only significant if it is assumed that proof had been submitted of Woehler's knowledge of at least some of the executions, and that it now remains to be examined what his actions in his capacity as chief of staff should have been. Even if this is assumed—an assumption which I again emphatically reject as being completely unproved—no crim-

inal connection between Woehler and the executions can be inferred therefrom.

It is by no means the more theoretical legal position of Woehler as chief of staff alone which excludes his criminal responsibility for the activities of the Einsatzgruppen. I believe that Woehler gave a convincing description in the witness box of the operations of the 11th Army and, in connection therewith, his tasks and his position as chief of staff of this army. The prosecution produced no counterevidence with regard to this description. According to this statement Woehler devoted his entire energy and all his thoughts exclusively to the very difficult operations and the often dangerous position of the army. As confirmed by the witness Halder, he had been appointed chief of staff of the 11th Army for this specific purpose and he was able to apply himself to these exclusively operational tasks all the more fully since he was not distracted by other matters happening in the army area. It is the view held by the defense, that in such a position not even a commander in chief can be held responsible for incidents outside his sphere of operations. The Yamashita judgment is of a different opinion. However, it is beyond any doubt that the chief of staff is not obliged to share the concern of the commander in chief, namely his responsibility for matters within his executive power in the territory under his command. And since nobody can be expected to attend to matters which are not within the limits of his tasks—the question of a moral responsibility must be left aside here—it stands to reason that Woehler cannot be expected either to show interest in matters which came within the area of executive power. Regarded in this light the question of whether Woehler had knowledge of the executions or not, loses increasingly in importance. Moreover, the witness Ohlendorf confirmed that in his opinion Woehler was exclusively responsible for the implementation of tactical tasks whereas the commander in chief was competent for those as well and in addition to the possessed executive power. Consequently Woehler cannot in any event be reproached for not acquainting himself more fully with the details of the so-called security tasks of the Einsatzkommandos, since the above-mentioned OKH order gave no reason to assume that executions were intended in general, and since despite several meetings Ohlendorf did not inform him to that effect.

In my arguments in connection with Woehler's position as chief of staff, the "Manual for the General Staff in Wartime" was frequently mentioned (*NOKW-1878 Pros. Ex. 42; Woehler 1,*

Woehler Def. Ex. 1).¹ In order to eliminate all possibilities of error, I wish to point out that this manual cannot be compared with the laws of the Hitler state, to which the defendants of other trials have referred for their justification. The difference is the following: If a law—for instance one of the racial laws—considered legal, ordered and organized an action which was adjudicated by the IMT to be a crime against humanity, and which also to a certain extent originally constituted an element of crime in Germany, then reference to such a law as justification was rejected by the IMT and the Military Tribunals as irrelevant. However, this is not the case with regard to the “manual”. The “manual” does not deal with actions which are punishable according to international law, or which represent an element of ordinary crimes. Woehler does not refer to this “manual” in order to *justify* the occurrences in the territory of the 11th Army and his own actions; he merely refers to the fact that the manual draws a *boundary line of competency*, and that for this reason he is not responsible under criminal law for the incidents with which he is charged.

Already at first glance this is logically entirely different from reference to a justifying law. In this case it may be left undecided whether it is possible now to condemn certain actions as crimes which in the Hitler Reich were ordered by law. There is no doubt, however, that, if at that time an officer or civil servant did *not* have certain authority, according to regulations such as the “Manual for the General Staff in Wartime”, this authority cannot be attributed to him today. For this reason the part of the “Manual” which refers to the position of the chief of staff is binding for this Tribunal as well.

Supplementary to my explanations in the opening statement² I may be permitted to draw attention to the following: In Woehler’s defense I do not refer to his position as chief of the general staff, because I am of the opinion that a chief of staff could never commit a criminal act. Neither did I allege that something to this effect is contained in the judgment of Military Tribunal V against Foertsch and Geitner. However, if a chief of staff commits only such acts as are prescribed by the “Manual for the General Staff in Wartime”, he consequently does not make decisions of his own, which are always the prerequisite of criminal intent. Woehler’s activity which is to be evaluated here, especially the marching orders to the Einsatzkommandos and the orders for combating *francs-tireurs*, are as much within the order of the

¹ Many of the provisions of this manual are quoted below in the extract from the prosecution’s closing brief against the defendant Woehler, (section 3).

² Pertinent extracts from the opening statement for the defendant Woehler appear in vol. X, section III E.

commander in chief as those orders which were signed by the defendants Foertsch and Geitner in Case No. 7. For this reason—I have to repeat it once more on account of the importance of this point—it is of no significance in connection with the plea of superior orders whether the defendant acted under irresistible pressure and whether he did anything to escape from this coercion. Neither Foertsch in Case No. 7 nor Woehler alleged that he disagreed with his commander in chief and that he was forced to sign the orders in question against his better judgment. Nor did Foertsch in Case No. 7 allege that he was an unimportant personality, a child or insane, so as to rid himself of his responsibility. There is no doubt about the fact that the chief of the general staff occupies a very important *military* position; however the “manual” clearly limits his responsibility to his internal relationship toward the commander in chief.

All this has been taken into account by Military Tribunal V in Case No. 7, as well as the complete difference between the position of the Chief of the OKW, Keitel, and that of the chief of staff of an army (Woehler). It must be avoided that the fair evaluation of Woehler’s connection with mass liquidations of Jews be obscured by the latter’s [the liquidations] sinister outer aspect. However, the outer aspects of Case No. 7 were not exactly pleasant either if one adds the numbers of hostages killed in the course of reprisal measures, which at that time the prosecution brought in direct criminal relation to Foertsch and Geitner. It is, no doubt, correct that the position of the chief of staff does not entail complete freedom of action, i.e., that it did not authorize Woehler deliberately, and what is more, spontaneously, to take an active part in the execution of so-called undesirable elements. However, this very fact has not been established in the evidence, as remains to be shown by the individual documents which are as yet to be discussed in this connection.

* * * * *

3. EXTRACT FROM THE CLOSING BRIEF OF THE PROSECUTION AGAINST DEFENDANT WOehler

* * * * *

Woehler relies most heavily on the defense that he, being chief of staff from the beginning of the war until his promotion to acting commander of an army corps in April 1943, does not bear any responsibility for this period of his activities. He claimed through the mouth of his counsel that—

"If a chief of general staff with an army could in any way bear responsibility for criminal happenings within the area of an army, such findings would have been made in the case of General Foertsch. The fact that Military Tribunal V did not arrive at such a decision proves that responsibility under criminal law can never be directed against the commander in chief and the chief of general staff simultaneously, just as military responsibility in the Wehrmacht was never divided between commander in chief and chief of general staff." (Tr. p. 5607.)

He relies on the fact that the two defendants in Case No. 7, United States vs. Wilhelm List et al., Foertsch and Geitner, who were in similar positions, were acquitted by Tribunal V and that thus a precedent was created which precludes the finding of guilty for Woehler for crimes committed in the area of the 11th Army and in Army Group Center respectively.

The prosecution submits that such is not the case. Tribunal V found in the case of the defendant Foertsch:

"The prosecution contends that Foertsch as chief of staff of the various army groups successively in command in the southeast was a powerful and influential figure. It is insisted that he exercised this power and influence upon his various commanders in chief in such a manner as to incriminate himself, irrespective of the fact that he had no command responsibility. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of various racial and religious groups finds support in the record, *but it fails utterly to establish that the defendant Foertsch, or any of the armed forces officers jointly charged with him, ever became a party to any such preconceived plan. We think the evidence shows that, insofar as the defendant is concerned, the actions in the Southeast were motivated by a desire to attain peace and order among the civilian population—a matter that was essential to an adequate program of defense against an Allied invasion.*

"The nature of the position of the defendant Foertsch as chief of staff, his entire want of command authority in the field, *his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the prosecution has failed to make a case against the defendant. No overt act from which criminal intent could be inferred has been established.*" [Emphasis supplied.] (Case No. 7, Tr. pp. 10497-98.)

And in the case of the defendant Geitner :

"The evidence shows that General Bader reserved unto himself the authority to issue orders for the arrest of hostages and the execution of all reprisal measures. It appears that the commanding general handled these matters with the aid of a special officer who had been trained in the law. It was the duty of this officer to examine the particular problem with regard to the correctness of the description of events and submit his conclusion to the military commander who made the decision. The defendant von Geitner was necessarily informed of the order made by virtue of his position. It became his duty to prepare the order and approve its forms, which he usually did by placing his signature or initials on it. This he contends is the extent of his participation in the issuing and distributing of reprisal orders.

"The applications for reprisal actions were generally made by (1) the administrative sub-area headquarters, (2) by troop commanders, or (3) the Higher SS and Police Leader. They were then referred to the special legal officer who worked on them and submitted the result to the commander. The commander then made the decision and delivered it to the defendant von Geitner for preparation and approval as to form. The latter was generally indicated by his initials or signature. The order then was sent on its way through regular channels by von Geitner. No doubt exists that the order was that of the military commander and that the defendant von Geitner lacked the authority to issue such an order on his own initiative. He contends that he was opposed to the reprisal policy carried out in this area, a statement sustained by the record. He does not say that reprisal killings against the population were not necessary, or that he considered it unlawful to carry out measures under certain conditions. The question posed is whether the stated participation of the defendant von Geitner in his capacity as chief of staff is sufficient to establish criminal liability. The evidence fails to show beyond a reasonable doubt that he aided, abetted or took a consenting part in acts which were crimes under international laws. No responsible act is shown to have been committed by him from which a guilty intent can be inferred. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of racial and religious groups is not established by sufficient evidence insofar as this defendant is concerned. The record does not show his participation in slave labor programs or concentration camp activities, although he knew of them.

“His testimony that he opposed all such measures is not effectively disputed. These things, coupled with the nature and responsibilities of his position and the want of authority on his part to prevent the execution of the unlawful acts charged, serve to relieve him of criminal responsibility. We find the defendant von Geitner not guilty.” [Emphasis supplied.] (Case No. 7, Tr. pp. 10500–02).

The wording of the opinion proves beyond doubt that the Tribunal V arrived at its findings of “not guilty” in respect to the defendants Foertsch and Geitner for reasons which emanated from their specific cases, and in fact did not find that a position of chief of staff, as such, excluded them from criminal responsibility. The Tribunal adjudicated only that the proof adduced against these two defendants did not warrant a finding of guilty.

In the case of the defendant Foertsch, for example, the Tribunal V found that the evidence in the record supported the charge of the prosecution that a conspiracy existed which had as its purpose the decimation and annihilation of various racial and religious groups, but that this evidence failed to establish that the defendant became a party to any such preconceived plan [*supra*]. The prosecution submits that in the case of Woehler evidence was adduced which proves his participation not only in such planning but also in the execution of such plans beyond any doubt.

In the case of the defendant Geitner, Tribunal V made the finding—

“The evidence shows that General Bader reserved unto himself the authority to issue orders for the arrest of hostages and the execution of all reprisal measures. It appears that the commanding general handled these matters with the aid of a special officer who had been trained in the law.” [Emphasis supplied.] (Case No. 7, Tr. p. 10500.)

And—

“No responsible act is shown to have been committed by him from which a guilty intent can be inferred. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of racial and religious groups is not established by sufficient evidence insofar as this defendant is concerned.” [Emphasis supplied.] (Case No. 7, Tr. p. 10501.)

In the case before this Tribunal the evidence proves that either Woehler himself, or officers of his staff who were directly subordinated to him, issued and executed orders which resulted in crimes, and participated actively in such crimes. This Tribunal

is called upon to decide whether the defendant Woehler—and not the defendants in Case No. 7—was a principal in, accessory to, ordered, abetted, took a consenting part in, was connected with plans and enterprises involving or was a member of an organization or group connected with the crimes charged in the indictment. If the proof shows such criminal activities of Woehler, his position as chief of staff undoubtedly does not and cannot constitute something like a *carte blanche* permitting him—the chief of staff—to commit crimes.

In this connection it is of importance to analyze the duties and responsibilities of a chief of staff in the German Army.

The German “Handbook for the General Staff Service in Wartime” of 1 August 1939 (*NOKW-1878, Pros. Ex. 42*) provided:

“1. *The chief of the general staff.*

* * * * *

“3. At the head of the staff stands the chief of the general staff. He is the first adviser of the commander in chief in all fields.

* * * * *

“The chief of the general staff has to inform the commander in chief of all official matters which are of significance to him. The commander in chief, on his part, should inform his chief (of staff) concerning all directives issued by him directly.

* * * * *

“5. *The chief of the general staff is the superior of all members of the staff unless something else is established in individual cases by the s.o.p. Overall soldiers, with the exception of those senior to him, the chief of the general staff of an army group and an army has the disciplinary jurisdiction of a division commander; the chief of the general staff of an army corps has that of a regimental commander. [Emphasis supplied.]*

“6. The chief of the general staff regulates the business routine of the entire staff unless the standard order of procedure provides for individual persons acting in special spheres.

* * * * *

“10. The chief of the general staff directs the verbal reports to the commander in chief. He may take part.

* * * * *

“11. The chief of the general staff examines all drafts before they are submitted to the commander in chief. He is authorized to sign documents which neither have basic significance nor contain evaluations concerning the recipient. The signature reads as follows:

'For the Army Group Command (Army Command, Corps Command) The Chief of the General Staff.'

* * * * *

"The chief of the general staff or, upon his orders, the IIa, sign the staff order.

* * * * *

"15. The chief of the general staff *makes recommendations concerning all officers of his subordinate staff*. He makes recommendations concerning general staff officers of subordinate offices on a separate sheet of paper.

"16. The chief of the general staff bears the responsibility for the training of all general staff officers within his sphere of command.

* * * * *

"18. The chief of the general staff represents the commander in chief during short absences. For longer absences, the higher command authority designates the representative of the commander in chief.

* * * * *

a. The 1st General Staff Officer (*Ia*)

"20. *Ia is the chief* of the operations section and he is concerned with matters pertaining to troop leadership.

"He reports to the chief of the general staff and generally attends the latter's consultation and report with the commander in chief insofar as those concern affairs of leadership of the troops. He keeps the staff informed on the situation (staff critiques see No. 8). *Ic* deputizes for *Ia*.

* * * * *

b. The 3d General Staff Officer (*Ic*)

* * * * *

"26. *Ic* is responsible for the cooperation of all officers and units employed in securing information.

* * * * *

c. The counterintelligence officer (AO) with army group headquarters and army command (subordinate to *Ic*)

* * * * *

"35. The tasks of AO derive from the counterintelligence tasks in peace time. * * * AO, by order of the *Ic*, issues orders to the Gestapo possibly active in the area of operations.

* * * * *

"66. Oberquartiermeister is subordinate to the chief of the general staff of the army.

* * * * *

"68. By order of the commander in chief, Oberquartiermeister divides the army area into the combat area and the army rear area. He is responsible for all matters of executive power in the army area."

The organizational chart of an army command contained in the handbook (Ibid., page 41 of original) shows the important members of the staff who are under the direct supervision of the chief of the general staff.

The Field Manual No. 90 of 1 June 1938 in its edition of 1940 (NOKW-2708, *Pros. Ex. 41*), gives further details about the subordination of the Oberquartiermeister to the chief of staff. It provides—

"11. The Oberquartiermeister is subordinate to the chief of the general staff of the army.

* * * * *

"He regulates the division of the army territory in a fighting and an army rear area."

Thus it can be seen that Woehler, in his capacity as chief of staff, was the direct superior of the Oberquartiermeister, Ic and AO officers, a fact which is not denied by him. (*Tr. p. 5894.*)

Woehler is charged with responsibility for his own acts and also with responsibility for the acts of these staff officers, his direct subordinates. It is not denied by him that he had command authority over the staff officers (*Tr. p. 5955*).

The defense bases its argument that Woehler in his capacity as chief of staff cannot be held responsible, mainly on the following provision of the handbook (NOKW-1378, *Pros. Ex. 42*):

"Decision and responsibility lie with the commander in chief alone. The chief of the general staff has to commit himself fully for the execution of the will of his commander in chief, even if the latter's points of view and decisions are at variance with his own."

There can be no doubt about the fact that the here defined responsibility is something completely different than criminal responsibility. The responsibility referred to in the handbook is responsibility for the strategical and administrative management of the particular army to the military superiors; in other words, the commander in chief of the army was not entitled to excuse eventual mismanagement of the army or setbacks by the inefficiency of his chief of staff. It is, however, hard to under-

stand what this type of responsibility should have in common with responsibility for criminal deeds. It is not disputed that the defendant Woehler, in his capacity as chief of staff, might not, in every case, have been the instigator of a criminal order. It might well have been that such an order was conceived by his commander in chief, although according to the regulations he had to direct verbal reports to the commander in chief, and had to examine all drafts before they were submitted to the commander in chief. (*NOKW-1878, Pros. Ex. 42.*) How far the personal influence of a chief of staff on his commander goes, and in this case how far the influence of Woehler on his commanders Schobert and Manstein went, is hard, if not impossible, to prove. Woehler has left no doubt in his testimony that he was, if inferior in rank, superior in intelligence to Schobert (*Tr. pp. 5647, 5694*) and worked in complete agreement with Manstein (*Tr. p. 5879*). Certainly earnest opposition by Woehler against an order issued by one of these two men, or against measures taken by them, would not have been fruitless.

* * * * *

X. FINAL STATEMENT OF DEFENDANT VON LEEB TO THE TRIBUNAL ON BEHALF OF ALL DEFENDANTS

A. Introduction

Article XI of Military Government Ordinance No. 7, dealing with the order of trial, provides that "Each defendant may make a statement to the Tribunal" after the closing arguments of the prosecution and the defense. In the High Command Case the defendant von Leeb alone made a statement to the Tribunal, speaking the last word on behalf of all the defendants. This statement is reproduced below (section B).

B. Final Statement of the Defendant von Leeb*

PRESIDING JUDGE YOUNG: Dr. Laternser.

DR. LATERNSER: If the Court please, I want to announce to the Court that Field Marshal von Leeb will speak the last word for all of the defendants. I ask that he be permitted to do it from the prosecutor's stand.

PRESIDING JUDGE YOUNG: He will have that permission in just a moment. In view of the fact that one of the defendants, Field Marshal von Leeb, will speak for all, he, of course, will not be limited to ten minutes if he desires more time than was in the order assigned to each defendant. The Tribunal will now hear such statement as Field Marshal von Leeb desires to make and he may make it from the podium.

DEFENDANT VON LEEB: May it please the Tribunal, I have been allotted the task of making the final speech on behalf of all the defendants.

I believe that we will not be looked upon as presumptuous in upholding our opinion that the German officer was respected beyond the boundaries of his own country. He was respected not only on account of his technical qualifications, but mainly because of those soldierly qualities which form the essence of the soldier's profession. We deem these qualities to include loyalty, close ties between officers and men, obedience, a sense of duty, unselfishness, and personal gallantry. The unusually high casualties among officers in both World Wars, including general officers, give proof of our readiness to lay down our lives.

We, the defendants, have belonged to this body of officers for many years. We have been trained and have grown up in this

* Tr. pp. 9,997-10,000, 13 August 1948.

spirit of the soldier's profession. We have fulfilled our duty as soldiers with equal loyalty under the German Emperor, during the First World War, under the Weimar Republic, and in the Third Reich. However, in the Third Reich, under the dictatorship of Hitler, we found ourselves faced with a development which was in contrast to our principles and nature. It is not true to say that we as officers changed—the demands made of us became different.

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

Above all, the body of officers as a whole was the only section of the population in Germany which, according to the constitution and to tradition, possessed no civic rights. We held no right of franchise or election. We were not permitted any activity in any political sphere whatsoever, be it domestic or foreign politics.

Therefore no one among us was able to exert any influence on Hitler's conduct of the affairs of state at home or abroad. We were neither able nor permitted to enter politics. We were merely required to be soldiers.

Even as soldiers we did not incite to war. We, of all people, were familiar with war and all its attendant horrors from personal experience of front-line combat during the First World War. On the contrary, we did everything in our power to dissuade Hitler from his bellicose plans.

However, once the head of state, who alone was vested with unlimited powers of decision on war or peace had commanded the initiation of acts of war against the will and advice of his generals, we were bound to do our duty as soldiers like any other Germans.

We were not entitled to demand enlightenment on the political reasons underlying a war and to refuse our services if such reasons should appear inadequate to us. We are not prepared to believe that the leading generals of any other state would have refused their services in the same situation.

War is a bitter life-and-death struggle between two nations. Any war will become all the more bitter and grim the longer it lasts, especially when two ideologies clash, and World War II followed the same course of developments. It terminated in destruction of an unparalleled extent inflicted on German soil.

In the East the grim aspect of the war was determined by Russia. Stalin's appeal for the slaughter of all Germans induced the partisans to pervert the conduct of the war.

We, as German soldiers, had up to that moment refrained from such conduct, and we had not desired and sought such extremes;

neither in Russia nor in other theaters. We were forced to seek effective protection against this degeneration in warfare. We acted in self-defense.

In regard to Hitler's instructions which went against our humane and soldierly feelings, we were never merely his tools without a will of our own. We did oppose his instructions as far as we deemed this to be possible or advisable and we toned their wording down and rendered them ineffective or mitigated them in practice. The counterorder issued by the Commander in Chief of the Army on the maintenance of discipline and many other countermeasures offer proof of our self-defense and our opposition.

No blame attaches to the Wehrmacht for anything that may have happened on Russian soil beyond the purely *belligerent* purpose of the war. Such actions occurred without our knowledge or participation. None of the defendants had any knowledge of the secret Fuehrer Decree and the organized mass murder carried out by the Einsatzgruppen which were *not* subordinated to us.

We are unable to grasp the charge contained in count four, according to which we are supposed to have participated in a common plan and conspiracy for the commission of crimes under Control Council Law No. 10.

In summarizing, I wish to state that we, the defendants, were required to do our duty as soldiers under a dictatorship in its most severe form, with unlimited legislative power, with manifold abuses, and with violent distrust of our persons, which gradually turned into hatred and called forth the reaction shown in the events of 20 July 1944.

Outwardly we were fighting our enemies abroad, but at the same time we were fighting at home against the Party with its influences, its demands, and its almost unlimited power—especially on the subject of military jurisdiction—and we were even fighting against our own Supreme Commander. What a terrible tragedy is revealed by the fact that we as the appointed *guardians of the soldiers' duty to obey* were forced to act towards our own Supreme Commander in defiance of this chief axiom of soldierly conduct.

No soldier in all the world has ever yet had to fight under such a load and such tragedy.

In the First World War we did not infringe any laws, and we remained what we were during the Second World War. We were not guided by criminal instincts, as the prosecution seeks to convey, but we now *look back* upon a life of disinterested service and unselfish fulfillment of duty towards our country and our men.

There is no need, nor is it in fact possible, to tear the mask from

our face, as the prosecution has told the German public over the radio, because we never wore a mask.

We are soldiers who upheld their soldierly honor even in this Second World War amidst the turmoil of dictatorial violence. As *our* witnesses we call upon those hundreds of thousands of front-line soldiers who fought under our orders.

PRESIDING JUDGE YOUNG: We appreciate the assistance of counsel for defense and prosecution in the presentation of this case and in bringing it, so far as the evidence is concerned and the arguments, to a conclusion. The Tribunal will now be recessed for preparation of its judgment, subject to call, of which, of course, you will have proper notice.

XI. JUDGMENT

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

* * * * *

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

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

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

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

The indictment named as defendants:

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

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

THE INDICTMENT

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

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

“1. All of the defendants, with divers other persons, including the co-participants listed in Appendix A, during a period of years preceding 8 May 1945, committed crimes against peace as defined in Article II of Control Council Law No. 10, in that they participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to the planning, preparation, initiation, and waging of wars of aggression, and wars in violation of international treaties, agreements, and assurances.

“2. The defendants hold high military positions in Germany and committed crimes against peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of crimes against peace.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"The documents must be properly translated, that is, the American translation must convey to the Tribunal the sense of the German text correctly and without omissions. This cannot be said of any of the document books. The English text in the hands of the Tribunal contains such a vast number of mistakes that to correct even the essential points is a task the defense is unable to cope with.

"The reviewing of the document books arranged by the defense went as far as document books 1-9Q, which is about half of the material. The number of mistakes so far established amounts to 1,936."

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

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

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

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

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

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

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

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

I will repeat two lines.

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

"Article I

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

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

"Article II

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

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

"(b) *War Crimes.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"(c) *Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

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

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

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

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

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

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

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

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

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

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

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

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

The first two articles are as follows:

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

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

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

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

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

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

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

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

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

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

“The Assembly:

“Recognizing the solidarity which unites the community of nations;

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

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

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

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

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

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

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

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

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

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

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

"The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.'

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

"It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

"The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.'

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

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

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

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

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

That is the end of the quotation.

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

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

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

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

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

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

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

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

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

Then there is quoted the language of the IMT heretofore¹ set out in this opinion. (*Tr. p. 10,015.*)

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

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

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

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

¹ See pp. 472-473.

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

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

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

"Hague Conventions

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

"Versailles Treaty

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

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

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

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

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

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

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

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

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

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

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

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

"Kellogg-Briand Pact

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

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

OBJECTIONS DURING THE TRIAL

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

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

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

Article 63 of the Geneva Convention provides:

“Sentence may be pronounced against a prisoner of war only

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

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

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

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

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

The IMT said:*

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

* * * * *

* Trial of the Major War Criminals, vol. I, pp. 218, 258.

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

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

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

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

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

CONSPIRACY COUNT

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

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

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

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

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

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

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

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

CONTROLLING PRINCIPLES IN TRIAL

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

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

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

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

COUNT ONE OF THE INDICTMENT—AGGRESSIVE WAR

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

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

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

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

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

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

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

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

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

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

The judgment of the IMT held that:*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WAR CRIMES AND CRIMES AGAINST HUMANITY

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

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

* * * * *

“Other war crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of comandos or captured airmen, or the destruction of the Soviet

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

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

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

* * * * *

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

CRIMES AGAINST CIVILIANS

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

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

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

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

In the IMT judgment it is said:*

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

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

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

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

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

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

This order provided:

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

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

* * * * *

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

GERMAN MILITARY SYSTEM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Army Field Headquarters

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

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

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

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

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

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

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

F. Occupational Headquarters and Units— Armed Forces Commander

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

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

Rear area commanders—During wartime the operational area

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

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

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

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

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

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

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

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

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

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

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

We now pass to superior orders.

SUPERIOR ORDERS

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

"4 (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDERS

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

For the first time in history individuals are called upon to

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

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

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

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

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

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

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

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

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

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

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

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

Another field of opposition was to sabotage the order. This

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

A fourth decision he could make was to do nothing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMISSAR ORDER

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

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

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

"Clash of two ideologies. Crushing denunciation of bolshevism, identified with asocial criminality. Communism is an enormous danger for our future. We must forget the concept of comradeship between soldiers. A Communist is no comrade before nor after the battle. This is a war of extermination. If we fail to grasp this, and though we are sure to beat the enemy, we shall again have to fight the Communist foe 30 years from now. We do not wage war to preserve the enemy.

"War against Russia. Extermination of the Bolshevist commissars and of the Communist intelligentsia. The new states must be Socialist, but without intellectual classes of their own. Growth of a new intellectual class must be prevented. A primitive Socialist intelligentsia is all that is needed. We must fight against the poison of disintegration. This is no job for military courts. The individual troop commander must know the issues at stake. They must be leaders in the fight. The troops must fight back with the methods with which they are attacked. Commissars and GPU men are criminals and must be dealt with as such. This need not mean that the troops get out of hand. Rather the commander must give orders which express the common feelings of his troops.

"This war will be very different from the war in the West. In the East, harshness today means leniency in the future. Commanders must make the sacrifice of overcoming their personal scruples."

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

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

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

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

"The troops must realize—

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

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

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

"For the rest, the following directives will apply:

"I. *Combat zone.*

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

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

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

* Document reproduced above in section VII, A2.

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

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

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

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

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

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

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

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

To I number (2),

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

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

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

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

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

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

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

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

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

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

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

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

[Signed] VON BRAUCHITSCH”

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

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

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

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

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

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

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

BARBAROSSA JURISDICTION ORDER

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

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

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

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

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

I. *Treatment of crimes committed by enemy civilians*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. *Responsibility of the Troop Commanders*

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

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

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

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

IV. "Protection as secret matter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMANDO ORDER

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

"TOP SECRET

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

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

"3. I therefore order—

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

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

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

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

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

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

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

NIGHT AND FOG DECREE

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

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

I

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

II

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

III

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

IV

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

V

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

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

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

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

HOSTAGES AND REPRISALS

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

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

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

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

PARTISAN WARFARE

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

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

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

“Article 1

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

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

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

“3. To carry arms openly: and

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

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

“Article 2

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

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

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

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

"One of the two enemies must die; do not spare the bearer of enemy ideology, but kill him.

"Every civilian who impedes or incites others to impede the German Wehrmacht is also to be considered a guerrilla (for instance: instigators, persons who distribute leaflets, nonobservance of German orders, arsonists, destroying of road signs, supplies, etc.).

"The population is denied the right to take up arms voluntarily. Neither are para-military associations (Komsomoel Osscaviachim) entitled to do so."

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

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

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

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

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

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

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

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

THE HAGUE AND GENEVA CONVENTIONS

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

“But it is argued that the Hague Convention does not apply in this case, because of the ‘general participation’ clause in Article 2 of the Hague Convention of 1907. That clause provided:

“The provisions contained in the regulations (Rules of Land Warfare) referred to in Article I as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.’

“Several of the belligerents in the recent war were not parties to this Convention.

“In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt ‘to revise the general laws and customs of war’, which it thus recognized to be existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter.”

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

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

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

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

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

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

* * * * *

“Article 6(b) of the Charter provides that ‘ill-treatment * * * of civilian population of or in occupied territory * * * killing of hostages * * * wanton destruction of cities, towns, or villages’

* Ibid., p. 232.

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

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

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

Another charge against the field commanders in this case is

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

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

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

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

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

“Article 4

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

“They must be humanely treated”.

* * * * *
That part of Article 6 which provides—

“* * * The tasks shall not be excessive * * *”

That part of Article 8 which provides—

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

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

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

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

That part of Article 3 which provides—

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

Article 4 which provides—

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

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

That part of Article 7 which provides—

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

These parts of Article 9 which provide that—

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

and that—

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

That part of Article 10 which provides—

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

These parts of Article 11 which provide—

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

and that—

“A sufficiency of potable water shall be furnished them.”

That part of Article 12 which provides that—

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

That part of Article 13 which provides—

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

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

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

That part of Article 32 which provides—

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

That part of Article 46 which provides—

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

Article 50 which provides—

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

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

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

That part of Article 56 which provided—

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

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

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

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

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

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

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

Article 43—"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Article 46—"Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected."

Article 47—"Pillage is formally forbidden."

Article 49—"If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question."

Article 50—"No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

That part of Article 52 which reads as follows :

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

That part of Article 53 which reads as follows :

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

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

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

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

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

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

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

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

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

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

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

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

"Article 1

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

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

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

"3. To carry arms openly; and

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

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

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

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

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

RESPONSIBILITY OF COMMANDERS OF OCCUPIED TERRITORIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HITLER AND THE WEHRMACHT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* Final statement is reproduced in Section X.

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

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

Again he said:

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

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

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

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

WILHELM VON LEEB

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"This morning the CinC of Army Group North visited the Panzer group.

"The essential content of the conference was about as follows:"

The pertinent entry reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

must assume a measure of responsibility for its illegal application.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HUGO SPERRLE

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

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

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

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

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

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

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

support of the Wehrmacht in compulsory recruitment of French labor.

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

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

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

GEORG KARL FRIEDRICH-WILHELM VON KUECHLER

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

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

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

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

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

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

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

We shall discuss these charges in order.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“3. Within the educational program, ample opportunity is

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

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

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

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

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

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

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

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

* * * * *

"a. Legislative

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

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

* * * * *

"c. Administrative

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Ad Section I

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

"Ad Section II, 2c

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

This order also inclosed a special ordinance for the procurment of

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

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

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

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

Section IV of the order provides:

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

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

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

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

“I. Task

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

“II. Supervision

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

III. Principles to be applied in the evacuation

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

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“2. I am also stressing the necessity of ensuring that every soldier of the army, particularly every officer, refrain from criticizing the ethnical struggle being carried out in the Government General, for instance, the treatment of the Polish minorities, of the Jews, and of church matters. The final ethnical solution of the ethnical struggle which has been raging on the eastern border for centuries calls for one-time harsh measures.

“Certain units and departments of the Party and the State have been charged with the carrying out of this ethnical struggle in the East.

“The soldiers must, therefore, keep aloof from these concerns of other units and departments. This implies that they must not interfere with these concerns by criticism either.

“It is particularly urgent to initiate immediately the instructions concerning these problems of those soldiers who have been recently transferred from the West to the East; otherwise, they might become acquainted with rumors and false information concerning the meaning and the purpose of that struggle.”

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

“Subject: Conduct of troops in eastern territories

“Regarding the conduct of troops towards the Bolshevistic system, vague ideas are still prevalent in many cases. The most essential aim of war against the Jewish-Bolshevistic system is a

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

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

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

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

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

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

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

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

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

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

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

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

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

HERMANN HOTH

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

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

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

COUNT TWO OF THE INDICTMENT

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

THE COMMISSAR ORDER

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

Prior to the beginning of the Russian campaign, the Commissar Order was sent to Hoth's headquarters. With respect to this order he testified as follows:

"Much as I would like to, I can no longer recall the occasion and the place, that is, when and where I passed on the order to the commanding generals of the two Panzer corps. I have thought much about it, but I no longer know. The fact that it was passed on by me is beyond any doubt."

He testified further that he expected the commissars to violate international law but did not wish them to be shot merely because they were commissars. There has been no contention during this trial that the commissars, sometimes referred to as Politruks, who were attached to the army, were not soldiers and that they did not comply with all the requirements of the Hague Convention and international law to constitute them lawful belligerents. In its essence, the Commissar Order was a clear and definite directive to shoot captured enemy soldiers with a known lawful prisoner of war status and being such it constituted an order to commit murder. It was a criminal order on its face. It was a criminal act under international law for Hoth to pass it down to his subordinate units. When these units committed the crimes enjoined by it, the superior commander must bear a criminal responsibility

for such acts because he ordered their commission.

As a defense Hoth says that he received the order from his superior Brauchitsch and that he simply passed it down without emphasizing it or attempting to mitigate it. He states also that he did not think Hitler would ask his commanders to do anything wrong and further that Hitler was the head of the state and that when he received a directive from him it superseded section 47 of the German Military Penal Code which provides that an officer need not carry out an order that is clearly criminal on its face and commits a criminal act if he does so. He further states, in effect, that he was certain that his subordinates were sufficiently radar-minded to pick up the rejection impulses that radiated from his well known high character and that he believed that they would have the courage that he lacked to disobey the order. As we have set forth in another section of the opinion, superior orders are not a defense but may be considered under some circumstances in mitigation of the punishment, but the mere unexpressed hope that a criminal order given to a subordinate will not be carried out is neither a defense nor a ground for the mitigation of punishment. That the character impulses were too weak or the minds of the subordinates were too insensitive to pick them up is shown by the documents.

On 22 June 1941, the 20th Infantry Division reported one commissar killed, this being on the first day of the Russian campaign. The next day another commissar was reported killed by this same division. It would be most unusual to find such in the reports if the commissars were killed in battle unless the reports referred to some preexisting order. With the Commissar Order in effect it is perfectly natural and logical to find such reports. Nothing in the Commissar Order required such a report of commissar battle casualties.

On 30 June 1941, a commissar with the rank of colonel was captured by the 12th Panzer Division which was subordinate to Hoth and shot as ordered.

On 6 July 1941, the 20th Panzer Division, subordinate to Hoth in its activity, report shows the interrogation and shooting of another commissar. On 18 July 1941, upon inquiry from the XXXIX Army Corps, subordinate to Hoth, it was reported that the division, since 5 July 1941, had shot approximately twenty commissars. On 26 July 1941, one political commissar was shot.

On 17 July 1941, Panzer Group 3 reported two commissars shot and in the same report for 18 July 1941, the following appears:

“A report on the number of *liquidated commissars* is not yet at hand. Up to now the number of captured and liquidated commissars seems to be very small (approximately 50).”

This report was made by the chief of the general staff of the Panzer Group.

An intelligence report of Panzer Group 3 covering the period from January until July 1941 contains the following statement:

"During the first weeks of the fighting only a small number of political commissars and officers were captured. Up to the beginning of August in the whole area of the group about 170 political commissars (within the armed forces) were captured and reported as removed by the army headquarters. This operation was no problem for the troops."

This activity report was seen by Hoth. Other portions of this report show that Hoth saw and signed it on 25 September 1941. Another paragraph contained in the report is significant as indicating what happened to the 170 commissars who "were captured and reported as removed by the army headquarters":

"The special treatment of the political commissars by the armed forces resulted in its becoming soon known on the Russian side and in the strengthening of the will to resistance. To prevent its being known, the special treatment should have been performed only in camps located far back in the rear. Most of the captured Red Army soldiers and officers are aware of such a special treatment, of which they said they learned from routine orders and from political commissars who had escaped."

The above paragraph is significant as indicating the actual carrying out of the Commissar Order. There would have been no need to say that the special treatment should have been carried out far to the rear to prevent its becoming known if there had not, in fact, been special treatment to become known to the Russians.

On 8 August 1941, in a directive from the chief of the general staff of Hoth's Panzer Group 3 the following appears:

"In accordance with the new Soviet regulations, all regiments and divisions, as well as higher staffs, have now *war commissars* (formerly political commissars), while companies, batteries, and troops have *political* leaders (Politruk), who also fall under the classification of war commissars. Individual inquiries on the part of the troops make it necessary to point out again that *there will be no change* in the treatment of these persons."

This document indicates that Hoth's psychological rejection of the Commissar Order had not gone as far down as his chief of staff. From the information contained in this directive from the chief of staff it would appear extremely doubtful that Hoth's

rejection of the order would be suspected at subordinate levels since the information is stated to be in response to inquiries by the troops.

On 25 November 1941, Hoth then being the Commander in Chief of the 17th Army, through his chief of staff, ordered the establishment of a concentration camp. Directions for the treatment of the inmates of the camp are attached to the order providing for the establishment of the camp. In these directions appears the following: "Commissars will be subject to special treatment".

The Commissar Order was passed down by Hoth and with his knowledge and approval was ruthlessly carried out by units subordinate to him.

TREATMENT OF PRISONERS OF WAR IN HOTH'S AREA

As regards the general condition of prisoners of war in Hoth's 17th Army Area the report of the Oberquartiermeister of his army under date of 25 November 1941 is enlightening. Hoth took command of the 17th Army on 10 October 1941. As the report covers the period from the beginning of the war to the date of the report, all of the delinquencies therein shown cannot be charged against him. It does not show whether the shooting of the four hundred prisoners therein noted occurred before or after he assumed command. The portions of this report significant as showing the general condition are as follows:

"The PW's who are still in the army area at present cannot be evacuated, since they are being required for the activation of PW companies to be used for railway maintenance and of PW construction battalions.

* * * * *

"Since the beginning of operations altogether 236,636 PW's were taken by the elements of the army up to 15 November 1941. Moreover, 129,904 PW's have passed through the installations of the army who were taken by units not tactically under the command of the army, so that since the beginning of operations a total of 366,540 PW's were made and evacuated. Approximately 400 were shot. As for those who died of natural causes and those escaped, no records are available.

* * * * *

"The rations ordered by decree OKH GenStdH/Gen. Qu., IVa (III,2) No. I/23728/41 sec., dated 21 October 1941, could not, of course, be issued to the PW's even in a single case. Fat, cheese, soya-bean flour, jam, and tea could not always be issued even to our own troops.

"These foodstuffs were replaced by millet, corn, sunflower kernels, buckwheat, in part by lentils and peas, partly also by bread.

"Distribution of the ordered rations, either in full or in part, was not possible simply because rations could not be supplied. The feeding of PW's has been possible only from stores found in the country. The cooking of the food causes additional difficulties since only in rare instances field kitchens were brought along by the PW's. Even our own troops, as a result of the supply difficulties, had to live from the country. The rations due to them had to be cut down by half for a longer period.

* * * * *

"Clothing is insufficient; above all footwear. Underwear, in part, is completely lacking. The insufficient clothing is particularly felt during labor employment in the winter.

"Conditions of the clothing situation can only be improved if all dispensable clothing items are being taken away from the PW's who are to be released in the rear area of the army group, and placed at the disposal of the armies upon request.

"Repair shops have been installed in the transit camps which are under the jurisdiction of the army. There is a shortage of material and tools. Deceased and *shot* persons will be buried without their clothes and the clothes used again. [Emphasis supplied.]

* * * * *

"In view of the present number of PW's, their housing is absolutely impossible. Brick stoves will be built by the PW's themselves.

* * * * *

"After being assigned for labor their health improves since these PW's receive supplementary rations. With the existing shortage of fat and albumen, mortality will increase during the winter months. Many cases of pneumonia and severe intestinal diseases have occurred. At the evacuation of the huge numbers of PW's taken in the battle east of Kiev, where under the worst weather conditions only part of the PW's could be sheltered in sheds, 1 percent died each day."

While not all of these conditions are shown beyond a reasonable doubt to be the responsibility of Hoth since some reports cover matters before he assumed command, certain of them are shown to be his responsibility. The first paragraph shows the prisoners

were not to be evacuated because the army needed them for labor purposes. Conceding that they were to be used for labor not improper under the rules of war, still it was not lawful to hold them even under Hoth's own evaluation of his responsibility that he must feed them because he exploited them for labor purposes. The report shows that the rations prescribed for prisoners of war by an OKH order of 21 October 1941, issued 11 days after Hoth assumed command of the 17th Army, "could not of course be issued to the PW's even in a single case". True, it shows also a shortage of food for the army. Both the army and the prisoners of war were living off the country. The prisoners of war were held for labor purposes with no food to properly sustain them. It was 25 November and the Russian winter, whose severity has here been so emphasized, was upon them. The prisoners had insufficient clothing. There is recorded the obvious conclusion—that the lack of clothing was particularly felt during labor employment in the winter. Clothing was so scarce that the shot and deceased persons were to be stripped before burial.

"In view of the present number of PW's their housing is absolutely impossible," is the further statement in the report. "The cooking of the food causes additional difficulties since only in rare instances field kitchens were brought along by the PW's." It was not permissible under international law to hold the prisoners of war for labor purposes under these inhumane conditions. It was his duty to evacuate them to a place where they could be cared for properly. While some of the conditions were inherited by Hoth from his predecessor, there is evidence of neglect that was continuing after he assumed responsibility in that he held them for labor under such conditions.

Hoth commented in his testimony that the bad condition of the prisoners when taken was due to their stubbornness and bad judgment in not surrendering when there was no hope for them. In the light of the treatment they received after surrender, there was little choice between fighting on hopelessly and starving or surrendering and dying in the 17th Army camp at the rate of one percent per day. Hoth admitted his obligation to care for the prisoners in his testimony, to which we have referred, wherein he said:

"* * * because I exploited these prisoners of war for labor purposes, and I had to feed them."

The documents in this case show that units subordinate to Hoth's 17th Army and later units subordinate to his 4th Panzer Army used prisoners of war for labor, consisting of road and railroad maintenance, work in construction battalions, and digging

antitank ditches. They show also that 2,071 prisoners of war were being used on 1 August 1943 for labor in troop supply. And, on 4 October 1943, 24 prisoners of war were turned over for loading ammunition. On 3 August 1943, the 11th Panzer Division reported the construction of 696 meters of antitank ditches and the proposed construction of 600 meters more for which 586 prisoners of war were being used.

The use of prisoners of war to load ammunition was contrary to international law. We have elsewhere in the opinion discussed what work is or is not permissible for prisoners of war. We cannot say that the evidence shows as to Hoth, except for the matter of loading ammunition, a use of prisoners of war that was unlawful, for it does not appear that any of it was done at the front or in a dangerous location.

The fact that the enemy was using prisoners of war for unlawful work as the defendant testified does not make their use by the defendant lawful but may be considered in mitigation of punishment.

On 15 July 1941, a report to the 20th Panzer Division contains the following:

“2 GPU soldiers were captured on 15 July 1941, during a systematic search of the city.

* * * * *

“On 15 July, early in the morning a wood factory in the north of the city started to burn again, after the fire in the city had been completely extinguished. It is probable that this was caused again by arson through members of the GPU. The two captured soldiers were shot, as a deterring example.”

That members of the GPU were soldiers and were to be considered as such is shown by an intelligence bulletin of Hoth's 3d Panzer Group bearing date of 8 August 1941 which specifically so states.

On 9 September 1941, “Four extremely suspected Red Army men were shot who were apprehended in Djedkovo—nearest the place of attack.” The attack referred to was the firing by ten or twenty partisans, none of whom were apprehended, on two motor vehicles of Panzer Group Signal Regiment 3. It is difficult to see anything in this but murder of prisoners of war as a pure terror measure.

These reports, to which we have referred, show that the killing of prisoners of war for the reasons therein stated were not mere excesses but were in accordance with an approved policy. If such had not been the case, it is not credible that the subordinate

commanders from whose areas the reports came would have reported the shootings or recorded them without reporting some action against the perpetrators.

Under date of 29 October 1941, in the war diary of the Oberquartiermeister of Hoth's 17th Army, appears the following:

"The billeting of PW's captured in the city and some of the inhabitants of the country in the building used by our own troops has proved to be a useful countermeasure against the time bombs put there by the enemy. It has been our experience, that, as a result of this measure, the time bombs were found and rendered harmless in a very short time by the prisoners and/or the inhabitants of the country."

To use prisoners of war as a shield for the troops is contrary to international law.

Hoth said he gave no orders that this be done and he did not think it was done in his army. However, he admits knowing that prisoners of war were used as a shield for German troops in another army and states that he thought his Oberquartiermeister was reporting on that.

WAR CRIMES AND CRIMES AGAINST HUMANITY CONSISTING OF CRIMES AGAINST CIVILIANS

Frequent reference has been made throughout the trial to the notorious Reichenau Order. This order was sent for information by von Rundstedt of the High Command of Army Group South to Hoth's 17th Army in a letter, dated 12 October 1941, which Hoth in his testimony states that in due course he received.

On 17 November 1941, Hoth issued a similar order over his signature which speaks the language of Hitler and shows a sympathy with his ruthless policy of exploiting the country and its population.

The documents clearly indicate Hoth's general attitude as being one of ruthlessness and brutality in dealing with the population. The Barbarossa Jurisdiction Order, which we have referred to elsewhere as being an illegal order, was passed down by Hoth. It was clearly susceptible without the strongest of safeguards of being made criminal in the implementation. Hoth said, "I received the order and passed it on to the troops subordinate to me." There is no testimony that any safeguards were attached when it was transmitted. On 25 September 1941, an activity report of Panzer Group 3 was made up covering the period from January to July 1941. This recites that on 11 June 1941 the intelligence officer and the army judge of Hoth's Panzer Group 3 were ordered to Warsaw for a conference with Major General Mueller, the General for Special Assignments, concerning the

Barbarossa Jurisdiction Order. This report bears the handwritten notation, "Seen 25 September 1941" and is signed "Hoth." In that report under the heading "Legal Question" the following appears:

"On 11 June, the intelligence officers and the army judge were ordered to Warsaw to a meeting with the General for Special Assignments with the Commander in Chief of the Army. The General for Special Assignments, Major General Mueller, after having read the Fuehrer decree, explained that in future operations the necessity of war might possibly have to come before a feeling of law.

* * * * *

"One of the two enemies must die; do not spare the bearer of enemy ideology, but kill him.

"Every civilian who impedes or incites others to impede the German Wehrmacht is also to be considered a guerrilla (for instance: instigators, persons who distribute leaflets, non-observance of German orders, arsonists, destroying of road signs, supplies, etc.).

* * * * *

"*Punishments*, principles: no delay but immediate proceedings. In lighter cases individual persons can, under certain circumstances, be punished by flogging. The hardships of the war require severe punishments (remember World War I: the Russians in Gumbinnen. If the railroad Tilsit-Insterburg were damaged, all village inhabitants who lived along that line were to be shot). In cases of doubt as to the guilt, suspicion will often have to suffice. Clear evidence often cannot be established."

Hoth testified that his judge advocate who attended the Warsaw Conference probably reported to him on his return, as it would have been his duty to do so. He denied any knowledge of the matters contained in the last-mentioned report and said he did not remember having read it. When Hoth saw, as we believe he did, this authoritative construction of the order, if not before, he must have known that criminal objectives were intended in its implementation, and this notwithstanding the so-called Brauchitsch Disciplinary Order that is claimed to have been designed to mitigate it. That the order was understood to be criminally implemented is apparent from an activity report and directive of the intelligence officer of Hoth's Panzer Group 3, dated 3 July 1941, in which it is said:

"Insofar as there is proof or well founded suspicion, that civilians actually are soldiers, assigned for duty as spies or saboteurs, or who have supported or carried out attacks against the German Wehrmacht, while wearing civilian clothing, they are to be segregated from the others and are to be shot upon orders by an officer."

and—

"Insofar as concerning civilians proof or *the well founded suspicion is given*, that they are soldiers employed for purposes of espionage or sabotage, or that it concerns those who in civilian clothing have supported or carried out measures against the German Wehrmacht, they are to be segregated from the others and to be shot by order of an officer." [Emphasis supplied.]

In the cover letter sent out by the 257th Infantry Division in Hoth's 17th Army, under date of 7 December 1941, the following appears:

"You receive enclosed an excerpt on the way and kind of conducting interrogations of partisans. *This excerpt was compiled by the army.* It must not be brought along when the deployment takes place * * *." [Emphasis supplied.]

Hoth in his testimony when asked if the army referred to in the letter was the 17th Army answered that, "It seems as though that were the case." The character of the instructions and the license they direct is apparent from the following contained therein:

"B. Directives for the interrogation

"It never occurred yet that an interrogated person incriminated even one other person without being put under heavy pressure. The following must, therefore, be observed:

All interrogated persons must be warned in a most severe way to say the truth. They expect anyhow nothing else but that the methods of the NKWD are applied in the interrogation, that means they count on being beaten up from the beginning. *The following categories of persons must first be questioned by third degree (eindringlich zu vernehmen) (25 on the buttocks), if women are concerned with rubber tubings, if men are concerned with cowhide or rubber truncheons):* [The material preceding in italics was crossed out in the original document, and the following handwritten remark was inserted: Destroyed in conformity with later order! to prevent that such things fall into enemy hands.]

- "1. Platoon and unit leaders of the destruction battalion.
- "2. Returned Colchos—and village leaders.
- "3. Veteran partisans.
- "4. Individuals who were named by tortured people.
- "5. Drivers of high party functionaries.

"One or the other will make depositions on partisans now.

As it is a common experience that the person concerned did not know anything before and makes depositions now, he is subjected to a more searching interrogation: 25 more with solid rubber or cowhide, while the question asked is repeated during the jam session (translator's note: Actually string orchestra is literal translation of the German word, 'Streichorchester'. The expression, 'Streich', has a double meaning in this connection, as it means as well playing a string instrument as also the strokes administered to the victim of such treatment as described here) and the word, 'Hovere' (talk) is added to the question. This way, e.g.

"Where is the leader of the partisan group?—Hovere!

"What tasks were assigned to you?—Hovere! etc.

"The person concerned will continue to talk, and 25 more are administered to him, after he was ordered to tell all he still knows, this way.

"1. Where are other partisans?

"2. Who is with the partisans?

"3. Who cooks for the partisans?

"4. Where are ammunition and food depots hidden?

"5. Who keeps in touch with the partisans?

"The following kind of people have to be interrogated most severely and searchingly in any case from the very beginning:

"1. Every party functionary, particularly commissars and Politruks.

"2. Every returned village and Colchos elder.

"3. Individuals named by the tortured people.

"The persons who were questioned most severely, as well as convicted persons (confront the people concerned!) must be liquidated at the end of the most severe detailed interrogation."

PRESIDING JUDGE YOUNG: That the instructions bore fruit is apparent from the fact that the 257th Infantry Division immediately passed this directive down in the form of an order following almost verbatim the wording of the directive.

A situation and activity report for the period 15-30 March 1942 to the XLIV Corps, then under Hoth's 17th Army contains the following:

"Of the 281 persons who had been turned over to the Partisan Jaeger Group, 12 were shot for illegally wandering around without proper identification; 59 as partisans, 78 as Communists and Komsomols, 82 as spies, 13 for sabotage and refusal to work, 31 for anti-German propaganda, 1 for stealing army property, and 5 Jews."

The foregoing shows that the Partisan Jaeger Group, a unit of the Wehrmacht, was *shooting civilians* for not having proper identification, for being Communists, for being anti-German, for being Jews, and for refusal to work.

The 257th Infantry Division under date of 3 December 1941, then subordinate to Hoth's 17th Army, gave the following instruction for supervision of the civilian population:

"c. During the combating and the interrogation the severest measures have to be applied, because, as experience shows, only the application of the most rigorous methods cause suspicious elements to make statements. In general, the examinations can be concluded only by the following:

"(1) Release.

"(2) Transfer to a prisoner or concentration camp.

"(3) Liquidation to be carried out if additional statements are no longer to be expected. Partisans of special importance are to be transferred to division section Ic. Liquidations, if they do not take place during combat or in case of resistance, are to be ordered by the counterintelligence officer."

On 7 December 1941, the 257th Infantry Division sent a directive for combating partisans which we have hereinbefore mentioned directing that third degree methods be used, and after no further information could be secured the person should be liquidated. That these brutal instructions were for the troops is indicated by the statement in the letter enclosing the directives in which it is said:

"* * * Further instruction of the Partisan Jaeger troops (partisan hunting units) will take place shortly."

Hoth left the 17th Army, according to his testimony, about the middle of April. The same document shows a continuation of similar practices up to the middle of May, a month after Hoth relinquished command of the 17th Army.

A similar report contained in the last-mentioned document through 15 April shows the shooting of 114 for the various reasons stated.

On 9 September 1941, an order by Hoth's chief of staff relating to partisans containing the following:

“In order to capture the harmless followers as soon as possible it would seem *expedient* to treat them extremely well in the presence of the civilian population (food and cigarettes) so that this will become generally known and fear of giving themselves up voluntarily will vanish. *Executions are, therefore, to be carried out far away and unobtrusively insofar as there are causes for suspicion of partisan activities*; otherwise they will be sent away as PW’s [Emphasis supplied].

* * * * *

“If weapons are found in the possession of partisans or if public acts of violence are committed against the Wehrmacht, the partisans are to be shot or hanged by order of an officer and the reason for it is to be made known to the local population in a suitable manner. (For instance, a sign could be hung around the neck of the partisans, stating: ‘This will happen to everybody who saws down a telegraph pole’). The same action is to be taken with regard to local inhabitants who support partisans.”

The foregoing show the implementation of the Barbarossa Jurisdiction Order as extending the classification of *francs-tireurs* in accordance with Mueller’s construction of the Barbarossa Jurisdiction Order.

The following shootings on suspicion and for reprisal are shown by units subordinate to Hoth in his commands:

“Two very suspicious looking men, probably partisans were seized on 19 September in the region of Pashkovo. They were shot.”

and—

“Around Bratzkaya Zemla the civilian population took part in the battle against our forces. Shooting of all male civilians over 15 years of age was ordered and carried out.”

Hoth in his testimony estimated that about fifty were shot in this operation.

The intelligence officer’s morning report for IV Corps subordinate to Hoth’s 17th Army under date of 7 March 1942, notes that “* * * 10 civilians were shot in public in Novo Alexandrovka because two civilians attacked an officer (who was lightly wounded).”

The intelligence officer’s morning report for XLIV Corps subordinate to the 17th Army between 13 December 1941 and 10 March 1942 contains the following:

“Five hostages were shot as a reprisal measure for a German sentry being fired on by civilians at Shabelkovka.”

On 17 July 1941, the XIII Army Corps reported to Hoth's 17th Army, “8 Jews and 2 Poles shot as a retaliatory measure for sabotage of telephone lines.”

A report of the Panzer Group 3, commanded by Hoth, to the 9th Army contains the following:

“A motorcyclist of the 3d Panzergrenadier Signal Regiment was killed in a hand-to-hand fight by a suspected man, whom he had relieved of his pistol, in the village of Rostrovski Latuiskhi (10 km N of Ripshevo), on 24 August. Five suspected civilians who had been apprehended shortly before were hanged in the village—which, by the way, is inhabited by Latvians who are absolutely pro-German and anti-Soviets—and the corpses were left hanging for 8 days.”

In as much as Hoth was temporarily relieved of his command on 28 November 1943, it well may be that he did not see the report to which we next turn, which is from Security Sector II to Panzer Army 4 [which is from Army Rear Area 585 to Security Sector II and 4th Panzer Army] by teletype dated 27 November. Hoth says he would have opposed the hostage measure as it would have been very inexpedient in the Ukraine. The report states:

“Since mines have been placed in an increasing number in the area Tshudnov-Miropol, severest measures are to be taken (against this activity). First, 15 men are to be arrested as hostages in each of the villages Tshudnov and Miropol. Notices in the German and Ukrainian language are to point out to the population, that in case of future placing of mines, 3 hostages will be shot for each German who is killed and 1 hostage for each German who is wounded. This will not take place if the culprits are handed over to the military authorities within 12 hours.

“I order, that numbers of hostages shall be shot at the above ratio if mines are placed again.

“The population of the districts of Tshudnov and Miropol will supply mine-searching details, which will search the streets constantly for mines.

“Reports concerning the seizure of hostages, executions by shooting, and mines removed by the population are to be forwarded daily in the daily reports to Korueck 585.

“Confidential agents committed in the area there, are to do everything in their power to find the mine-placing band, so that

a larger operation can be carried out, which will lead to the total extermination of the gang.”

This may not be held as incriminating Hoth beyond a reasonable doubt, since it is probable he did not receive it and therefore could not have countermanded it. It is consistent with the general policy that prevailed during his period of command.

A directive of the XLIV Corps, subordinate to Hoth's Panzer Group 3, at this time, dated 9 September 1941, for the control of the civilian population contained the following:

“In case of sabotage of telephone lines, railway lines, etc., sentries will be posted selected from the civilian population. In the case of repetition, the sentry on whose beat the sabotage was committed will be shot. Suitable as sentries are only people who have a family who can be apprehended in case the sentry escapes.

“I. Thorough action in accordance with the issued instructions will be taken with ruthless strictness in all cases where attempts against the Wehrmacht, its supply institutions or those of the country have been found out.”

Hoth says this was a corps order; that he didn't know about it but “that on the whole it is consistent with the situation of the time and of the necessities of that time.” He says he would not have approved of shooting the sentries.

COOPERATION WITH THE SD

The record discloses that the SD perpetrated a mass killing of 1,224 Jews, 63 political agitators, and 30 saboteurs and partisans on 14 December 1941 at Artemovsk. This was, at the time, in the area of Hoth's command and immediately after the occurrence, it came to his knowledge. He testified that he then criticized his chief of staff for not advising him that the SD were in his area and he, the chief of staff, said he would settle the matter. The chief of staff issued an order that “the drives on Jews in Artemovsk are postponed until the situation at the front is straightened out.”

The record shows a large scale mopping-up action in Kramatorskaya by the SD about 6 weeks later. Kramatorskaya at this time was Hoth's headquarters. The record fails to show any executions as a result thereof. There can be no doubt that Hoth knew after the Artemovsk incident that the SD, along with its police functions, operated as a murder organization also. The record shows after he acquired this knowledge that within his area his own army police, over whom he had command authority,

turned over prisoners and Jews to the SD as a regular practice. When Hoth's concentration camp, which he says was merely a collection camp, known as Dulag 180, was dissolved there were turned over to the SD, 35 prisoners and 25 from the camp hospital. There is no evidence in the record that the SD were a medical unit or had any hospital facilities.

These cases of turning civilian prisoners over to the SD occurred continuously from the time of the Artemovsk incident till Hoth relinquished his command of the 17th Army in the middle of the following April.

The SD during this time maintained liaison with the Ic officer on Hoth's staff and when Hoth moved his headquarters the SD moved its headquarters to Hoth's new location. Neither in the documents nor in the testimony is there any evidence that Hoth gave any more attention to the SD after he turned the matter over to his chief of staff who entered the aforesaid postponement order. Hoth had executive power and it was his duty to protect the civilian population including prisoners in his area. Notwithstanding his knowledge of the character and functions of the SD, his possession of the power to curb them and his duty to do so, he washed his hands of his responsibility and let the SD take its unrestrained course in his area of command.

On the matters above set forth, and on the record, we find the defendant Hoth guilty on counts two and three of the indictment.

HANS REINHARDT

The defendant Reinhardt was born 1 March 1887 at Bautzen in Saxony. He served as a junior officer in World War I and after the war remained with the Reichswehr. As a major general he participated in the invasion of Poland as Commander of the 4th Panzer Division and of Belgium and the Netherlands as Commanding General of the XLI Panzer Corps. With this corps he took part in the invasion of Yugoslavia. Still commanding the XLI Panzer Corps, he entered the campaign against Russia, the corps being subordinated to Army Group North. On 5 October 1941, he was appointed Commander of Panzer Group 3. In March 1942, he was appointed Commander in Chief of the 3d Panzer Army which position he retained until appointed Commander in Chief of Army Group Center on 16 August 1944. Due to differences with Hitler concerning his conduct of operations, he was relieved of this command on 26 January 1945. In 1940, he was promoted to lieutenant general of Panzer Troops and in 1942, to full general. The defendant Reinhardt is charged under all four counts of the indictment. Counts one and four having been disposed of, there remains to be considered the question of his guilt under

counts two and three which charge respectively: war crimes and crimes against humanity; crimes against enemy belligerents and prisoners of war, and war crimes and crimes against humanity; crimes against civilians.

THE COMMISSAR ORDER

The Commissar Order was transmitted to Reinhardt by General Hoepner, the commander of Panzer Group 4, and Reinhardt thereafter communicated it orally to his divisional commanders. He testified that when he transmitted it to his divisions, he directed orally that it was not to be carried out. He testified further that General Hoepner was opposed to the order and that he, Reinhardt, protested it to General Hoepner; that General Hoepner protested to the army group under von Leeb and presumably, the protest was carried back from the army group to the Commander in Chief of the [German] Army. Notwithstanding this alleged resistance and repudiation of the order, it appears from the documents that reports of executed commissars shortly began to be sent in from subordinate divisions and that they were sent on by the corps.

The Russian campaign began 22 June 1941. The 269th Infantry Division reported on 9 July to the XLI Corps that 34 Politruks were liquidated. On the same day the XLI Corps reported to Panzer Group 4 a total of 97 Politruks had been executed in the corps area up to 8 July. The balance of 63 liquidated commissars doubtless are chargeable to the three remaining divisions of the corps, the 1st and 6th Panzer Divisions, and the 36th Motorized Division. On 10 July 1941, Panzer Group 4 reported to Army Group North that up to 8 July 1941, 101 commissars had been liquidated. Out of a total of 101 executed Politruks, 97 were liquidated by Reinhardt's XLI Corps, and the balance of 4 by the LVI AK of Panzer Group 4. At the time of the report, Panzer Group 4 consisted only of the XLI AK and the LVI AK. Thereafter, 71 commissars were executed by the 19th of July by Panzer Group 4. We have mentioned that Reinhardt testified that he orally directed that this order not be carried out. A second defense, which is supported by the testimony of two witnesses, Bruns, the intelligence officer of Hoepner's Panzer Group 4 and Mueller, an ADC of Bruns, is to the effect that all of these reports were fictitious. The testimony might be more credible if they had not drawn such fantastic conclusions as that Hoepner clearly expressed his repudiation of the Commissar Order by having Bruns read it to the corps commanders and later that he expressed it by gesticulation. Mueller was more definite as to Hoepner's rejection of the order but it is not possible for the Tribunal to believe in the face of these reports that commissars were not shot

pursuant to this order within the area of Reinhardt's command. The order was a criminal order on its face, and one which under the German military regulations and certainly under international law should not have been passed down by either Hoepner or Reinhardt. If international law is to have any effectiveness, high commanding officers, when they are directed to violate it by committing murder, must have the courage to act, in definite and unmistakable terms, so as to indicate their repudiation of such an order. The proper report to have been made from division to army group level when a request was made from the top level to report the number of commissars killed would have been that this unit does not murder enemy prisoners of war.

Counsel for the defendant, in his brief, makes the following statement:

“War has its own laws, even more than peacetime. One of the most incomprehensible laws of war is that certain news spreads through mysterious channels and with unbelievable rapidity over entire fronts, entire armies and whole countries; that it even spreads from one's own frontline to that of the enemy, and it can never be found out how this was possible. Of course, this also happened with such an extraordinary order as the Commissar Order. Several witnesses testified that it was known among the Russians even at an earlier date than among our soldiers in the front line.”

Unless the order had been communicated rather extensively, and as a policy down to low levels and even to the troops, it is difficult to understand how it would sweep the entire Russian front. The obvious explanation for this is that it became known because of its implementation.

That the defense of fictitious reports may itself be fictitious is suggested by the activity report of one of Reinhardt's divisions. The 36th Motorized Division on 3 July 1941 before the need for any fictitious reports was created by a top level inquiry, notes the capture of Latvian and Russian soldiers and that two political commissars were eliminated during the advance. On 4 July, a political commissar who pretended to be a sergeant was eliminated. On 6 July, three commissars were eliminated and on 16 September, a captured Politruk of a Russian rifle regiment was eliminated. It is not quite comprehensible why the shooting of these five commissars on three different days is reported unless the executions actually occurred.

In January 1942, an activity report of the 35th Infantry Division, subordinate to Reinhardt, contains the following:

“* * * The reason for the will to fight may be found primarily in the fact that well in advance the enemy learns how the commissars and political leaders are treated when captured by the Germans. The mistake of drawing attention to this has been made even in German propaganda leaflets. It would have been better to keep the treatment of the commissars a secret. It would have sufficed to transport them separately to the rear, to a camp specially established for this purpose by the corps, and to take them to task only then and there.”

The Tribunal finds that Reinhardt passed on this criminal order and bears the responsibility for its execution in his area.

THE COMMANDO ORDER

We have discussed this criminal order generally in a preceding part of this opinion. A copy of this order was sent to the 3d Panzer Army. The war diary of this army for 27 October 1942 shows it was received. Reinhardt, at this time, was in command of the 3d Panzer Army. On 28 October, the IX Corps, subordinate to the 3d Panzer Army, notes the order received in its war diary. We take no stock in the defense that this order was not to be effective in the East. That the 3d Panzer Army was of the opinion that it was applicable in the East, appears from the war diary of this army for 18 November 1942, which is several weeks after the receipt of the order. In that war diary it is stated [NOKW-3482, *Pros. Rebuttal Ex. 46*]:

“Various difficulties have arisen concerning the execution of the Fuehrer order of 21 October, relative to the shooting of terrorists and groups of bandits. The Pz. Army asks the army group to clarify, above all, whether this order Vol. IIb, 30a, merely concerns British terror groups or whether it also applies to the bands in the occupied area. *In this connection, the army group takes the attitude that, until a new OKW decree is published which is in prospect, all bandits are to be shot to death even if they wear uniforms.* Bandits who voluntarily surrender without being forced to do so by their situation will be treated as PW's. An order will be issued to the troops on this subject.” [Emphasis supplied.]

That the army considered the Commando Order of general application is shown by the emphasized portion of the above quotation, that until otherwise advised, the order was to be carried out against men in uniform. Another entry in the war diary of the 3d Panzer Army referring to this same situation reads as follows:

“Until new regulations of OKW are published, bandits who surrender voluntarily without being forced by circumstances,

will be treated as PW's. All other bandits, also the uniformed ones, will be shot.

"This order will be destroyed after reading, this order will not be passed on in writing."

It was a criminal order, Reinhardt passed it down in the chain of command.

It may be stated as a matter somewhat in mitigation and as showing the personal attitude of the defendant Reinhardt, that in November 1943, he issued an order that parachutists are lawful combatants and are to be treated as prisoners of war. That was at a time when the German Army was not so flushed with success and when it was a little more inclined to soften the treatment meted out to the Russians. The Tribunal has noted it as being a matter proper, at least for consideration, on the question of mitigation. It should further be noted in this connection that it does not appear that Reinhardt, though he received it, ever passed on literally or in substance the notorious Reichenau Order.

PROHIBITED LABOR OF PRISONERS OF WAR

An order from the commander in chief of the [German] army, providing that mines were to be detected and cleared by Russian prisoners of war in order to spare German blood, was issued on 29 October 1941. This order was transmitted in the area of Army Group North and was implemented in Reinhardt's area. His LIX Corps issued an order [on 2 March 1942] providing [*NOKW-2139, Pros. Ex. 201*]—

"If it is suspected that roads or places are mined, prisoners of war or the local population are to walk in front or clear the mines."

The activity report of the 3d Panzer Army, dated 15 December 1943, notes that there were five prisoners in Dulag 230 who were requested for mine clearing and that Dulag 230 was informed accordingly. A report sent by the LIX Corps to the 3d Panzer Army covering the months of January, February, March, and May 1943 relative to the use of prisoners of war for these months, respectively, shows the following: 246 in supply units, 104 for billet and field fortification construction; 193 in supply units; 25 for billet and field fortifications; 196 in troop supply units, and 183 for billet and field fortifications; 175 in troop supply services; and 11 for billet and field fortifications. On 6 January 1944, the 3d Panzer Army furnished 40 prisoners of war to an SS unit for field fortification work at the front. A report of the 83d Infantry Division in the 3d Panzer Army shows 25 prisoners of war put to work by the 2d Rifle Battalion were killed while working. An

activity report of the 3d Panzer Army states that on 4 October 1943, 200 prisoners of war were used on field fortifications. Numerous other documents show the use of prisoners of war on field fortifications and at the front, their use being so general that we conclude it was the policy of the 3d Panzer Army under Reinhardt to use prisoners of war for that purpose.

An order signed by Reinhardt as Commander in Chief of the 3d Panzer Army, dated 18 October 1942, confirms this conclusion in every respect. Under the heading "Labor Allocation of Prisoners of War and Civilians," he states:

"The urgent need for prisoners of war in the zone of operations and for the economy and armament industry at home requires a thorough and planned organization of the labor allocation of prisoners of war."

We do not find all of the above uses of prisoners of war criminal. To use them for field fortifications, loading ammunition, mine clearing, and any other work that is dangerous was clearly prohibited by international law and constitutes a war crime.

MURDER AND ILL-TREATMENT OF PRISONERS OF WAR

Reports of subordinate units show the hanging of two former Russian soldiers for being friendly to partisans; and the shooting of four Russian prisoners for planning to escape, and six prisoners of war who had stolen arms and ammunition and tried to escape. On 15 December 1942, a report shows the shooting of a Russian prisoner of war since he could not be removed under the eye of the enemy and within the range of enemy machine guns. Four days later the same unit reported that two other prisoners of war had to be shot.

TURNING OVER OF PRISONERS OF WAR TO THE SD

On 24 July 1941, [NOKW-2423, Pros. Ex. 244] the High Command of the Wehrmacht issued an order for the screening and separation of Russian prisoners of war in the camps in the zone of operation by which politically untenable and suspicious elements, commissars, and agitators were to be segregated. An activity report shows that the commander of the Army Rear Area 590, subordinate to Reinhardt, issued an order of 29 December 1942 containing the following [NOKW-2389, Pros. Ex. 708]:

"6. The fetching of prisoners from the prisoner collecting point for the purpose of interrogation, transfer to a transient camp, 'special treatment', or discharge can take place only through the Feldgendarmerie Battalion (motorized) 695 and the Security Police and SD Dorogobush in mutual agreement. In

the event that no officer of the Feldgendarmerie Battalion (motorized) 695 known to the camp commandant of the prisoner collecting point, nor the chief of the SD unit Dorogobush, should be supervising the taking away of the prisoners, a written authorization issued by these offices must be handed to the camp commandant. The turning-over of a prisoner may in any event take place only against a written receipt."

This Wehrmacht report should be noted for the reason that the term "special treatment", enclosed with quotation marks, is used with apparent understanding. The next paragraph to that above quoted is of interest as relating to labor allocation. It is stated therein that—

"An allocation may take place only in keeping with the stock available of able-bodied prisoners. Only those prisoners may be allocated for labor in whose case no special treatment is to be expected, and whose interrogation has been concluded."

Since the whole report concerns prisoner of war matters, it is to be expected that the prisoners who may not be allocated as "special treatment" are prisoners of war. As an example of the carrying out of the general policy to eliminate those opposed to the Wehrmacht, the following appears in a report received by the 3d Panzer Army:

"On 28 December 1941, the prisoner of war Alesander Wassiljew, who worked in a snow-shoveling detail and thereby came into touch with the Russian civilian population, was arrested and shot in Shachovaskaya; he continuously had caused unrest among the population by talking to the people about the overwhelming defeat of the Germans and prophesied that the Russians would soon appear in Shachovaskaya."

In comments emanating from one of Reinhardt's staff officers relative to the suggestion for the formation of a Russian Red Cross, it is indicated that he was opposed to authorizing the Red Cross to make any search for prisoners missing in action and the reason which he gives is set forth with great frankness. It is as follows:

"Overwhelmingly large number of POW's deceased without documentary deposition, and of civilians who disappeared due to brutal actions."

At this point we refer to the following finding of Tribunal V in Case No. 7, and adopt it as a correct statement of the law. It is as follows*:

* United States vs. Wilhelm List, et al., p. 1271, this volume.

“Want of the knowledge of the contents of reports made to him (i.e., to the commanding general) is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.”

DEPORTATION AND ENSLAVEMENT OF CIVILIANS

Deportation and enslavement of civilians was carried on within the area of Reinhardt's army commands on a scale of great extent. At the outset of our consideration of this subject, it should be said that there is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power. This is the holding of the IMT judgment and this consistently has been the holding of all of the Nuernberg Tribunals. It is necessary then only to determine factually whether with the knowledge, consent, or approval of the defendant the deportation and enslavement occurred. There is no military necessity to justify the use of civilians in such manner by an occupying force. If they were forced to labor against their will, it matters not whether they were given extra rations or extra privileges, for such matters could be considered, if at all, only in mitigation of punishment and not as a defense to the crime. While we do not, in referring first to a report to the 3d Panzer Army, dated 6 March 1944, follow the chronological order, we set it forth first because it deals with the manner of conscription and the attitude of the army long after the beginning of the war. In this report the following appears [*NOKW-2531, Pros. Ex. 527*]:

“Partly the workers are being seized in the streets and under the pretext that they are to work for 2-3 days; they are being brought to work without any winter clothing, shoes, mess kit, and blankets * * *. The indigenous auxiliary police fetched the Russians out of their houses at night, but partially these people could buy themselves out of it by giving *some alcohol to the indigenous auxiliary policemen.*

“This manner of conscription did not increase the Russians' willingness to work.”

Apparently due to an error, some terribly diseased and afflicted persons were sent out on a work assignment. The explanation contained in the document which is offered in Reinhardt's defense shows, probably, a mistake but does not otherwise greatly improve

his situation. It shows how labor recruiting was carried on and that the army was cooperating. Among other things, it states:

“Army Q.M. [O.Qu.] order to the general [corps] commands that in case of drives for the recruitment of labor forces a labor allocation official has to participate right from the start. The Army Economy Official—Group Labor could supply officials from his own ranks; but whether this employment could be achieved speedily enough in each case is a matter still open to doubt.

“2. The criticized conditions in the recruitment of labor forces (kidnapping on the street, corruptness of the O.D. men—(indigenous auxiliary police—etc.) can never be entirely eliminated, especially in cases of sudden demand. It is possible that the criticized events concern the Kaminski drive, in which once 750 workers were supplied. But such abuses are also not entirely avoidable within the area of the divisions. In the case of the ‘78 year olds, the blind, and the cripples, etc.’ it is, according to a statement by the Fortification Engineer Staff 7, a case in which a group of 15–20 people once happened to get mixed up with a transport in the beginning of February. Responsibility cannot be fixed any more, as nothing is known about this in Vitebsk.” [*Reinhardt 208, Reinhardt Ex. 17.*]

The Commander of Army Rear Area 590 in a report to the 3d Panzer Army reported the following assignments: women for the Reich, 100; field fortification construction, men, 956, women, 2199. His report also contains the following [*NOKW-2341, Pros. Ex. 444*]:

“Five hundred male and 500 female workers were conscripted at the time, as ordered in paragraph 18 of the procurement order. This conscription, however, was superseded by the subsequent orders concerning the formation of transports of labor detachments. The following must be said about the organizing of these transports:

“Nowhere was there any desire or inclination for this labor assignment; indeed, sometimes it even occurred that men wept when they were being shipped away. Almost all of the workers had literally to be dragged away. This caused very grave difficulties for the local military administrative offices, because all of the transports had to be assembled at very short notice and almost simultaneously. There were not always sufficient forces (military police, military police service) to bring the workers from remote villages. Those who were brought, however, sometimes proved to be unfit for work. There was no suitable

place to accommodate those who were fit to be sent away, a place which would have made guarding easy until they could be shipped away. The workers, however, had to be closely guarded at all times for otherwise they would have run away."

The foregoing shows clearly that these people who were used for work were not volunteers but were rounded up and impressed into service as slaves.

The [Ober-] Quartiermeister for the 3d Panzer Army on 3 December [1942] made a report to Army Group Center in which was contained the following [NOKW-2347, Pros. Ex. 1560]:

"The application of force, unavoidable in putting the population to work and mentioned already in one of the regular reports as causing a great strain, is beginning to show effects. In addition, matters are rendered more difficult by inadequate food rations which—according to consistent reports from all districts—are not sufficient to satisfy the hunger of the population.

* * * * *

"Noteworthy is the generally established fact that the number of persons staying away from work or of those who must forcefully be driven to work is on the increase.

* * * * *

"The extent of difficulties to be surmounted can be realized when bearing in mind that *nearly all workers have to be pressed into service and must often individually be driven to work by soldiers, cossacks, and members of the auxiliary police.*" [Emphasis supplied]

A letter signed by Reinhardt under date of 28 March 1943 to the Commanding General of the XLIII Corps shows conclusively his knowledge and attitude toward the labor program. Among other things in the letter he said [NOKW-524, Pros. Ex. 455]:

"Time and again, I have, when touring the area, noticed squads of civilian workers practically idling. Furthermore, the number of inhabitants assigned to a job does not correspond to the task which could, *with proper planning, be achieved by half the number.* The supervisory personnel (furnished by the troops, by Organization Todt, etc.) is just standing by and does not show any military bearing; foremen and supervisors do not take any steps to urge more working speed. This intolerable state of affairs will immediately cease once and for all. We must keep in mind that in the homeland even German women and girls are working hard, readily fulfilling what they

consider their elementary duty. This being the case, we ought to be ashamed of ourselves if we did not request the civilian inhabitants of the occupied territory, called upon to work on our behalf, to utilize the working day fully. In this respect, I rather prefer a daily minimum of 8 working hours, of which the fullest use is made and which include breaks, *to longer hours, half of which is spent in dawdling*. The population—which is being subjected to a much greater strain on the Russian side—must be compelled to fulfill my requirements, if necessary through retention of wages, deprivation of food, and restraint of personal liberty; just as I shall call to account any supervisory personnel of any description and rank, if my demands are not enforced. Supervision of workers is a military duty like any other and requires the full efforts of the personnel assigned.

“It is requested that all military superiors and all organs in charge of traffic control and of the maintenance of discipline cooperate with me in the full exploitation of labor of any kind.”

The Commander of the XLIII Corps, to whom this letter was addressed, on 2 June 1943, issued a directive to draft by force male and female labor power from the rural communities of the communication zones. He then specified five rural communities in which coercive measures were to be carried out. He directed that the policy be announced as permanent so the population will come forth from its hideouts and be seized. The effect on the people is indicated by his statement that the drafted forces will attempt to dodge the labor allocation with every means at their disposal. The ruthlessness intended is shown by the direction that all men and women are to be instructed that they will be shot at when attempting to flee and the reason given, “* * * only partisan adherents flee; they undergo corresponding treatment.”

How many so fleeing were shot and denominated as partisans in the reports, the record does not show. The report states that for several weeks the population of the rural communities “does not cooperate in fighting against them (the bandits) in a measure which is to be expected for the final liberation of Russia.” To remedy this lack of cooperation with their German conquerors, all male inhabitants of these rural communities, as well as females, between the ages of 14 and 45, unless the women had one child under eight, were drafted for tasks in another region.

A division under the XLIII Corps on 30 June 1943 reported:

“Already it happened that civilians assigned to fortification work, who up to now did not receive supplementary rations for heavy work, collapsed due to exhaustion, especially since Rus-

sian civilians are being assigned for labor regardless of their physical fitness." [Emphasis supplied.]

On 5 January 1944, the 3d Panzer Army issued a directive for its corps headquarters and rear area which stated [NOKW-2367, *Pros. Ex. 523*]:

"All persons capable of carrying arms and able to work must be seized for the allocation of labor. That is to say, in general, all men and women, age 14 to 55."

It appears beyond question that men and women and even children were drafted for work and that they were used in the main front line. One order says they are to be sheltered and fed and another that they shall be used ruthlessly and, if the situation permits, in the front lines also. Another report shows that "the allocation of entire families for fortification construction near the front line met with difficulties."

We are convinced by the documents and the testimony in the case that in the area of Reinhardt's army, enforced labor by the civilians was carried out as a policy and that it was implemented ruthlessly with Reinhardt's knowledge and consent, and even pursuant to his orders.

DEPORTATION AND ENSLAVEMENT FOR LABOR IN THE REICH

Reinhardt's policy with respect to this matter is shown by an order signed by him as Commander in Chief of the 3d Panzer Army to the effect that [NOKW-3539, *Pros. Rebuttal Ex. 39*]—

"The Fuehrer has charged Gauleiter Sauckel with the direction of the entire labor allocation program reaching *into the zone of operations*. An intelligent cooperation of the military agencies with the departments of the labor allocation administration must make it possible to mobilize the work capacity of the entire able-bodied population. If success cannot be achieved in any other way, coercive measures must now be applied to recruit the required labor for allocation in the Reich." [Emphasis supplied.]

This order had wide distribution throughout his command. Having given such an order he must assume responsibility for what was done by his subordinate units in response thereto.

We find in the records a report from the Secret Field Police that a father making his way to the partisans, over the objection of his children, was shot while so doing. The three children were sent to Germany to work.

When the order came down from the OKH to draft the age groups 1925 and 1926, Reinhardt's chief of staff of the 3d Panzer Army gave an order in which it was specified [NOKW-2340, *Pros. Ex. 484*]—

“Beginning 3 August 1943, a transport train with eastern workers will be dispatched each Tuesday and Friday from the army area to the Reich.”

The proclamation sent out with these orders stated that “whoever tries to evade his service obligation will be severely punished.”

A report of 23 July 1943 reveals that a conference was held at the headquarters of the 3d Panzer Army. This document is rather significant. A notation of one of the matters discussed is as follows [NOKW-2473, *Pros. Ex. 487*] :

“Severe sanctions against resistance and transgression.

“Transferring guilty persons to the SD? (Lublin?)

“Family members of persons liable to service who have escaped to be apprehended without consideration for personal situation for labor allocation Reich; however these are to be cared for and treated like those willing to work.”

Three days after this conference, the 3d Panzer Army reported to the Army Group Center. A trenchant statement contained in that report is [NOKW-2454, *Pros. Ex. 489*]—

“Persons apprehended by force after attempts to evade this draft at first will be sent to penal camps which must be run along strict lines.”

An activity report of 4 August 1943 of the 3d Panzer Army with reference to the labor commitment of the civilian population and particularly the 1925 and 1926 classes states [NOKW-2336, *Pros. Ex. 491*]—

“The first batches of eastern workers for the Reich have been assigned to the collection camps without use of unpleasant measures. In some areas about 50 percent of the persons subject to the labor draft have fled, possibly by way of joining the bands.”

A notation under date of 30 October 1943 appears in the war diary of the Third Panzer Army as follows:

“MVR [Militaerverwaltungsrat] Behnisch, Chief of the Labor Group of Economy Headquarters 206 in Vitebsk, reports to O 5 on the allocation of his forces during the ‘Heinrich’ operation, and on the intended transport of the civilians emanating (gemachten) from this enterprise. All personnel fit for military service and for work, who are seized are to be sent to the

concentration camps of Lublin and Auschwitz via the SD camps and Dulag 125. In any case they may not be turned over for free labor allocation in the Reich. MVR Behnisch further reports that in the rear area of the II Luftwaffe Field Corps there are about 8,000 newly arrived civilians, and in the area of the O.K. Shumilino about 3,000. He asks for a decision whether any recruits may be drawn from these resettled persons for labor allocation in the Reich. After being submitted to O. Qu. this is authorized, but intensive recruiting in Vitebsk, which according to MVR Behnisch's opinion would produce 2-3,000 persons, is delayed for the time being."

This clearly disposes of any contention that the recruitment of those classes for labor in the Reich was on any voluntary basis. A situation report of the 3d Panzer Army, dated 21 February 1944, notes—

"Utmost seizure of all unemployed and able-bodied civilians still loitering about. Recently ordered by Panzer AOK 3/O.Qu./Qu. 2 dated 10 January 1944, No. 579/44 secret."

Following this on 4 April, a report of the 3d Panzer Army shows that 11,000 from the Vitebsk area were found fit for labor assignment to the Reich and deported. The report further notes that there was a continuation of labor assignment according to the most recent draft of the order concerning age groups, 1925-1926.

The foregoing and other evidence in the record convince us that the forcible conscription and illegal use of civilians within the area of Reinhardt's command was a fixed policy. While he and his witnesses deny that such a policy was in effect, we find their testimony not credible. Not only were civilian workers conscripted for use in the army areas but the orders and reports cited, and others to which we have not referred, show clearly that the deportation of civilian workers to the Reich was of such long continued and general practice, that even were there no orders signed by the defendant authorizing it, he must be held to have had knowledge of the practice and of its extent. The record shows that he did nothing to hinder or prohibit the practice, that on the contrary he encouraged and carried it out in the area of his command.

PLUNDER AND SPOLIATION

The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows, beyond a reasonable doubt, acts that were not justified by military necessity.

MURDER, ILL-TREATMENT, AND PERSECUTION OF CIVILIAN POPULATIONS

Reinhardt passed on the Barbarossa Jurisdiction Order. On 25 February 1942, he gave the following directions to his troops [NOKW-1921, *Pros. Ex. 171*]:

"6. If weapons are found in the possession of partisans or their partisan activity seems quite obvious, the partisans are to be shot or hung by order of an officer, and the reasons made public to the population by some suitable manner (for instance, a sign attached to the partisan with the inscription: 'This is what happens to everyone who fells a telegraph pole'). Similar treatment should be given to inhabitants who support partisans."

This shows clearly that in his area they extended the term *franc-tireur* in accordance with the Mueller directions at the Warsaw Conference. The LIX Army Corps and Panzer Group 3, among other things, ordered—

"The holding of hostages may be deemed necessary. If it is suspected that roads or places are mined, prisoners of war or the local population are to walk in front or clear the mines."

On 31 July 1942, Reinhardt signed an order which, among other things, stated, "The death sentence may be imposed on every tenth man if the ringleader or the especially guilty persons cannot be apprehended." He states further in the order that every officer or field police official (not auxiliary police official) is competent to make the decision and, after careful examination, that such officer shall order the executions (shooting or hanging).

An order signed by Keitel on 16 December 1942 provided [NOKW-2961, *Pros. Ex. 1306*]:

"The troops are therefore entitled and even obliged to employ whatever means in this fight without any restraint, also against women and children, as long as it leads to success."

This order was sent down to subordinate units by the 3d Panzer Army on 6 January 1943 and was carried out with ruthlessness. Reinhardt says his chief of staff transmitted this during his absence, but throughout the trial it has been the contention of the defense that the chief of staff took no authority in matters of policy and did not sign orders unless he knew that they were in conformity with the will of the commander. We think that is what occurred in this case. If the order was not in conformity with his policy, he should have repudiated it. Reinhardt says he did not return to this sector but there can be no question that he returned to his command and we have no doubt he learned what his chief of staff had done in his absence.

The 3d Panzer Army on 30 March 1943 passed on an OKH order in which it is provided that band supporters and band *suspects* are to be handed over to the Senior SS and Police Leader for transfer to a concentration camp "providing they have not been shot immediately, or hung, or in special cases assigned to the combating of bands according to section 11 of the circular." The XLIII Army Corps, under date of 29 March 1943, suggested to the 3d Panzer Army the following [NOKW-457, *Pros. Ex. 715*]:

"When in band-infested areas, where the bulk of the bands consists of forcibly recruited persons, bandits are publicly hanged or shot, it must be considered that these forcibly recruited people, if only for fear of a similar fate, will be induced to offer the most active resistance to the troops mopping up. If, therefore, it is not succeeded in eliminating the bandits immediately on the battle field, they should rather at first be taken along as prisoners and *inconspicuously eliminated only during the transport*. Thus, only the fact of the capture will be passed on from mouth to mouth, and the number of deserters will grow in spite of the active counterpropaganda of the commissars. It may be advisable, for propaganda reasons, to dress up some bandit as a member of an East unit or of indigenous auxiliary police (OD), under inconspicuous but strict guard, and to show him very conspicuously to the population in the area of his former commitment. This ruse of war again and again induces bandits to desert, as experience shows." [Emphasis supplied.]

A directive of the IX Corps dated 26 September 1942 sent to the Jagdkommando (partisan hunters) describes how they shall set traps and wait with patience to catch possible partisans or mine layers. One paragraph in this directive is as follows:

"If the element of surprise is no longer present, e.g., if by chance local people turn up, the spot selected for activities is to be abandoned at once unless the inconvenient witnesses can be done away with quietly." [NOKW-2113, *Pros. Ex. 648*.]

This shows the utter disregard for the life of the civilian population by elements subordinate to Reinhardt.

SD detachments were assigned by the 9th Army to Reinhardt's Panzer Group 3 with directions that the group make further assignments. An order from the chief of staff of Panzer Group 3 to the LVI Army Corps also discloses such assignments. It must therefore be said that Reinhardt knew of the SD being in his area as early as September 1941. That this association with the SD continued when Panzer Group 3 became the 3d Panzer Army

is indicated by the war diary of the 3d Panzer Army, wherein is set forth, under date of 30 March 1943, an order by the Chief of Staff of the 3d Panzer Army in which the following appears [NOKW-1976, *Pros. Ex. 656*]:

"1. Band supporters and band suspects are to be handed over to the competent senior SS and Police Leaders for transfer to a concentration camp, providing they have not been shot immediately, or hung, or in special cases assigned to the combating of bands according to section 11 of the 'circular.'

"2. The population is to be clearly informed of the difference between 'forced labor' which is carried out under extremely hard conditions, and the 'labor allocation to the Reich' on the basis of recruitment of labor by the Plenipotentiary General for Labor.

"In this connection it is ordered:

"I. The band supporters and band suspects apprehended in the army area are to be handed over to the Einsatzkommando of the Security Police and the SD for transfer to a concentration camp. Units of the SD are located at Vitebsk, Demidov, Surazh, Gorodok, Nevel, Sebezh, Polotsk."

Not only did Reinhardt's Army know about the SD, but over a long period of time, it actively cooperated with it in sending suspects of all kinds, including civilian men, women, and children for forced labor in the concentration camps "under extremely hard conditions." Thousands of such unfortunates were deported to the Reich and sent to Lublin and Auschwitz through the instrumentality of Reinhardt's commands.

Among reports indicating Reinhardt's knowledge of the activities of the SD, we find such notations as the following:

"Military administrative councillor, Matthes, reports that 700 of the evacuees in PW Transient Camp (Dulag) 230 have been screened by the SD and that all of them are intended for evacuation to Lublin."

Dulag 230 was under Reinhardt's control.

Under date of 2 September, this notation appears:

"SD Vitebsk reports that the evacuation of supporters of bands to Auschwitz could not be effected as yet because the railroads did not allocate cars."

Under date of 18 September, it is noted:

"Qu 2 arranges with SD that in case the evacuation to the Reich fails to materialize, the people will be deported by the SD to Auschwitz or Lublin as soon as shipment is possible. SD is directed to send the 700 prisoners from Granki to PW Transient Camp 230."

On 6 October 1943, the commander of Dulag 230 reported :

“* * * that a convoy of 31 men, 172 women, and 240 children had arrived. It consists of the band population rounded up by the troops. There are now about 1,000 civilians in Dulag who can be transported”.

and also—

“Where old people and small children are concerned, SD cannot (as discussed with Obersturmfuehrer Meder) transport the people to Lublin or Auschwitz.”

On 19 October 1943, the following was reported :

“Visit of the Secret Field Police Group 717 concerning the question as to which camp civilian prisoners can be sent to, who are old and infirm and who have small children, and whose kin have been executed as bandits or bandit supporters, or have been handed over to the SD to be transported to Lublin. It seems intolerable to settle these persons anywhere in the army area because they spread an extremely poisoned atmosphere against the Germans.”

An order of 12 August 1943, by the 3d Panzer Army contained the following [*NOKW-2354, Pros. Ex. 727*] :

“According to Pz. AOK 3, Ia No. 6262/43 secret, it is ordered to evacuate the area designated in the above reference since it was established beyond doubt that the population helped the bands during the operations of the 2d and 7th Jaeger Battalions. SD Vitebsk has declared itself ready to arrange that the population which is to be evacuated will be sent to an SD camp (Lublin).”

The distribution list shows that the army sent a copy of the order to “SD Vitebsk” for information.

Seven days later, on 19 August 1943, another order was issued relating to the same evacuation and by the same authority. Among other things, the order stated :

“* * *. This concerns approximately 2,500 persons from the district of Vitebsk, to whom about 500 civilians from the district of Surazh will be added. The latter are to be brought to Transient Camp 230 by the II Luftwaffe Field Corps. Sufficient equipment for the trip, including additional food, is to be allowed to the persons to be evacuated. All cattle, agricultural equipment, and agricultural products remaining will be taken over by economic detachment, group agriculture. Report on the goods taken over is to be made to O. Qu. 2/IVa by 31 August 1943.

"The request to SD Vitebsk, to separate unmistakable band elements in Transient Camp 230 and to take them over for the purpose of accommodating them in Lublin, continues to be upheld.

"Besides properly looking after them and feeding them which has already been ordered, Transient Camp 230 will also see to indoctrinating them with the necessary propaganda (especially also informing them of the reason for the evacuation—large sections of the population aiding the bands; the innocent ones must suffer with the guilty ones)."

Reinhardt held the executive power for his area and it was his duty to exercise it for the protection of the population. He was obligated not to deport them, not to despoil them of their property, nor to send both those innocent and those guilty of aiding the so-called bands to concentration camps, as well as sending the 1925 and 1926 groups to forced labor in the Reich. The orders to do those things were criminal orders and they were fully implemented by him. He is criminally responsible for issuing the orders and for the acts done in implementation of them.

Whether or not Reinhardt knew that Lublin and Auschwitz were murder institutions is not material. There is no direct evidence that he did. One of his orders shows he knew that the forced labor was hard. He knew they were penal camps. He sent old men, women, and children to them. His own testimony convicts him of knowledge that the SD killed cripples. He had known this for 2 years. He knew they operated under their own authority, conveyed by orders of whose origin and nature he professed ignorance, and yet he turned over to them large numbers of the civilian population over whom he had power and whom he was under a duty to protect. He turned civilians over to this organization, over which he also says he had no control. Slave hunting in his area was so general and long continued that without the direct evidence pointed out, knowledge would be imputed to him.

The Tribunal, on all the evidence, finds Reinhardt guilty on counts two and three of the indictment.

Judge Harding will continue with reading the judgment.

HANS VON SALMUTH

JUDGE HARDING: Hans von Salmuth was born in Metz on 21 November 1888. He became an officer aspirant in September 1907 and served in the First World War, first as battalion and

executive officer and then as general staff officer. After the end of the war he remained in the Reichswehr where he held various assignments. He was promoted to brigadier general in 1937 and became Chief of the General Staff of Army Group Berlin. In September 1939, he became Chief of General Staff of Army Group North and took part in the Polish campaign. At about this same time he was promoted to major general. From October 1939 to May 1941, he was Chief of General Staff of Army Group B, during which time he was promoted to lieutenant general of the infantry. From May to December 1941, he was Commanding General of the XXX Corps and participated in the Russian campaign. From 21 March to 6 June 1942, he was Deputy Commander of the 17th Army, and from 6 June to 13 July 1942 he was Deputy Commander of the 4th Army. On 13 July 1942, he was appointed Commander in Chief of the 2d Army and promoted to general in January 1943. In October 1943, he was appointed Deputy Commander of the 15th Army and subsequently became its Commander in Chief, a command which he retained until August 1944.

He was not a member of the Nazi Party or any of its formations.

The defendant is charged under counts two and three of the indictment and the charges urged against him in respect to these counts come under the following headings which we will consider in serial order: (1) The Commissar Order; (2) The Commando Order; (3) prohibited labor of prisoners of war; (4) murder and ill-treatment of prisoners of war; (5) deportation and enslavement of civilians; (6) plunder of public and private property and wanton destruction; (7) murder, ill-treatment, and persecution of civilian population; (8) discrimination, persecution, and execution of Jews, including cooperation with the Einsatzgruppen in this program.

1. *The Commissar Order*—The Commissar Order was received by the defendant while he was Commanding General of the XXX Army Corps. The evidence shows that it was distributed to subordinate units by him. He states that he rejected the order and acquainted his divisional commanders with his objections. The evidence does not establish that the order was ever carried out within the XXX Army Corps while it was under the command of the defendant. Two instances are cited which, it is urged, show it was carried out; in one instance within the 17th Army over which he subsequently became the commander in chief. This instance occurred approximately one month before his arrival. The second instance relied on occurred in the 4th Army approximately one month after he assumed command. This instance is considered ambiguous as to whether or not the commissars were in

fact executed after they had been taken prisoner. In neither instance, however, is it considered that the defendant can be charged because from the time element, it cannot be said that they occurred with his acquiescence or approval or due to any order which he had distributed.

2. *The Commando Order*—The evidence shows that this order and also Hitler's supplement to it were received by the defendant while Commander in Chief of the 2d Army. On 28 October he transmitted this order for compliance with a cover letter to units within his command and requested that all copies were to be returned to AOK 2 by 10 November. This cover letter was signed by his chief of staff and shows the initials O.B., commander in chief. The defendant states that his chief of staff should not have signed the letter and was not authorized to do so, but he did nothing to repudiate this action of his chief of staff, nor is it shown that he reprimanded him in any way therefor.

It is shown further that an order for the 580th Rear Army Area, signed by the quartermaster, was issued, providing:

“Members of terror and sabotage troops, agents, who fall into the hands of the Wehrmacht are to be turned over to the SD without delay.”

and that—

“Any military detention in prisoner of war camps, etc., is most strictly forbidden, even if considered only as a temporary measure.”

On 8 October 1942,* the AOK 2 requested clarification from Army Group B of dubious points arising from application of the Commando Order.

It is obvious that he transmitted this order for execution wherever it was considered applicable, whether to British, Americans, or Russians.

3. *Prohibited labor of prisoners of war*—Under the conditions confronting the defendant, it is considered as a matter of fact that the use in the combat areas of prisoners of war constituted a use in a dangerous area. Numerous documents and the testimony of witnesses including the defendant in this case establish this. Furthermore, Exhibit 226 and Rebuttal Exhibits 58, 59, and 60 show the illegal use of captured soldiers of the Western Powers. The Western Powers were signatories to the Geneva Convention as was Germany, and the uses to which they were put were illegal under the provisions of that Convention. This fact is shown by

* Evidently this date is a recording error in 'as much as the Commando Order was not issued until 18 October 1942.

the documents themselves and the defendant must accept criminal responsibility for his use of prisoners of war both on the eastern and western fronts.

Exhibits 524 and 526, among others, are cited to show this illegal use.

4. *Murder and ill-treatment of prisoners of war and Red Army soldiers*—On 25 July 1941, the OKH issued an order which was transmitted in the chain of command by Salmuth's XXX Corps. This was obviously an illegal order in that it provided that Red Army soldiers "are to be considered guerrillas as from a certain date, to be fixed in each area, and are to be treated as such." This Tribunal finds also that the defendant was criminally responsible for its transmittal.

On 21 November 1941, von Salmuth transmitted an order concerning partisans to subordinate units which provided that "every civilian and also every dispersed soldier who is found in the possession of arms in the region of the XXX AK is to be shot immediately." Von Salmuth signed this order and it is found to be an illegal order. This order was executed within the command of the defendant.

Concerning the treatment of prisoners of war in the areas under the defendant, numerous reports from these areas show what must be considered as an excessive number of deaths by shooting and otherwise among the prisoners of war. They imply a degree of negligence on the part of the defendant but we need not discuss this question. These reports show that prisoners of war were handed over to the SD, a police organization, and that thereafter the army exercised no supervision over them and apparently had no control or record as to what became of them.

Whether or not they were liquidated, as many of them undoubtedly were, is not the question. The illegality consists in handing them over to an organization which certainly by this time the defendant knew was criminal in nature.

The defendant undertakes to state that he had no supervision over these prisoner of war camps. From the evidence we are of the opinion that the defendant was responsible for prisoners of war within his area and also had control over them and that he must accept criminal responsibility for the illegal transfer of these prisoners to the SD.

5. *Deportation and enslavement of civilians*—Concerning the question of the use of the civilian population in the army area of the defendant and the illegal recruitment and transportation of civilian slave laborers to the Reich, the evidence establishes the defendant's responsibility. Numerous documents in evidence might be cited and, furthermore, documents introduced in rebuttal

show that the extension of this program, both in the West and the East, was one which the defendant strongly urged.

A defense witness, Harteneck, who acted as the chief of staff of the defendant, shows that this labor was compulsory. The documents speak for themselves. But if further evidence is needed, the defendant's own testimony on the stand shows that this labor was compulsory. The record shows the defendant was guilty, both of using prohibited labor of civilians in operations directly concerned with the conduct of the war and of transporting slave laborers to the Reich.

6. *Plunder of public and private property*—The evidence in this case is not considered sufficient to establish criminal connection for plunder of public and private property.

7. *Murder, ill-treatment, and persecution of civilian populations*—The evidence does not establish beyond a reasonable doubt the transmittal of the Barbarossa Jurisdiction Order by the defendant. The evidence does, however, establish many instances of the illegal executions of civilians by units subordinate to the defendant. From this evidence the following exhibits are cited:

From 15 to 30 April 1942, a report of the Feldkommandantur to the XLIV Army Corps of the 17th Army under von Salmuth shows the shooting of persons as partisan suspects, Communists, for stealing army property, as Jews, and the turning over of Jewish women to the SD.

A report dated 2 September 1942, from the Korueck 580 to AOK 2 under von Salmuth shows the hanging of persons "strongly suspected" of sabotage.

Reports from the same Korueck addressed to AOK 2, covering a period from 7 October to 12 November 1942, show that on 16 October "a large number of suspects" were shot; that in the localities near Veretenino "several hundreds of suspects were liquidated" and the town itself burned; that a patrol reports "three suspicious looking men" were shot.

A report of 2 September 1942, states:

"If the prerequisites for surprise no longer exist, for instance, because inhabitants appear by chance, the chosen site must be immediately abandoned if the troublesome witnesses cannot be eliminated silently."

A report shows 6,000 persons executed as partisans and agents by all participating agencies (excluding the SD).

The war diary of the 17th Army under von Salmuth, 24 July 1942, reports that concentration camp Gorlovka was dissolved on 22 July, and that of 655 civilians who passed through, 158 were liquidated and 23 handed over to the SD.

Whether or not these and other executions, shown by the evidence, by his subordinates were pursuant to the Barbarossa Jurisdiction Order is immaterial. These illegal executions were carried out over a wide period of time and by numerous units subordinate to the defendant.

The evidence also establishes in many cases issuance of orders which would naturally result in such criminal acts by his subordinates. Among these is cited an OKW order of 16 December 1942 which the defendant distributed for information and further action, which provided that the order should not fall into enemy hands. This order dispensed with the von Brauchitsch disciplinary order as far as partisan warfare was concerned by providing that no punishment should be imposed upon troops because of their conduct and that no sentence should be confirmed which contradicted this order. It also provided [*NOKW-2961, Pros. Ex. 1306*]—

“If this war against the bands in the East and the Balkans is not waged with the most brutal methods, the available forces will in the near future no longer be sufficient to overcome this plague.

“For this reason the troops are justified and obliged to resort in this combat to all measures—even against women and children—without leniency, as long as they are successful.”

AOK 2, under the defendant, even recommended a supplement to this order, submitted on 2 April 1943, to the Army Group Center which provided [*NOKW-473, Pros. Ex. 1523*]:

“During interrogation of bandits, also that of women, all means have to be employed in order to get the necessary statements. Interpreters are to be specially trained for the interrogation of bandits. It is frequently necessary to interrogate an individual bandit several times in order to get a result.”

On 7 August 1941, Salmuth's XXX Corps received from the AOK 11 an OKH order of 25 July 1941 concerning the treatment of enemy civilians and prisoners of war. This order he distributed down to the battalions of his corps. It provided in pertinent part as follows [*NOKW-1906, Pros. Ex. 247*]:

“Attacks and all kinds of acts of violence against persons and objects, as well as all attempts, are to be beaten down ruthlessly by use of arms until the enemy is destroyed.

“In cases of passive resistance or road obstructions, shootings, raids, or other acts of sabotage where the culprits cannot be determined at once and taken care of in the already ordered manner, collective forcible measures are to be carried out

without delay by order of an officer not below the rank of a battalion commander, etc. It is specifically pointed out that it is not necessary previously to take hostages to hold liable for future offenses. The population is held responsible for order in their areas even without special previous announcement and arrest.

“Attacks and assaults on natives assigned by us to work (for instance, road construction, agriculture, trades, factories) and on supervising personnel, constitute attacks on the occupation forces and are to be punished as such.”

This and other evidence in this case prescribed the employment of ruthless collective measures and terror activities against the civilian population. On 26 November 1941, the XXX Corps distributed to subordinate units an order, in pertinent part as follows [NOKW-2538, *Pros. Ex. 630*]:

“The incidents which happened during the last days, during which several German and Rumanian soldiers lost their lives during attacks of partisans, require severest countermeasures.

“2. Therefore immediately the following persons are to be taken hostages in all places where troops are stationed:

“a. Persons whose relatives are partisans.

“b. Persons who are under suspicion to be in contact with partisans.

“c. Party members, Komsomols, party applicants.

“d. Persons who formerly were members of the party.

“e. Persons, who, prior to the moving in of the German and Rumanian troops had any official functions, i.e., village magistrates and deputies, members of the local Soviet, party officials of any kind, directors of state institutions of any kind, sanatoriums, etc.

“f. Persons who are found outside the closed villages without a special permit.

“3. These hostages are to be accommodated in concentration camps. Their food must be supplied by the inhabitants of the village.

“4. From these hostages 10 are to be shot for each German and Rumanian soldier who is killed by partisans, and 1 of the hostages is to be shot for every German or Rumanian soldier wounded by partisans; if possible they are to be shot near the place where the German or Rumanian soldier was killed and then they are to be left hanging at that place for 3 days.”

The record shows such collective actions to have been carried out by subordinate units under the defendant's various commands.

The Tribunal finds from the evidence above cited and other evidence in this case that the defendant sponsored, acquiesced in, and approved such illegal executions within the areas of his command.

8. *Discrimination, persecution, and execution of Jews, including cooperation with the Einsatzgruppen in this program*—On 1 August 1941, a Ukrainian woman reported a secret meeting of some fifty local Jews and Bolsheviks who she said planned to collect and destroy leaflets dropped by German planes requesting the Ukrainian population to resume work in the fields, and to attack the German military offices after the Jews had become strong enough by calling in other persons.

On 2 August, the XXX Corps reported to the 11th Army, a pertinent part of which is as follows [NOKW-650, *Pros. Ex. 738*]:

“On the basis of this report the SS Einsatzkommando 10a, stationed in Olshanka was informed immediately. The Einsatzkommando was requested to dispatch a detachment to Kodyma immediately in order to prevent the execution of the intentions of the Jews and Bolsheviks on the same afternoon by an extensive action in the Jewish quarters. The action was executed under the command of SS Hauptsturmfuehrer Prast, and 300 members of various troop units were also employed to block off the city quarter involved. The action started on 1515 hours and was finished at 1900 hours.

“III. *Results.*

“A total of 400 male persons were arrested, mostly Jews. These were subjected to an interrogation in the market place of Kodyma. It was remarkable that many of these Jews were from Balti, Soroki, Yampol, and other localities formerly occupied by German troops, in particular former leading Communists. 98 of these 400 persons were proved active members of the Communist Party (functionaries and the like) and/or urgently suspect of participation in the intended plots.

“The rest of the persons consisted to a great part of asocial elements of the Jewish race. The first mentioned 98 persons were shot to death outside of the village pursuant to the directive of SS Hauptsturmfuehrer Prast, after they were briefly screened and interrogated once more.”

On 2 August 1941, the 11th Army made the following entry in its war diary [NOKW-1465, *Pros. Ex. 739*]:

“Preparation of a plot by Jews and Komsomols in Kodyma. Gang leaders and suspects were shot. In addition 170 hostages arrested.”

On 3 August 1941, Sonderkommando 10a reported to Einsatzgruppe D as follows [*NOKW-586, Pros. Ex. 741*]:

“* * * In agreement with the commanding general, 99 of the persons arrested were shot, among them 97 Jews, approximately 175 were taken as hostages, the rest released. Executions were carried out by 24 men of the Wehrmacht and 12 of the Security Police * * *”.

On 2 August 1941, Sonderkommando 10a filed a report concerning this instance, pertinent parts of which read as follows:

“By interrogation of and confrontation with Ukrainian inhabitants of the town, 98 persons were identified who had taken part in the meetings or who had behaved in an insubordinate manner to the German military, or who had belonged to the Jewish intelligentsia.” [*NOKW-579, Pros. Ex. 740.*]

The headquarters of the XXX Corps on 1 August was located in Kodyma and the defendant was in command of the area, including that city which consisted of about 10,000 people. The defendant on the stand denies his participation in or knowledge of this incident until after it had taken place and he is supported in his position by the testimony of his then chief of staff, Harte-neck and his Ic, Eismann. The stories of these three witnesses, however, are not consistent. Nor is the defendant's own testimony consistent with itself.

The record further shows that subsequent to the execution herein described, that on the evening of 1 August and prior to 8:30 p.m., the defendant issued a proclamation to the population of Kodyma as follows [*NOKW-586, Pros. Ex. 741*]:

“1. A number of persons were shot today, because it had become known to the German Command that preparations were being made for secret attacks against the troops of the German Wehrmacht in the town.

“2. Besides, a further number of persons were taken hostages and brought to the prison camp. They will not be harmed if the population of the town shows a quiet and loyal attitude towards the troop detachments in the town and towards the German soldiers.

“3. However, should any troop detachments or individual German members of the Wehrmacht or any installations of the German Wehrmacht in the town or in the vicinity of Kodyma be attacked, the German Command shall be obliged to have more executions ordered. Only a quiet and loyal attitude of the entire population secures the lives of those hostages.

"4. It is herewith being ordered that until further notice the population of Kodyma has to provide for the provisioning of these hostages. The town mayor is arranging for details with the local commander and the commander of the prison camp.

"5. Starting immediately the civilian population is forbidden to leave their homes between 2030 and 0400 in the morning. Anyone being in the streets during this time will be shot.

"Kodyma, 1 August 1941

The German Command"

On 2 August, he signed an order to his troops which reads as follows [NOKW-2963, *Pros. Ex. 1303*]:

"2. Participation of soldiers in actions against Jews and Communists

"The fanatical intent of the members of the Communist party and of the Jews to stop the German Wehrmacht at all costs must be broken under all circumstances. In the interest of the security of the army rear area it is therefore necessary to proceed with all vigor. Sonderkommandos have been charged with this mission. At one place, however, members of the armed forces participated in such an action in an unpleasant manner.

"For the future I order:

"Only those soldiers may participate in such actions who are expressly ordered to do so. I also forbid all members of the troops subordinate to me any participation as spectators.

"In as much as members of the armed forces are ordered to participate in such actions, they must be under the command of officers. These officers are responsible that every unpleasant excess on the part of the troops be avoided."

It also appears in none of the documents or the testimony herein that the defendant in any way protested against or criticized the action of the SD or requested their removal or punishment. The only punishment inflicted, according to the testimony, upon any one was apparently a 20-day confinement sentence against a member of his own staff for unauthorized participation in this action.

If we are to accept the rather flimsy pretext that some Jews in Kodyma were planning action against the Wehrmacht, the evidence established that the executions recorded were far beyond the punishment of those involved in any such conspiracy and constituted a murder action, and the Tribunal finds from these documents and other evidence that the defendant acquiesced in and approved this criminal action.

Certainly from then on the defendant knew of the murder activities of the SIPO and SD. When he turned over prisoners of war and civilians to them, he knew what could be expected as to their fate. When these units operated in his area he knew the murderous functions they performed. Notwithstanding, on 7 August, he transmitted the OKH order of 25 July 1941, which provided [NOKW-1906, Pros. Ex. 247]:

"Suspected elements who, although they can not be proved guilty of a serious crime, seem dangerous because of their *attitude* and behavior are to be handed over to the Einsatzgruppen or the Kommandos of the SIPO (SD). The moving about of civilians without travel authorization must be stopped."

On 24 July 1942, Korueck 580, which was the rear area of the AOK 2 under von Salmuth, directed:

"A Sonderkommando of the Security Police and of SD 4a has been attached to AOK 2 for the carrying out of special security police tasks outside of the jurisdiction of the troops. The Sonderkommando carries out its mission on its own responsibility. The AOK will coordinate the tasks of this Sonderkommando with those of the military counterintelligence, the activity of the Secret Field Police, and with operational requirements."

And on 4 July 1943, while Commander in Chief of the 4th Army, the defendant signed a report as follows:

"III. Collaboration with the GFP (Secret Field Police), Senior SS and Police Leaders, Plenipotentiaries of the Chief of Security Police, the SD and the Einsatzstab Rosenberg.

"Collaboration with all German offices was very good. Especially in the corps areas, the cooperation of the GFP (Secret Field Police) with the commands proved very advantageous."

On 26 December 1944, he issued a directive, signed by his chief of staff, as follows:

"7. The Sonderkommando 4a of the Security Police and the SD.

* * * is subordinate to the army with regard to routing, supplies, and accommodations.

"The Kommando receives its operational orders from the Chief of the Security Police and the SD.

"The army has the right to issue orders when they are required in order to avoid interference with operations. Besides, it is the responsibility of the Ic/AO to coordinate the tasks of the Kommando with the interests of the military counterintelli-

gence, the activities of the GFP and the requirements of the operations.

"The head of the Kommando must effect a close collaboration with the Ic/AO of the army. Since the operational area of the Kommando is as a matter of principle restricted to the army rear area (with the exception of individual cases) a close collaboration with the O.Qu./Qu.2 and the Commander of the Army Rear Area is also indicated.

"Counterintelligence tasks within the troops and their counterintelligence protection are the sole tasks of the GFP. (Initial) KI."

The record does not establish the extent or location of the liquidations pursuant to this program carried out within those areas, but it does establish his cooperation with the Einsatzgruppen, knowing their murderous functions.

On 24 May, while in command of the 17th Army, the defendant distributed an order to subordinate units, requiring the registration of all citizens except Jews, foreigners, Red Army soldiers, and certain other categories, and provided that:

"Persons supplying shelter to new arrivals (also to members of the family) without the certificate or with a forged certificate are shot to death just as those persons who take quarters in a place (hide overnight), without having obtained the written permission of the mayor."

In other words the order provided for the registration of certain civilians and excluded others, including Jews, who apparently were to be shot for not having the certificate with which they were not provided.

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

KARL HOLLIDT

Karl Hollidt was born in Speyer on the Rhine on 28 April 1891. After a normal education, he became an officer aspirant in July 1909, and in November 1910 became a second lieutenant of infantry. In the First World War he was a combat soldier and was wounded. Subsequent to the First World War he served with the Free Corps and later was accepted into the Reichswehr or One Hundred Thousand Man Army as a captain. He stated in his affidavit that he was promoted to brigadier general in the summer of 1938.

He did not participate in the Polish campaign but, at the onset of the war, took over command of the 52d Infantry Division and

was committed for the defense of Saarbruecken in the West Wall. In April 1940, he was promoted to major general. In November 1940, he was given command of the 50th Infantry Division. He participated in the invasion of Greece and later, from Rumania, participated in the invasion of Russia. In February 1942, he was made general of the infantry (lt. general) and given command of the XVII Corps of the 6th Army. In January 1943, he was appointed Commander of Army (Armeeabteilung) Hollidt, which was later reorganized as the 6th Army under his command.

In February 1943, he was promoted to Generaloberst (general). In April 1944, he was relieved of his command and retired to inactive duty. In March 1945, he became liaison officer of the chief of civilian administration in the Ruhr district where he remained until April 1945.

Aside from the charge of crimes against peace, heretofore disposed of in this opinion, charges under counts two and three of the indictment will be dealt with under the following headings: (1) The Commissar Order; (2) The Commando Order; (3) prohibited labor of prisoners of war; (4) murder and ill-treatment of prisoners of war; (5) deportation and enslavement of civilians; (6) plunder of public and private property and wanton destruction; (7) murder, ill-treatment and persecution of civilian population.

1. *The Commissar Order*—The evidence shows that the defendant Hollidt received in writing this order or a similar order providing for the shooting of political commissars. The defendant testified that he instructed his regimental commanders not to comply with this order. The only report in evidence as to such executions is from the 50th Division; it is the ambiguous statement found in [NOKW-2945, Pros.] Exhibit 1265. A later report submitted by the XVII Army Corps of the 6th Army on 15 February 1942, discloses the execution of two commissars. From this report it is not clear that the commissars were executed after capture. We can only construe such documents favorably to the defendant.

Furthermore, the defendant denies that he, on this date, had assumed command of the XVII Army Corps and alleges that he did not see this document. It is true that his service record discloses that he was assigned to this corps in January 1942. However, an assignment and the assumption of command are different; and assuming that he had taken command in January, it can hardly be said that the execution, if such is assumed, grew out of any action or neglect on his part in view of the length of time he had been with the command.

We therefore find from the evidence that the defendant was not criminally connected with this order.

2. *The Commando Order*—The XVII Army Corps received this order and, on his return from leave in early November 1942, the defendant Hollidt read it. He stated that he saw no reason to pass on the order and the evidence does not establish that he did so, and there is no evidence to show that it was ever carried out by units under the defendant.

We are therefore unable to find the defendant criminally connected with this order.

3. *Prohibited labor of prisoners of war*—Documents pertaining to this matter upon which the prosecution relies pertain to the time when the defendant was in command of the *Armeeabteilung Hollidt* [later] the 6th Army. At that time he was in the course of retreat which covered some 1,500 kilometers, and his army was in a difficult and deplorable condition at various periods during this retreat, and he defended his use of prisoners of war to some extent upon the exigencies of the situation which confronted him. This constitutes no legal defense but is only in mitigation. From the factual point of view that the defendant was in retreat and subject to heavy, unexpected attacks it is evident that the employment of prisoners of war in constructing field fortifications and for labor with combat units necessarily put them in a position of greater danger than the same use would have subjected them to on a more stable front.

The evidence in this case shows that over a wide period of time prisoners of war were used in the combat zone for the construction of field fortifications by units subordinate to him which could only have been done with his knowledge and approval. Reports show that prisoners of war were in fact killed and injured by an attack from enemy mortars.

We can only find from the evidence that prisoners of war were used under the defendant in hazardous work with the knowledge and approval of the defendant and that he is criminally responsible therefor.

4. *Murder and ill-treatment of prisoners of war*—This charge is based in part upon certain documents which show that prisoners of war were shot by units subordinate to the defendant. These documents are by no means clear as to the circumstances, or to the effect that the shootings were unjustified; but on the assumption that they were, it is considered that such instances would have to be classified as excesses committed by troops with which no criminal connection of the defendant is established.

The other exhibit on which the prosecution relies under this heading is [NOKW-2807, Pros.] Exhibit 1528, an order pertain-

ing to the shooting of parachutists. The Tribunal is not of the opinion that this order constituted an illegal order and we therefore find no criminal act established against the defendant under this heading.

5. *Deportation and enslavement of civilians*—The evidence in this case establishes without question the illegal use of civilian labor by units under the defendant's command with his knowledge and consent. This labor was not voluntary and involved the use of civilians in the construction of field fortifications contrary to international law.

The evidence also established that the defendant participated in the recruitment of slave labor for the Reich under the compulsion of orders to do so. He alleges that he was opposed to this program of recruitment of labor to be sent to Germany. [Document Hollidt 146.] Hollidt Exhibit 146 shows that any disapproval was based upon the fact that he needed such labor for his own purposes.

6. *Plunder of public and private property*—In connection with this charge we consider it established by the evidence and particularly by [Document NOKW-2788, Pros.] Exhibit 573 that the defendant considered civilian authorities subordinated to the army in matters concerning evacuation, and he directed that "everything which could be usable to the enemy in the area must be destroyed if no evacuation is possible." The Tribunal does not feel that the proof establishes that the measures applied were not warranted by military necessity under the conditions of war in the area under the command of the defendant. Nor does the proof establish what property was removed to the rear with his knowledge and consent.

We are therefore unable to find the defendant criminally responsible under this heading.

7. *Murder, ill-treatment and persecution of civilian population*—The proof in this case does not establish that the Barbarossa Jurisdiction Order was ever transmitted by the defendant. The order upon which the prosecution relies is a drastic military order for the suppression of partisans and to secure the area of the 50th Infantry Division against guerrilla activities by the population. The Tribunal does not believe that the issuance of this order in itself constituted an illegal act for which the defendant should be held criminally responsible. It is true that this order provides for the shooting of persons whose "partisan activities are proven by their confessions or by credible testimony of witnesses without court martial proceedings" and it can be inferred that it was derived from the Barbarossa Jurisdiction Order.

If in fact the Barbarossa Jurisdiction Order was received and transmitted in the 50th Division, the order of the defendant places

a limitation upon its enforcement to the effect that only those persons who were proved by their own confession or by credible witnesses to have been guerrillas were to be shot. The above limitation upon the provisions of the Barbarossa Jurisdiction Order is to his credit rather than detriment.

The Tribunal is unable to find beyond a reasonable doubt that the defendant is criminally responsible in these particulars.

Concerning the responsibility of the defendant for actions of the GFP or Secret Field Police, the documents cited do not establish criminal responsibility upon his part under international law.

With regard to the SD operations within the 6th Army, it is considered that there is no evidence to establish that those activities were confined to more than their legal functions as a police organization in connection with guerrilla warfare within the area of the defendant.

For the reasons set forth, in connection with the defendant's criminal responsibility for the illegal use of prisoners of war and for the illegal use of civilians and their illegal deportation to the Reich, we find the defendant guilty under counts two and three of the indictment.

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

OTTO SCHNIEWIND

JUDGE HALE: He was born on 14 December 1887, and entered the navy in 1907 as a midshipman and received various promotions up to his appointment as admiral at the end of 1940. He became Commander of the Fleet in 1941 and remained in this position until his retirement at the end of 1944.

The principal charge against him was that of crimes against peace, which has been heretofore disposed of in this opinion.

The remaining charges under counts two and three are based upon (1) The Barbarossa Jurisdiction Order; and (2) The Commando Order.

The Barbarossa Jurisdiction Order was sent by OKW to OKM on 14 May 1941, and received the following day. The defendant did not see it until 20 May 1941. At that time he was Chief of the Naval Command Office and Chief of Staff of the Naval War Staff, a department in the Naval Command Office. He relinquished this command on 12 June 1941, to become Commander of the Fleet. The Barbarossa Jurisdiction Order was not passed on to subordinate units until 17 June, nearly a week after he had left his command. It seems the delay was due to some question as to the legality of this order. It was first sent to the Legal Department

of the Navy Defense Office before it was passed down to subordinate units, which, as pointed out, was after Admiral Schniewind's departure. The prosecution's brief has this rather naive statement, "For the period after the receipt of this order, during which time he was still Chief of Staff of SKL, Schniewind has offered no proof that he had done anything to discourage or stop the further distribution of this criminal order." We decline to adopt this line of reasoning.

The Commando Order was distributed by SKL to subordinate units on 27 October 1942, after the defendant became Commander of the Fleet. It was sent to his headquarters and his subordinate units.

There is no evidence it was implemented by him or enforced by any units subordinate to him. From the very nature of the order it is apparent it could but have little, if any, relation to his command of the surface vessels engaged in fighting and subordinate to him, viz, the battleships, cruisers, destroyers, torpedo boats, speed boats, and mine laying ships.

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

KARL VON ROQUES

The defendant Karl von Roques was born 7 May 1880. During the First World War he was general staff officer, and after the war remained with the Reichswehr. On 31 January 1933, he was released from active duty until 23 May 1939, during which time he was active in the Civil Air Raid Protection Service at Berlin. On 1 December 1939, he became a divisional commander. From the middle of March 1941 until 15 June 1942, he was Commander of the Rear Area Army Group South. From about 10 September 1941 until 5 October 1941, he held a command at the front, also remaining during this time in command of the Rear Area Army Group South. From 27 October 1941, until 10 January 1942, he was absent from his command on account of illness, during which time Lieutenant General Friderici deputized for him as Commander of the Rear Area Army Group South. During April 1942, he was absent two weeks on furlough. On 15 June 1942, he was transferred to the Fuehrer reserve. At the end of July 1942, he was appointed Commander of the Rear Area Army Group A (Caucasus). This appointment became effective for the southern part of the former Rear Area Army Group South at the beginning of August and for the Caucasus at the beginning of September 1942. In the middle of December 1942, the defendant

was retired because of old age and did not participate further in the war. His last rank was lieutenant general to which he was promoted in 1941.

The defendant von Roques is charged with war crimes and crimes against humanity, which is all that we here consider in as much as we have elsewhere disposed of the charges of crimes against peace and the conspiracy to commit crimes against peace. These crimes under the evidence are only such as were committed while the defendant was Commander of the Rear Area of Army Group South and of the Rear Area of Army Group A. We shall consider these under the heading of: (1) The Commissar Order; (2) prohibited labor of prisoners of war; (3) murder and ill-treatment of prisoners of war; (4) The Barbarossa Jurisdiction Order; (5) hostages and reprisals; (6) ill-treatment and persecution of the civilian population; (7) partisan warfare.

Von Roques' testimony discloses that he had in the area of his command executive power as the representative of the occupying power in his area. He stated that he owed a duty to the civilian population because he needed its cooperation. Neither his testimony nor his actions show that he appreciated the fact that he owed a duty as an occupying commander to protect the population and maintain order.

General Halder in his testimony succinctly defined executive power as follows [*TR. p. 1853*]:

“The bearer of executive power of a certain area unites all the legal authorities of a territorial nature and legislative nature in his own person.”

The responsibility incident to the possession of executive power is well stated in the judgment of Tribunal V* as follows:

“ * * * This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territories having executive authority as well as military command will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon

* United States vs. Wilhelm List, et al., Case 7, p. 1256, this volume.

the commanding general. He cannot ignore obvious facts and plead ignorance as a defense.”

In the Yamashita Case decided by the Supreme Court of the United States, on which case we have elsewhere commented in the judgment, it is stated:*

“These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”

We are of the opinion that command authority and executive power obligate the one who wields them to exercise them for the protection of prisoners of war and the civilians in his area; and that orders issued which indicate a repudiation of such duty and inaction with knowledge that others within his area are violating this duty which he owes, constitute criminality. The record shows orders by the defendant, knowledge, approval, and acquiescence in acts by troops under his authority, and by agencies within his area which violated the most elementary duty and obligations owed to prisoners of war and the civilian population by the commander of an occupying army, having command authority and executive power.

1. *The Commissar Order*—We have heretofore held this order criminal and need not further comment thereon. Von Roques admitted that he learned of this order in June or July of 1941. He denies having passed it on but from a consideration of the documents and the extensive implementation of the orders by units under his command, serious doubt is cast on the truth of his testimony and that of some of his defense witnesses; but whether the order was or was not passed on by him, its implementation was so extensive in his territory as to require action on his part to prevent the criminal action that was carried on by the units under him and agencies in his area. Commissars were regularly shot with his knowledge, and he did nothing about it.

One paragraph of the Commissar Order in the light of the documentary evidence is important. It reads as follows:

“II. *In the rear areas*—Commissars arrested in the rear area on account of doubtful behavior are to be handed over to the ‘Einsatzgruppe’ or the ‘Einsatzkommandos’ of the SS Security Service (SD); respectively.” [NOKW-1076, *Pros. Ex. 57.*]

* United States Reports, Cases Adjudged in the Supreme Court. In re Yamashita, 327 United States 16.

The documents disclose that the Security Divisions 444, 213, and 454 for much of the time were subordinate to von Roques. He contends that in the early part of the war against Russia, these security divisions were subordinate to Army Group South, but while they were subordinate to the army group in the early days of the war merely for simulating an attack they were "to remain *fully* subordinate to the commanders of the rear areas of the army groups."

On 20 June 1941, the 454th Division had the Commissar Order. An order of this division, 2 August 1941, provided for segregation in the camp of "politically intolerables" and suspected partisans, commissars, and "instigators" who were to be dealt with by the camp commandants, in accordance with special orders issued.

An order of the 444th Security Division, bearing date of 14 June 1942, requires the groups of the Secret Field Police to submit reports to section Ic of the division by the 10th and 25th of each month, giving the number of commissars identified and listing them as commissars with the troops, civilian commissars, and commissars turned over to the SD; and if no commissars had been identified, a report to that effect is required. This order, as noted before, is dated 14 June 1942 and von Roques says he left for the Fuehrer reserve on 13 June. There is a reference in the order to two previous orders that were dated, respectively, 29 August 1941 and 30 January 1942. It is apparent that the matter covered was not new to the divisions, and that a year after the war began von Roques' troops were carrying out the Commissar Order.

A teletype dated 25 July 1941 from von Roques' Rear Area Army Group to the Security Division 213 announces the arrival of an SS Brigade on 24 July and says it is to be committed on 26-28 July. Under the same date, 25 July 1941, Jeckeln, the Commander of the SS Brigade, issued an order for a mopping-up operation describing towns and locations shown by the operational maps of 20 July and 5 August 1941 to have been throughout that time in von Roques' Army Group Rear Area. In his order of commitment Jeckeln states that contact is to be established with the Ukrainian militia if present in the various towns. He states "that Ukrainians who are still wearing the Soviet Uniform are to be treated as prisoners of war for the time being"; that arrested commissars are to be transferred to him, Jeckeln, for thorough interrogation by the SS leader of his staff, and that similar agents or Jews who offered their services to the Soviets are to be treated accordingly. Six days later, this same SS and Police Leader, Jeckeln, reports as follows [NOKW-1165, *Pros. Ex. 81*]:

"To: 6th Army

"One copy each to:

"Reich Leader SS and Chief of the German Police

"Commander, Army Group Rear Area, General von Roques

"Commander, Army Rear Area, Major General von Puttkamer

"Chief of the Regular Police, General of the Police Daluege.

"II

"1. By request of Generalfeldmarschall von Reichenau, the Reich Leader SS made available the 1st SS Brigade for a mopping-up operation in the army rear area and/or army group rear area.

"The carrying out of this operation in the area of Zviahel, Sluch Valley, Nov. Miropol, Shepetovka, Zaslav, Ostrog, Horyn Valley, Hoszcza, took place according to the directives of the Chief of Staff of AOK 6 in accordance with the Commander of the Army Rear Area, Major General von Puttkamer, and the Commander of the Army Group Rear Area, General von Roques.

"2. The units subordinated to me had the order as far as they were available for this operation:

"Arrest and/or execution of (a) remaining parts of the 124th Soviet Rifle Division, (b) armed bands, (c) guerrillas, (d) persons who have assisted the Bolshevist system * * *.

* * * * *

"9. Total number of persons captured—135 soldiers of Ukrainian nationality transferred to transient prisoner camp (Dulag).

"Shot—73 Russian soldiers (guerrillas); 165 functionaries and other persons who have rendered considerable service to the Bolshevist system, among them 4 women; 1,658 Jews who have rendered considerable services to the Bolshevist system, and who reported Ukrainians to Bolshevist rulers."

It is clear from this that von Roques' Army Group South [rear area] knew of this commitment, permitted it in its area, and received a report after it was completed. It is clear that 73 Russian soldiers were shot as guerrillas, that 165 functionaries were shot, and that 1,658 Jews were shot. From the face of the report, it is apparent that these 1,896 executions were all in violation of international law. Von Roques says that this was done on Reichenau's responsibility and not his, but a large part of the operations were in the area of his command. He admits that he quartered the SS Brigade, and that his chief of staff reported the accomplished fact to him. Certainly after 1 August 1941 von Roques

could never contend that he did not know that it was the function of the SS and SD to exterminate commissars and Jews.

A report of the Chief of the Security Police and the SD, dated 17 July 1942, shows that the SD at Vladimir-Volynsk gave special treatment to 36 commissar functionaries from a Russian officer's camp and to 76 Jewish Bolshevik officers who were planning to escape. This place was in von Roques' area according to the operational map of 20 July 1941, and von Roques in his testimony said the boundaries of his area were fixed by 10 July 1941.

An activity report of the 454th Security Division for the month of November 1941 stated that 24 Politruks and officials of the NKVD were shot for illegal activities. [*NOKW-2926, Pros. Ex. 1310.*]

On 24 August 1941, only 24 days after the mass killing of Jews and functionaries which we have referred to, von Roques signed an order in which he stated that the SD is to participate in the screening of prisoners in order to have possible unsuitable elements segregated. This order was with respect to policies for the combating of partisans. The witness Fruechte was a physician at Dulag 160 in the rear area of Army Group South. At the prisoner of war camp, he testified the SD searched for commissars. His testimony in this respect is as follows [*Tr. p. 9100*]:

"To the best of my knowledge there was a directive to the effect that prisoners of war were to be screened for the presence of commissars and Politruks. In actual practice it only happened very rarely. I only remember two cases, since the commissars had, in most cases, been liquidated before the prisoners had arrived in the camp. I only know of two cases, one in the camp Kirovograd where a man who was charged with being a Politruk was interrogated by a judicial officer and by the commander. The second case which I recall occurred in the main camp Khorol where a noncommissioned officer of the field police, when a column of prisoners arrived at the camp, immediately segregated one commissar and shot him on the spot. He wanted him shot already in the camp; I happened to be in the camp at that time, but I told him that nobody must be shot in the camp. Therefore, he took him away, had him undressed, took off his clothes, and had him shot at the next corner."

And [*Tr. p. 9102*]—

"I want to refer back to the other subject matter. I don't believe I was understood correctly. I didn't say then that only on two occasions searches were carried out. Of course, searches were carried out all the time, but only in two cases something was actually discovered. It was a matter of course for the German guards that every incoming transport of prisoners of

war was screened as to the presence of political functionaries, but only on two instances something was actually discovered, as I said, because in most cases the people had been liquidated prior to the transport reaching the camp. I wanted to supplement this statement to my last answer."

Dulag 160, where Fruechte was medical officer, was located at Khorol. Fruechte's testimony is supported by that of the witness Blumenstick, who was an inmate of this camp, and testified that there was an order that commissars, Politruks, officers, and other staff workers were immediately to be assembled in one group; that on one occasion while there, he saw either seven or nine people shot, and that among them prisoners of war, commissars, and three Jews.

The commander of the Rear Area Army Group South, the defendant von Roques, is number four on the distribution list of the order from the OKH which we next consider. This order of 7 October 1941 definitely provides for the SD to enter the camps in the rear areas, and there can be no misunderstanding as to what was to happen to those whom they segregated and removed from the camp. Among other things contained in the order are the following:

"* * * Sonderkommandos of the Security Police and Security Service (SD) will be set up, in accordance with the directives enclosed herewith, in the *transit camps of the rear army area* to segregate *on their own responsibility* unbearable elements.

* * * * *

"b. In agreement with the commanding officers of the rear army area (district commanders for prisoners of war), the operations of the Sonderkommandos have to be regulated in such a way that the segregation is effected as unobtrusively as possible and that the liquidations are carried out without delay and at such a distance from transit camps and villages as to ensure their not becoming known to the other prisoners of war and to the population.

* * * * *

"d. In the transit camps of the rear army area in which a segregation by Sonderkommandos could not yet be effected, procedure according to previous regulations and under *the responsibility of the camp commanders* should be carried on. Upon arrival of the Sonderkommandos the segregation of unbearable elements is exclusively the task of the latter. Segregations executed jointly, etc., must not take place.

"3. This order must not be passed on in writing—not even in the form of an excerpt. District commanders for prisoners of war and commanders of transit camps must be notified verbally."

It is apparent from this order that it was considered so bestial as to be fit to be seen only by those to whom it was addressed, among whom was the defendant von Roques, for it was forbidden to pass it on in writing, even in the form of excerpts. It provides, as will be noted, that the district commanders for prisoner of war and transit camps must be notified verbally. Von Roques' Army Group Rear Area received this order for it was on the agenda for discussion at the "Commander's Conference" in the Rear Area Army Group South on 17 November 1941, under the heading "Authority of the SD in prisoner of war transient camps (new decree)." Whether von Roques saw this order is not material, for operations were carried on in camps under his jurisdiction and control in accordance with it by the SD, who could enter such camps only with his permission.

On 15 May 1942, five hundred prisoners segregated in Dulag 160 were shot. This is testified to by Dr. Fruechte, camp physician at Dulag 160. His testimony on this occurrence is as follows (*Tr. p. 9133*):

"Q. Now, with reference to the prisoners who were executed by the SD in Dulag 160, how were they accounted for? Was there any record ever made of what happened to them, or, how they were checked off, or, do you know the procedure?"

"A. It was as follows: the SD came to Khorol with the mission—I myself talked with the SS Untersturmfuehrer, a non-commissioned officer; their mission was to shoot all Jews and all other persons who were in some way suspects. Some 50 civilians had remained in Khorol. Some were craftsmen who were still needed. In addition, all prisoners of war had remained in Khorol and a number of persons who were detained in the prisoner of war camp as suspects, that is a suspicion of being partisans, Jews, gypsies, Communists, functionaries, etc. The SD first had all Jews detained in the local prison in Khorol, all of them civilians; then the SS Untersturmfuehrer went to the camp; in the camp a list had been compiled by the camp management, recording all persons who were not Jews but who were suspects. The Jews didn't have to be checked because they were to be shot just as the Jewish civilians without any formalities. The SD Untersturmfuehrer then had two or three hundred suspects file past him on 2 days and put on his list, behind each name an 'F', which denoted 'Free', or an 'E', which

meant 'to be shot'. All persons who were assigned an 'E' were put together with the Jews and on 15 May they were shot together with the Jews.

"Q. And how many were there in all?

"A. I already stated, a total of approximately 500; thus, there must have been 450 Jewish prisoners of war and suspect persons from the camp because 50 local civilians were still there in addition."

No comment is required on this testimony. Again the testimony of the witness Blumenstick corroborated it, for he states that he was marched from Khorol, Dulag 160, to Kremenchug, with 12,000 or 15,000 Russian prisoners of war. Those unable to keep up in the march were shot. Blumenstick testified that three were shot by his side because they were exhausted and fell, and that he thought probably 1,200 were killed for this reason. Fruechte also heard from those of the troops who accompanied these marches that the exhausted prisoners of war were shot and left lying by the roadside. At the time of these occurrences at Dulag 160, it was within the area of von Roques. All of the foregoing incidents occurred in the rear area of Army Group South.

Those hereinafter noted occurred in the Rear Area Army Group A, of which von Roques assumed command at the beginning of August as to part and 1 September 1942 as to the remainder of such rear area. The 454th Division, subordinate to him shot two partisans for being Communists, also 37 active Communists. Part of this shooting was done by the SD, though the report showing it is a report of the 454th Division. From the foregoing documents and orders, and oral testimony and other evidence in the record, there can be no question but that defendant von Roques, if he did not hand down the Commissar Order, received it and from the beginning of the campaign knew it was being carried out in his area.

2. *Prohibited labor of prisoners of war*—Von Roques received the OKH order on 31 July 1941 with respect to the allocation of labor, in which it was directed that commanders in the army group rear areas would carry out labor allocations in the interest of the operations. It was directed further that prisoners must be offered for work to all large scale organizations, such as supply districts, road and bridge construction battalions, railroad engineer relay points, ground personnel units of the Luftwaffe, economic offices, Organization Todt, and officers charged with the construction of winter quarters. This order probably was illegal in that it may have permitted and authorized work not permissible under international law. Apparently von Roques passed it down to his divisions, but there is no evidence that prisoners were used except for

work such as clearing snow from roads and work of this character. There is a picture that shows prisoners of war loading ammunition at a point which on the date of the picture is not shown by the operational map to have been in von Roques' area. Other maps before and after show it in his area. Von Roques testified that no prisoners of war were used for forced labor in his area. On the whole record, we are not satisfied that the evidence is sufficient to establish the defendant's guilt of using prisoners of war for prohibited labor.

3. *Murder and ill-treatment of prisoners of war generally*— Von Roques denies that he distributed the Commando Order, but paratroopers were shot as guerrillas in his area. An order by the Chief of Staff of the Rear Area Army Group South, bearing date of 9 August 1941, was directed to be distributed to all departments. Apparently the order was issued in reply to an inquiry about the treatment of captured paratroopers. Statements contained in the order are as follows:

"It has to be insisted that every paratrooper is a guerrilla who, as a civilian, in any way opposes the German Wehrmacht and its institutions.

"He is therefore also to be treated as a guerrilla on principle.

"Only if paratroopers report to a German headquarters on their own or have themselves brought there by Ukrainian militia to whom they voluntarily surrendered will they be treated as prisoners of war.

"Statements of captured paratroopers that they were forced into this service are not to be believed at all, since these statements in all probability are made according to orders.

"Only through ruthless measures can the paratrooper plague be opposed successfully."

The defendant von Roques in his testimony said that his troops understood this order in the way he intended it, which was that paratroopers in uniform were not to be shot but treated as prisoners of war. It will be observed that there is no such exception contained in the order. Clearly none was intended. Subordinate units understood it according to its literal terms.

A report of the director in charge of the [Secret] Field Police in the Army Group Rear Area 103, which was under von Roques, shows the shooting of 49 parachutists as guerrillas.

The war diary of the 444th Security Division, under date of 21 March 1942 [NOKW-2871, *Pros. Ex. 1317*] at which time the order of battle shows it was subordinate to von Roques, contains a report of the shooting of nine "parachute saboteurs" by the Field Police.

A report of the Einsatzgruppen, bearing date of 12 November 1941, contains the following [NO-2830, Pros. Ex. 949]:

“* * * Among those executed by Sonderkommando 4a in the second part of the month of October 1941, until the date of this report, in addition to a comparatively small number of political functionaries, active communists, people guilty of sabotage, etc., the larger part were again Jews, and a considerable part of these were against *Jewish prisoners of war who had been handed over by the Wehrmacht*. At Borispol, at the request of the commander of the Borispol PW camp, a platoon of Sonderkommando 4a shot 752 Jewish prisoners of war on 14 October 1941 and 357 Jewish prisoners of war on 18 October 1941, among them some commissars and 78 wounded Jews, handed over by the camp physician.”

Defendant von Roques stated that Borispol at this time was in his area. It will be observed that this action occurred at the request of the camp commander. It will be observed further that it was subsequent to the mass murder by the SD on 27 and 28 of July, to which we have heretofore referred. Apparently at this time von Roques had taken no steps to advise his prisoner of war commanders that they were to have no further traffic with the SD.

A report of the Feldkommandantur 194 to the Commanding General, Rear Area Army Group South, on 13 April 1942 shows that 126 prisoners of war were handed over to the SD in Chernigov. While von Roques testified that he was on leave in Berlin and did not receive this report, we do not deem this material because at this time for a long period of time he had had knowledge that the SD were a murder group, and it was his business with such knowledge to see that prisoners of war were not turned over to them. He had had ample time to do this before going on leave to Berlin.

Another occasion on which prisoners of war were murdered is evidenced by a teletype which von Roques admitted having read. It is a report of the 24th Infantry Division, dated 15 October 1941. Therein is contained the following [NOKW-1615, Pros. Ex. 257]:

“Devoting every effort to the task, the removal of prisoners proceeds according to order. *Insubordinations, attempts to escape*, and exhaustion of prisoners make the march very difficult. Already there are *over 1,000 dead following executions by shooting*, and exhaustion. In Aleksandriya, *no preparations* have been made by PW transit camp 182 for the permanent accommodation of 20,000. Novo Ukraina allegedly only for 10,000.”

On the same day that the above report was received, the Commander in Chief of the Rear Area Army Group South made a report to the Army Group South in which he stated the following:

“At 24th Infantry Division the march is made difficult by insubordinations, attempts to escape, and exhaustion of PW’s. Following executions by shooting and exhaustion 1,000 dead.”

On the agenda for a commander’s conference on 17 November 1941, under the heading of “Prisoners of War” appears this statement:

“Shooting to death by 24th Infantry Division of prisoners of war unable to march. Countermeasures.”

Also appearing on the agenda is the statement:

“Lieutenant General of the Infantry von Roques, the Commander of the Rear Area Army Group South, starts a two months furlough for a cure. His deputy is Lieutenant General of Infantry Friderici. * * *”

It is clearly indicated by this that on 17 November it was known that the shooting of prisoners by the 24th Infantry Division because they were unable to march had occurred. It is clearly indicated that von Roques was still in command on 15 October for he initialed the teletype of that date and signed an order commending the 24th Infantry Division for its participation in the movement of prisoners, under date of 26 October 1941.

The witness Blumenstick, who made this march as a prisoner of war, testified that three men were shot near him because they were too exhausted to keep up with the march. He testified further [*Tr. pp. 9139, 9140*]:

“From Khorol to Kremenchug, we had to march in groups of 20 men and 5 men in breadth. The Jews who had remained alive were to head this group, then followed some commissars, another group of officers. They were guarded very heavily and then the other nationalities followed on this march from Khorol to Kremenchug. People who tried to obtain some food were shot immediately, whenever they deviated from the marching formation to the right or to the left. . People who were unfit to march, who couldn’t go on any more, were shot immediately, and were left to the right and left of the road. They were lying prostrate with their faces to the earth and with their hands stretched forth.”

* * * * *

“As we prisoners assumed at the time, we estimated the number between 1,200 and 1,500.

“Q. Can you tell the Tribunal how many people were transported at that time?

“A. We estimated about 12,000 to 15,000.”

Dr. Fruechte, who was medical officer at the prisoner of war camp, testified [*Tr. pp. 9106-07*]:

“I can only remember one instance in which I know positively that on the march prisoners of war were shot, and this march was the one that took place in the middle of October. I cannot recall the exact date but it was directed from Khorol to Kremenchug. The camp Khorol was too crowded and there was an order to transfer about 20,000 prisoners of war cross country marching on foot to Kremenchug. I, as a camp physician, was ordered by the camp management to make notes when the prisoners filed through the gates of the camp and to segregate prisoners who looked weak and exhausted. I did that, and a number of people of whom one could see that they would not be able to physically withstand the strains of the march I segregated. Later on soldiers who either participated in the march or others who passed the stretch of road between Kremenchug and Khorol on vehicles said that all people who were exhausted * * *.”

And—

“A. I said that shortly after the march had taken place, the personnel of the camp was informed by soldiers, some of whom had participated in the march as escorts, or by other soldiers who had passed the stretch of road where the march took place in some way or other, that those people who couldn't march any further were shot. They also told us that the corpses were left at the road and that the whole stretch of road up to Khorol was marked by the corpses left there.

“Q. Can you tell the Tribunal why you were ordered to segregate the weak people?

“A. So that only those people were to participate in the march who would be able to stand the strain of the march.

“Q. Who gave this order to you please?

“A. The camp commandant.”

General von Tettau, who was in command of the 24th Infantry Division, gave an affidavit in which, among other things, he stated that he knew nothing about the shooting of prisoners of war unable to march. Since he knew nothing about it, he could not explain on cross-examination how the matter came to the knowledge of von Roques so that he could report it to Army Group South. This affidavit is not convincing on this point. It is

proper to state, however, that the order given by von Tettau which effected the transfer of the prisoners concerning which Dr. Fruechte testified is a clear and humane order.

An order from the High Command of the Army specifically states that security tasks in the rear area of the army and army groups embraces among other things "guarding and transfer of prisoners of war, the allocation of prisoner of war labor detachments." Von Roques as commander of the Rear Area Army Group South had control of the prisoners of war, and it was his duty under international law to provide and care for them within his area and to treat them humanely.

Bearing the date of August 1941 is a report of Jeckeln, Higher SS and Police Leader and Commander of an SS Brigade, giving an account of an operation. This report shows that 73 Russian soldiers were captured and shot as guerrillas.

As showing the general condition that prevailed in the Rear Area Army Group South, a report from von Roques' Army to the OKH, dated 20 December 1941, contains [NOKW-1605, Pros. Ex. 272]:

"Prisoners of war.

"The mass deaths of undernourished prisoners of war in the Dulags (transient camps) increasingly attracts unwelcome attention among the civilian population. The mass of the prisoners of war is unable to work due to exhaustion."

Another enclosed report shown in the same document, dated 21 December 1941, sets forth graphically the conditions of the prisoners of war in the Rear Area Army Group South. It reads as follows:

"1. On 20 December 1941, the total of prisoners of war in the four prisoner of war camps located in the Rear Area Army Group was: (Dulag 160, 182, 205, Stalag 346) 52,513 prisoners of war.

"2. Mortality rate of prisoners of war in the camps:

"a. Dulag 160: From 12,959 prisoners of war, an average of 10 deaths per day, 28.02 percent a year.

"b. Dulag 182: From 7,507 prisoners of war, an average of 18 deaths per day, 87.05 percent a year.

"c. Dulag 205: From 9,271 prisoners of war an average of 21 deaths per day, 82.06 percent a year.

"d. Stalag 346: From 22,776 prisoners of war an average of 50 deaths per day, 80.1 percent a year."

The testimony shows that many, in fact the greater part, of the prisoners here referred to were taken in the battle of Kiev and Urman, which occurred in the middle of September. This was

6 weeks before von Roques temporarily left the area. It would not have been possible for the conditions indicated to have grown up during the one month of his absence had proper provisions been made for these prisoners. This occurred in the area over which von Roques had control and is evidence of the gross neglect that was exercised in carrying out the obligations of international law as expressed in the Geneva and Hague Conventions.

There is evidence in the record that von Roques returned on 10 January 1942. There is a report of the Commander of the Rear Area Army Group South, dated 31 January 1942, which shows that conditions had not improved, and that in three of the Dulags, which then contained an aggregate of approximately 30,000 prisoners, they were dying at the rate of 106 percent yearly in one [camp], 262 percent yearly in another, and 254 percent in the third.

Another report shows the general mortality rate in February in five of the camps, containing 38,508 prisoners of war, to have been 2,814 dead or 7.5 percent monthly. For the month of March in the same camps, out of a total of 42,078, 1,707 dead were counted, or a mortality rate of 4.1 percent monthly.

The chief medical officer with the Commander of Rear Area Army Group South reports an inspection of the prisoner of war hospital and the prisoner of war camp of Dulag 205 and states that there are "impossible sanitary conditions and advanced starvation of prisoners of war".

A report of the Commander of the Rear Area Army Group South to the OKH Quartermaster General, which bears von Roques' initials and is dated 16 January 1942, states that on 13 January 1942 there were 46,371 prisoners of war in the camps. The lack of food is stressed and this statement appears:

"Until 1 April, therefore, the high mortality rate will probably account for loss of 15,000 prisoners of war."

The report, which is signed by the Chief of the General Staff of the Rear Area Army Group South, concludes with this statement:

"There is no doubt that for the time being labor allocations of these prisoners of war who still are in the camps must be abandoned almost completely. Only by this and by simultaneous improvement of food supplies will it be possible to save at least a fraction of the considerable labor potentiality which lies in the prisoners of war. Otherwise, it has to be expected that about 46,000 prisoners who are now in the Rear Area Army Group South will have eliminated themselves in a few months by death and diseases."

No comment is necessary to show the extent of the neglect of

these prisoners. Von Roques was responsible for the prisoners of war in his area during the time these conditions existed, as shown by the record in the case.

4. *The Barbarossa Jurisdiction Order*—We have discussed generally the character of this order, which opened the door for much of the criminal activity of the German Army in Russia. Von Roques handed it down to his subordinates. He says he emphasized the necessity of maintaining the discipline of the troops. It was sent to his three Security Divisions, 213th, 444th, and 454th, and to 14 Feldkommandanturen.

The 454th Security Division, on 2 August 1941, issued an order providing, among other things, for the arrest of civilians and that, "If they appear in any way suspect, they are to be handed over by the PW transient camps to the SD", and that, "In the rear area of the army group they are to be transferred to the Einsatzgruppen and Kommandos of the Security Police and SD".

An order of the 213th Security Division, dated 22 August 1941, contained the following:

"Civilians, who are sufficiently suspected of espionage, sabotage, or partisan activity are to be shot after interrogation by the Secret Field Police. Nonresidents who cannot sufficiently prove the reason for their presence, should, if possible, be handed over to the SD commandos, or otherwise be transferred to a prisoner of war camp for further action by the SD commandos. Young boys and girls who are often used by the enemy are not to be excluded."

Not to be outdone by his divisions in implementing in bloody fashion the Barbarossa Jurisdiction Order, von Roques himself, on 23 August 1941, issued an order in which the following appears [*NOKW-2590, Pros. Ex. 605*]:

"In case weapons are still found, the offenders will be punished according to the regulations concerning guerrillas with capital punishment. Should the participation of broad circles of the population be probable, or if it is the matter of an ammunition depot, an officer occupying the post of at least a battalion commander will order the execution of collective punishment, i.e., mass executions, or that villages be burnt to the ground partially or entirely. The latter shall, however, be carried out only if the billeting of the units is not endangered. In consideration of the Russian conditions it is required that each superior exercises ruthless measures for the security of the unit.

"The execution of collective punishments will be reported daily in the evening reports as a special event."

Later, on 21 March 1942, von Roques' chief of staff issued an order cautioning units in the combat zone about shooting those arrested for espionage, suspicion of espionage, sabotage, or partisan activities without informing the intelligence officer of the Secret Field Police, because by so doing important information might not be uncovered or might be lost. Von Roques, on his examination, pointed out that such information would be lost "if those people are shot without the Secret Field Police." The life of a suspect was of no concern to the Wehrmacht; but the information which the Secret Field Police might extract from him was precious and must on no occasion be lost. Von Roques testified at some length that the Secret Field Police did not shoot suspects unless the matter was passed upon by an officer of the rank of lieutenant colonel, but he wavered so much that his testimony is not credible on this point. Von Roques turned cases over to the Secret Police and used them as his investigators. Under such circumstances, it was his duty to direct and channelize their action in such a manner that they did nothing that he could not control. It was his duty to see that his troops and the Secret Field Police which he used in his area did not have and act within a sphere of competence derived from some other source that permitted action by them that he was charged with a duty to see did not happen.

A teletype to von Roques, dated 2 October 1941, initialed by him, shows four suspects shot by the 213th Security Division. A report of 25 January 1942 by the Higher SS and Police Leader to the Commander of the Rear Area Army Group South says that on 23 January four suspect individuals were apprehended and "summarily shot". Von Roques says it was ordered by the police leader on his own responsibility and there was no reason for him to intervene, nor could he.

Other reports show that civilians and suspects were shot without even the minimum of judicial protection being afforded them, but merely on the order of a troop or police officer.

That von Roques knew of the criminal activities of the Senior SS and Police Leaders and their units is conclusively shown by an order issued by him under date of 1 September 1941, which is in part as follows:

"3. Executive measures against certain parts of the population (in particular against Jews) are expressly reserved to the forces of the Senior SS and Police Leader, especially in those districts which have already been pacified.

"The troops themselves will liquidate on the spot only such natives as have been proved or are suspected of having committed hostile acts, and this only in compliance with orders of

officers; collective measures may be ordered only by an officer with at least the rank of battalion commander. No doubts can be admitted in this respect. Any arbitrary shooting of natives including Jews by individual soldiers and any participation in executive measures of the Senior SS and Police Leader must be considered as insubordination and punished by at least disciplinary measures, unless court procedure is required."

From the foregoing, and a great amount of other evidence in the case, we find von Roques passed down the Barbarossa Jurisdiction Order; that he personally issued other orders in implementation of it or pursuant to it that are criminal; and that he bears responsibility for the acts of his subordinate units acting under such orders, and for the acts of other agencies acting within his area, which were criminal and which they were able to carry out only with his acquiescence and approval.

5. *Hostages and reprisals*—We have commented generally on the fact that the so-called hostage and reprisal orders and killings in this case are not such in fact but merely terror threats and killings.

Von Roques received an order from Army Group South on 1 October 1941, which he saw because he initialed it, which directed [*NOKW-1599, Pros. Ex. 613*]:

"1. Arresting hostages and all men not residing in any villages near the railway line Kazatin-Fastov-Smela-Dnepropetrovsk, possibly also near the line Aleksandriya-Dnepropetrovsk.

"2. Hanging hostages at the railway tracks in case of new acts of sabotage.

"3. In case of further acts of sabotage, complete evacuation of a strip 1-2 km. wide on either side of the railway line and firing on every civilian approaching the railway tracks."

He immediately sent it on to his subordinate Feldkommandanturen.

We do not find from the evidence that hostages were shot in von Roques' area. He says they were not.

6. *Ill-treatment and persecution of the civilian population*—Many of the documents heretofore set forth show ill-treatment and persecution of the civilians in von Roques' area of command. Other documents show the establishment of ghettos for the Jews; requirements that they wear the Star of David; prohibition of Jewish rites; confiscation of Jewish ritual articles; requirements that Jews surrender all foreign exchange securities, precious metals, and precious stones; terror killings of suspect partisans and partisan sympathisers; so-called mopping-up exercises and turning over of Jews and Communists to the SD; orders by von

Roques himself that the troops shall not participate in "arbitrary shooting" of Jews and the executive measures of the SD; orders that all headquarters shall help the SD detachments in carrying out its orders from the Reichsfuehrer SS, other than taking part in executions; and that "the right to object does not exist for the subordinated headquarters with regard to measures carried out by the SD detachments." Such orders show beyond doubt the complete subservience of the Wehrmacht in von Roques' area to the SD and its full cooperation with the SD program, with knowledge of its debased and criminal character.

7. *Partisan warfare*—With respect to partisan warfare in the light of the foregoing documents and orders set forth, we need only say that the execution of partisan suspects and other civilians not *francs-tireurs* was a regular and continued practice in von Roques' area.

On the matters herein pointed out, and the record in the case, we find the defendant von Roques guilty on counts two and three of the indictment.

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

HERMANN REINECKE

JUDGE HARDING: Hermann Reinecke was born in Wittenberg on 14 February 1888. He was a career officer in the German Army and served in the First World War as a captain in an infantry regiment. After the end of the war, he held various positions until 1938 when he was appointed chief of the newly activated office group, General Wehrmacht Affairs (AWA). In 1939, this group was renamed General Wehrmacht Office (AWA) and Reinecke became office chief which position he retained until the end of the war. He was promoted to brigadier general in 1938; to major general in 1940; and to lieutenant general of the Infantry in 1942.

In addition to his duties as Chief of AWA, in December 1943 by a Fuehrer order, he was appointed Chief of the National Socialist Guidance Staff of the OKW.

He received the Golden Party Badge in January 1943, and the Hitler Youth Honor Insignia on 30 January 1944. He states in his affidavit that in 1944, Hitler ordered that bearers of honor insignia would become automatically Party members so that this order affected him in the fall of 1944.

Aside from the charge of crimes against peace, heretofore disposed of in this opinion, we think that charges under counts two and three of the indictment may be disposed of under the

following headings: (1) segregation and murder of prisoners of war; (2) ill-treatment of prisoners of war; (3) The Commando Order; (4) prohibited labor of prisoners of war; (5) looting; (6) murder and ill-treatment of civilians. We shall discuss these charges in serial order.

1. *Segregation and murder of prisoners of war*—The record in this case established numerous and far-reaching crimes by the Third Reich and its leaders committed against prisoners of war. These concern not only Russian prisoners of war but other Allied prisoners of war. The evidence in this case establishes the use of French prisoners of war in the manufacture of arms contrary to the Geneva Convention which was binding upon Germany as to French prisoners of war. It is alleged that this was done by agreement with the ambassador of the Vichy government to Berlin. There is no evidence of any agreement by the Vichy government in this case.

This matter was considered in both the case of the United States against Milch and the case of the United States against Krupp, et al., both of which Tribunals held such use illegal. We are of the opinion, for substantially the reasons cited in the Krupp Case, that if any such agreement existed, it was contrary to international law. Certainly a conquering power cannot set up and dominate a puppet government which barter away the rights of prisoners of war while the nationals of that country under substantial patriotic leadership are still in the field.

Concerning Russian prisoners of war the evidence establishes a series of colossal and stupid crimes under the Third Reich. Hundreds of thousands, millions, were doomed to die through neglect or were killed by ill-treatment or deliberately executed by the agencies of the Reich Government in order to exterminate the so-called bearers of Communist ideology, the "unfit", Jews, and others. The record also shows shooting of Russian prisoners of war who attempted to escape and were recaptured, and the branding of Russian prisoners of war.

This Tribunal, from the evidence in this case, finds that such uses of prisoners of war and the treatment of prisoners of war outlined above constituted international crimes. It now becomes our duty in this case to determine the connection, if any, of the defendant Reinecke with such crimes from the evidence before us.

The authority exercised by the OKW over prisoner of war affairs did not extend to camps within the operational area of the OKH or to camps of the air force and navy. In these camps the appointment of personnel and disciplinary power was exercised by the various services. In the Reich Commissariat the camps were under the jurisdiction of the armed services commander, a

subordinate of the OKW; also prisoner of war camps within the Reich and the Government General were under OKW jurisdiction except as to disciplinary powers which in the Reich were exercised by the Commander in Chief of the Replacement Army.

The organization of Prisoner of War Affairs in the OKW is shown by the chart of General Westhoff, Chief of Prisoner of War Affairs in the OKW. Subsequent to the appointment of Inspector of Prisoner of War Affairs it is shown by the chart of General Roettig, Inspector of Prisoner of War Affairs.

The OKW, within the Reich, controlled the appointment of district prisoner of war commanders, camp commanders, and other personnel of the prisoner of war administration and conducted training courses to prepare such personnel for their tasks although the actual appointment of this personnel was made by the Army Personnel Office.

The commanding general of the service commands exercised a dual function; one, as commander of service commands subordinate to the OKW; and the other as commander of troops subordinate to the Replacement Army, but his Referent for Prisoner of War Affairs was the commander of Prisoner of War Affairs in the service command, who in turn was a superior of the various camp commanders. The control of the OKW over prisoner of war camps and their personnel is shown in the document pertaining to the Meinel affair. It is also shown by the testimony of the affiant Westrem wherein he states in pertinent part as follows:

"The controls from above (OKW, commanders of the prisoners of war, commander of the PW base camps, the competent battalion commanders, whose company commanders and officers travelled around at all times) * * *".

When he testified on the stand, he stated:

"I am of the opinion that the OKW/AWA was the agency charged with dealing with prisoner of war matters." [Tr. p. 8392]

The defendant was the Chief of the AWA. One of the most important subsections of this office was that of Prisoner of War Affairs, and the evidence establishes the general control and responsibility of the defendant over these matters within the Reich, the Government General, the Reich Commissariat, and other areas under the OKW.

On or about July 1943, the general inspector of Prisoner of War Affairs was appointed and was directly subordinate to Keitel and not to the defendant. Notwithstanding this fact, the testimony of Adolf Westhoff, Chief, Prisoner of War Affairs in the OKW, shows that this general inspector reported concerning conditions of prisoner of war affairs to the Chief of Prisoner of War

Affairs under the defendant. It also appears from the evidence that there were other officers who acted as inspectors of prisoner of war camps for the AWA and who reported directly to the Chief of Prisoner of War Affairs under the defendant Reinecke.

This organization of prisoner of war matters remained in effect until Himmler became Commander in Chief of the Replacement army sometime in September of 1944, but apparently the change in prisoner of war matters did not take place until October of that year. After this period a great many of the important functions regarding prisoner of war affairs were transferred from the AWA organization to Berger who operated directly under Himmler. The situation after this change is shown by a chart of Colonel Fritz Meurer, former chief of staff under Berger.

Concerning prisoners of war in the camps under his jurisdiction, the defendant Reinecke issued many directives. Whether or not these instructions were designated as "directives", such "directives" issued by the OKW were orders and binding upon subordinate units to whom they were directed. This is shown by the testimony of many witnesses, including that of General Westram, former commander of prisoners of war in Wehrkreis XII, General Schemmel, former district commander of prisoners of war, Wehrkreis XIII, General Westhoff, and numerous other witnesses, both of the prosecution and defense. The testimony of the defendant himself also shows that his directives were considered by him as orders binding upon the units to whom they were directed.

We are not concerned in this case with the fact that the defendant did not have direct command authority or disciplinary authority over the personnel of camps or units of the army. He issued the over-all directives in the name of the OKW and the Commander in Chief of the OKW, with which they were compelled to comply. The evidence in this case shows that the defendant exercised direct authority over Wehrkreis XIII. That he by-passed the chain of command as stated in the testimony of General Schemmel is immaterial.

The defendant contends that such directives were always issued "by order" of his superior, Keitel, and in this respect the evidence on the whole bears out his contention but that fact does not absolve the defendant for responsibility in connection with such directives. The Chief of the AWA was not a stenographer who merely transcribed the orders of his superior and passed them on. Keitel undoubtedly had a secretary who performed that function.

The record in this case contains page after page of voluminous orders transmitted over the signature of the defendant by order

of Keitel. The fact is that it was one of the defendant's major functions to draft and prepare orders for submission to Keitel for his approval (or sign in his name orders in conformity with his known policies). That this procedure was followed is shown by the testimony of General Westhoff, reproduced on page 55 of the defendant's brief, where he stated [*Tr. p. 7740*]:

"I wrote out a draft decree in accordance with the Geneva Convention and sent this draft to General Reinecke. General Reinecke sent back this draft decree to me after he had made a few improvements in it; he turned sentences around, etc., and then he ordered me to send the draft to the various ministers for checking purposes."

and where he states further:

"Then the draft had to be submitted to the Party Chancellery. The Party Chancellery thereupon announced that the draft in no way corresponded with their demands; that it must be altered, and the Party Chancellery then altered about 70 percent of this draft themselves. This new draft I then received back again by the AWA with the order to submit the decree in its form as it was then, and to submit it for signature."

The statement of the witness Kattner, secretary to the defendant Reinecke, also cited in the defendant's brief, states [*Tr. p. 8361*]:

"As a matter of principle, these things were like this: the draft of such an order would be prepared in the Prisoner of War Department; would then be submitted to the Field Marshal and be initialed by him and he would also put a date thereon. Then this draft was returned to us and was copied out and signed by General Reinecke, 'I.A.—Im Auftrage—by order of'."

In other words, her testimony was to the effect that the drafts of these orders were prepared by the subordinates of General Reinecke before they were submitted to Field Marshal Keitel for his signature or approval. It is not even to be presumed according to normal staff procedure that where the ideas expressed in the order carried out a policy of Keitel known to the defendant, that Keitel saw and approved such orders before they were issued. It is to be noted in this connection that while the office of the AWA was located in Berlin, Keitel undoubtedly remained constantly with Hitler's headquarters in the East. Many of the directives signed by the defendant do not bear Keitel's initials or signature, showing they were seen and approved by him as is the usual procedure where such is the fact. In fact, [Prosecution] Exhibits

366, 411, 371, 1248, 363, 210, and 232 show neither Keitel's initials nor his signature.

These matters have been heretofore discussed in this opinion and the defendant in this case cannot escape responsibility for decrees issued under his signature merely by the fact that they were issued "by order". The defendant, in his own testimony, concedes that many of the ideas therein contained were his own but these, according to his contention, were always the beneficial provisions; a contention with which this Tribunal is not impressed in view of all the evidence.

It is alleged by the defendant that he could visit prisoner of war camps only with the permission of the commander in chief of the replacement army. This defense is considered without merit. Whether he and his subordinates formally obtained such permission is immaterial. If such a requirement existed, it was a mere formality.

The defendant's supervision and control of prisoners of war and prisoner of war affairs is also shown by the testimony of General von Westrem, who stated [*Tr. pp. 8392-93*]:

"I am of the opinion that the OKW/AWA was the agency charged with dealing with prisoner of war matters."

He further stated:

"Yes, AWA, that is, the department for prisoners of war, did use extensively its right to control the prisoners of war and the work in their camps. That was done in the first place by General Reinecke himself, who visited me twice, then by the inspector of prisoner of war matters who, in behalf of the AWA, was constantly travelling. It was also done by individual officers on the staff of the AWA who, by surprise, came to visit labor detachments and prisoner of war enclosures."

The evidence establishes that he made inspections himself and that the camps were constantly being inspected by his subordinates. Inspection of such camps and knowledge as to what occurred within them was a function of the defendant. Westhoff testified that the Inspector of Prisoner of War Affairs was subordinate to the AWA and could inspect camps within the jurisdiction of the AWA.

A Reinecke exhibit, an affidavit by Rudolf Schleier, shows that the right to inspect was vested in the defendant.

This Tribunal is not concerned with fine formalities or divisions of authority. The evidence establishes overwhelmingly the over-all control and supervision of the defendant Reinecke as to prisoners of war under the supreme authority of the OKW and

his power over prisoner of war camps and prisoner of war affairs. The evidence shows that he exercised that authority by issuing orders; that he had the right of inspection both in himself and his subordinate; that such inspection was a duty entrusted to him and carried out by him; that he had the sources of knowledge and the duty was placed upon him to know and supervise what took place in these camps, and that he did know and supervise what took place therein and directed certain operations in such camps.

As heretofore stated, it is established that prisoners of war were segregated and liquidated under the program of the Third Reich. The process of segregation and the resultant executions have been shown to have been carried out primarily by the SIPO and SD units sent to the camps.

The defendant has denied knowledge of this segregation and liquidation program of prisoners of war under his jurisdiction. The knowledge of the defendant, his approval, and cooperation with this program of murder carried out by Himmler and his police, particularly by the SIPO and SD is established from evidence too voluminous to recite in detail in this opinion. Broadly speaking, however, the sources of evidence may be classified under various headings; first, the directives and reports of the SIPO and SD through their own channels in which they refer to agreements with the OKW as to their operations. These documents, it is true, did not go through military channels, nor were the specific agreements with the OKW set forth, and some of the agreements referred to are antecedent to documents introduced in evidence which show the official action of the AWA and OKW in regard to operations of the SIPO and SD in prisoner of war camps. However, that such agreements did in fact exist is not only shown by these SIPO and SD documents, but from the fact that in view of the responsibility of the OKW and AWA over prisoner of war affairs and prisoner of war camps, the activities of the SIPO and SD could not have taken place without the assent of the OKW and AWA.

Most certainly this segregation and liquidation program was known to the commanders of the various camps where the segregation took place and to various other military officials within these camps. The evidence in this case discloses not only that it was the duty of the defendant to know what took place within them but that in fact from constant inspections by his subordinates and which he made himself, he could not have escaped such knowledge.

Not only did he have this power and duty of inspecting but it is also established by the evidence that at conferences which he called for the camp commanders, he was in contact with personnel who

knew very well what was taking place within their camps as to segregation and liquidation.

Another source of evidence which the defendant had as to this program was the various conferences which he is shown to have had with SS Obergruppenfuehrer Mueller who represented Himmler and the RSHA in carrying out this liquidation program. The witness, Otto Braeutigam, liaison officer between the Ostministerium and the Wehrmacht Operations Staff, has testified to one such conference between Reinecke and Mueller where the liquidation of prisoners of war was openly discussed. He testified that he took to the conference the orders of the SIPO and SD pertaining to this matter and that these orders were brought to the attention of the defendant. Certain conference notes of Ministerial Councillor Dr. Letsch show discussions of liquidation of prisoners of war who had been segregated for that purpose. Another conference between Reinecke and SS Obergruppenfuehrer Mueller and others was attended by Erwin Lahousen, Chief of Counterintelligence, Department II, as the representative of Admiral Canaris sent to protest against this program, and the witness, Lahousen, testified that not only was the matter discussed but that the defendant signified his approval of the program of Mueller as to segregation and liquidation of prisoners of war.

The defendant denies any such conference but the evidence, including that of his own witnesses, supports the testimony of Lahousen.

A final and most convincing source of evidence on this point is found in the documents signed by the defendant himself. [Doc. No.-3417, Pros.] Exhibit 363 shows an order of the OKW, dated 8 September 1941, distributed "by order" over the signature of Reinecke, providing for cooperation of the camp authorities with the SIPO and SD.

[Document 695-PS, Pros.] Exhibit 411, dated 24 March 1942, over Reinecke's signature shows the segregation program of the Einsatzgruppen and the cooperation prescribed for camp commanders with the SIPO and SD.

A decree of 5 May 1942, signed by Reinecke, shows an agreement by him and the Reich Leader SS in connection with segregation and refers to the "eliminations". This agreement was intended to avoid a double screening and provided that thereafter the screening would be east of the old Reich frontier.

Another decree signed by Reinecke is dated June 1942. This decree is termed "Policy regarding Commissars and Politruks" and provided for the "elimination" of commissars and Politruks while within the Government General. It further provided:

"Within the Government General, the elimination shall be carried out as before by the Security Police according to directives given by ordinance Az. 2 f 24.73 AWA/Prisoners of War Gen. (Ia) No. 389/42 g, dated 24 March 1942. Those sought out by the SD commissioners shall in future be conveyed to Security Police camps specially prepared for this purpose in the Government General or in the Reich and remain in custody there. Special treatment, as hitherto, will no longer be given, unless people are involved who have been convicted of criminal acts such as murder, cannibalism, and similar acts.

"To accelerate the proceedings, the Security Police shall reinforce their Einsatzkommandos in the Government General."

This shows the use of the term "special treatment", and that that term clearly meant liquidation. Furthermore, the testimony of many witnesses, including the defendant himself, established beyond a reasonable doubt that the defendant knew, participated in, and approved the segregation and liquidation program carried out by the SIPO and SD as to prisoners of war under his jurisdiction and the evidence in this case establishes that that segregation and liquidation were not confined to political commissars but included many other classifications among the prisoners of war, including the Jews. The evidence also establishes that those sick and unable to work, prisoners of war who had escaped and had been recaptured, and prisoners of war of Polish and certain other nationalities who had had sexual intercourse with German women, were turned over to the Gestapo, SIPO, and SD, and the defendant's connection therewith.

This Tribunal does not propose to enter into the question of how these liquidations were carried out or their precise number. Nor is it concerned with the fact that the program of the SIPO and SD was not entirely coextensive with the jurisdiction of the defendant. It is shown that it was carried out in camps under his jurisdiction by virtue of directives issued by him. Whether the unfortunates who were segregated were transported to concentration camps to be gassed or worked to death or otherwise disposed of, as described so graphically by the witness, Smolen, formerly with the political reception detachment at Auschwitz, and the question of whether or not their deaths were reported to the Wehrmacht Information Center, WAST, an office under the AWA, as he also testified or whether as described by the witness, Ohler, former inspector of the Nuernberg Gestapo, they were transported to the railroad station by the camp authorities, chained, and taken into Dachau where, five at a time, they were taken out, stripped of their clothing, and shot by the Einsatzkommando, is not the ques-

tion. The fact remains and is clearly proved that the defendant was an active participant in the program of segregation and illegal liquidation of prisoners of war under his jurisdiction; that he knew prisoners of war turned over to the police agencies were to be so eliminated; and that he arranged for turning them over to such units for that purpose.

Nor are we concerned with the fact that having participated in the ruthless policies of the Reich in the early stages of the war with Russia with regard to Russian prisoners of war, ultimately the leaders of the Reich came to the conclusion that they were depriving themselves of a valuable source of manpower and thereafter relaxed in a measure their program of extermination. This is a relaxation for which the defendant or anyone else can claim little credit at best, and according to the defendant's testimony, he can claim no credit because he asserts that he never knew of the existence of any extermination program in the first place.

For the reasons above stated, we find the defendant guilty of participation in the criminal segregation of prisoners of war for liquidation of certain elements and for turning others over to the Gestapo for confinement in concentration camps or elimination as they saw fit.

2. *Ill-treatment of prisoners of war*—The record in this case shows various inflammatory orders concerning prisoners of war issued by the defendant and his subordinates. These include [Doc. 888-PS, Pros.] Exhibit 1248 and [Doc. NOKW-035, Pros.] Exhibit 336.

On 24 March 1942, the OKW/AWA issued an order which the defendant claims favorably modified preexisting directives. However, the purpose of this order was apparently to increase the production of prisoners of war. This order contains the following provisions:

“Ruthless and energetic action in cases of uncooperativeness, refusal to work, and negligence in work, especially toward Bolshevist agitators, is to be ordered; insubordination or active resistance must be completely removed *immediately* with a weapon (bayonet, gun butt, or firearms, no sticks).”

This order directed ruthless and energetic action for “uncooperativeness”, “refusal to work”, “negligence in work”, especially “toward Bolshevist agitators”. This directive also provided:

“The decree concerning use of arms by the armed forces is to be interpreted strictly. Whoever does not use his weapon or does not use it energetically enough in seeing that an order is carried out is liable to punishment.”

On 19 August 1942, Reinecke signed a decree. This order was distributed by the Plenipotentiary for the Four Year Plan and the Plenipotentiary General for Labor Allocation. This order states:

"During these visits it should be mentioned that a further OKW decree pertaining to the treatment of Russian PW's in case of refusal to work will follow soon. Furthermore, inquiries are to be made if and where it has become known that guards have neglected their duty in supervising the work output of PW's. In case this is ascertained, the most drastic steps are to be taken.

"For 10 September 1942, reports will be submitted to the OKW confirming that all NSDAP functionaries (Hoheitstrae-ger), in whose districts (Bezirke) PW's have been allocated to work, have received the decree referred to, and where discip-inary action has been taken against guards who have neglected their duty."

This order shows party interference and influence upon the defendant in connection with his treatment of prisoners of war and also directs vigorous measures in case of refusal to work and to increase the work output of prisoners of war.

On 29 January 1943, von Graevenitz, a subordinate of Reinecke, signed and distributed an order extending the power to inflict punishments upon prisoners of war for attacks upon the State. This order was distributed by the Party Chancellery to various Gauleiters.

On 17 August 1944, an OKW decree, signed by Reinecke, concerning the treatment of prisoners of war, again shows the party influence upon the defendant in regard to this matter. Pertinent parts of this order read as follows:

"* * *. The prisoners of war must definitely know at all times that they will be ruthlessly proceeded against, if necessary with weapons, if they slack in their work, offer passive resistance, or even rebel * * *."

Paragraph 5 provides—

"* * *. Minor offenses by the guard and auxiliary guard personnel in the treatment of prisoners of war are not to be prosecuted if they serve to help increase production * * *."

Paragraph 6 provides as follows:

"* * *. The guard and auxiliary guard personnel must therefore be briefed on political views as often as possible. The commanders of prisoners of war in the Wehrkreis are responsible that official NS political officers are speedily assigned to all men's prisoner camps * * *."

This paragraph clearly establishes that the ruthless policy of the Party as to treatment of prisoners of war in work production was put into effect by the defendant Reinecke.

In addition to assisting in the liquidation by the SIPO, SD, and Gestapo of "undesirable elements" among prisoners of war, the exhibit above cited discloses that the defendant directed that the remaining prisoners were to work under the merciless lash of the Party. For such inhuman orders and abandonment of prisoners of war under his jurisdiction to the supervision of a ruthless civilian agency, of whose nature and purposes he was advised and which he claims to have resisted, the defendant Reinecke is criminally responsible.

It is small wonder from the above cited directives that General Schemmel testified to the effect that the mortality rate of Russian prisoners of war engaged in heavy labor at Nuernberg was very high.

3. *The Commando Order*—The evidence in this case is not considered to establish beyond a reasonable doubt the defendant's connection with the execution of the Commando Order.

4. *Prohibited labor of prisoners of war*—The witness, Henri Bousson, former French prisoner of war in Wehrkreis VI, establishes the illegal use of French prisoners of war within Reinecke's jurisdiction in the manufacture of artillery weapons in the Krupp plants.

It is also established by Westhoff's testimony that he called the use of French prisoners of war in armament work to the attention of Reinecke and advised him that it was contrary to the Geneva Conventions, to which Reinecke replied that an agreement had been reached with Ambassador Scapini and the French Government permitting such use.

This and other evidence in this case clearly establishes the illegal use of French prisoners of war in the manufacture of arms and munitions and the defendant's knowledge thereof. That Reinecke was responsible for this use of prisoners of war is shown from the record which, as heretofore pointed out, establishes authority and jurisdiction over prisoners of war within the Reich. Reinecke's control over such prisoners of war is also shown by [Doc. NOKW-180, Pros.] Exhibit 230, wherein Goering on 4 November 1943, stated :

"* * *. The Italians (Italian military internees) get beaten up when they do not work. If Reinecke cannot do the work, I shall dismiss him and get somebody else. * * *"

And by a meeting of the Central Planning Board wherein Field

Marshal Milch stated :

“Gablentz, I want you to get in touch with Reinecke concerning these French. I demand that if the people refuse to work they immediately be placed against the wall and shot before all the other workers. * * *.”

While the proof in this case establishes many uses of Russian prisoners of war and while it establishes that they were used to replace French prisoners of war for use in the armament industry, it fails to establish the actual use of Russian prisoners of war in the manufacture of arms and munitions.

5. *Looting*—On 17 September 1940, Keitel issued an order to the military commander in occupied France providing for the illegal seizure of property and its transfer to the Reich. This order in pertinent part reads as follows [138-PS, *Pros. Ex. 547*] :

“Reichsleiter Rosenberg and/or his deputy Reichshauptstellenleiter Ebert has received clear instructions from the Fuehrer personally governing the right of seizure; he is entitled to transport to Germany cultural goods which appear valuable to him and to safeguard them there. The Fuehrer has preserved for himself the decision as to their use.

“It is requested that the services in question be informed correspondingly.”

On 10 October 1940, Reinecke wrote to the Supreme Commander in France and requested that the directions given in the above directive of Keitel's be transmitted to the military administration in Belgium.

On 30 October, he addressed a communication to the Armed Forces Commander in the Netherlands, supplementing this order of Keitel's, a copy of which he sent for information to Reichsleiter Rosenberg.

For his connection with this looting program of the Third Reich, he is considered criminally responsible.

6. *Murder and ill-treatment of civilians*.—We do not feel that the proof in this case establishes beyond a reasonable doubt the criminal participation of the defendant in the screening and turning over of civilians to the SIPO and SD, or that he in fact had authority over civilians.

There has been much discussion in this case concerning the defendant's assignment as Chief of the National Socialist Guidance Staff of the OKW for the purpose of fostering the Nazification of the various services, particularly of the army. But the fact remains that the indoctrination of the army in the Nazi ideology, repulsive as that ideology might have been, does not in itself con-

stitute an international crime, and the fact that he was appointed and carried out such functions is not considered to have any significance in this case other than as it indicates his conformity to the ideals of Hitler and Keitel whose orders and directives he is shown to have formulated and transmitted, and his relation to Bormann and the Party to whom he, in a measure, surrendered the supervision and treatment of prisoners of war.

It has also been established that he was a member of the People's Court as one of the lay judges thereon and that he sat in the trial of the conspirators of 20 July 1944, where the contemptible Freisler presided, which is perhaps the most infamous travesty on human justice ever so completely recorded in the annals of man.

The fact, however, that he was a member of the People's Court and sat in this trial does not constitute an international crime and is of no significance in this case other than it reflects his character as a trusted and supine instrument of Hitler's will in any capacity

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

PRESIDING JUDGE YOUNG: I shall continue with the reading of the judgment.

WALTER WARLIMONT

Walter Warlimont was born on 3 October 1894. He saw service in World War I in the artillery as a combat officer. At the end of 1920, upon his own application, he was taken into the Reichswehr. From then on he served in various capacities and in 1929 was detailed to the United States Army to study the economic mobilization system. Later on he served in various capacities, and in April 1933 was transferred to the Reichswehr Ministry in Berlin, Army Armament Office, as group chief in the economic department. In the summer of 1934, he was appointed chief of this department. At the end of August 1936, he was sent by the Reich Minister of War, von Blomberg, as Military Plenipotentiary to Generalissimo Franco in Spain, where he remained until November 1936.

In October 1937, he was given command of an artillery regiment and in 1938, shortly after the Anschluss, he was ordered to Vienna by Keitel, Chief of the OKW, to represent the OKW there. After a few weeks he returned to his regiment. On 1 August 1938, he was transferred to the OKW in Berlin to become familiar with the position of chief of the section of national defense as a successor to Jodl. At that time his chief task was to represent the

OKW in ensuing conferences where the military occupation of the Sudetenland was being arranged with the military representatives of Czechoslovakia and the signatory powers of the Munich agreement.

On 10 November 1938, he was appointed Chief of the Section of National Defense and was at the same time charged with the affairs of the Chief of the Wehrmacht Operations Office, which shortly before had been activated. In August 1939, Jodl returned to the OKW and took over the affairs of the Chief of the Wehrmacht Operations Office and the defendant remained Chief of the Section for National Defense. On 1 August 1940, he was promoted to brigadier general. The first of January 1942, the Office Chief of National Defense was renamed Deputy Chief of the WFSt without incurring any changes in its duties. On 1 April 1942, he was promoted to major general. On 1 April 1944, he was promoted to lieutenant general of artillery. The Department of National Defense consisted of the following divisions:

- A. Operations Section Army (OPH (I/H)).
Operations Section Air Force (OPL (I/L)).
Operations Section Navy (OPM (I/M)).
- B. Quartermaster Section (Qu.).
- C. Organization Section (Org.).

When in January 1942, these sections were directly incorporated into the WFSt, under Warlimont, Jodl explained Warlimont's duties as follows:

"Warlimont's principal activity was to assign the entire work of the staff and to issue directives for that work. He supervised everything. He received orders from me concerning his work, discussed it with the general staff officers, examined the drafts, signed, and sent them to me.

"Another special activity was his direct cooperation with Field Marshal Keitel, concerning all the questions which I did not handle, problems which did not concern me. I concentrated almost exclusively on operational problems. Warlimont handled, without my participation, any other administrative questions in the occupied territories, any economic questions, in short, all questions which were not of an operational nature, which had to be sent in the form of orders by Keitel to the other offices.

"As to operational questions, he prepared and submitted them to me. As to others, he cooperated independently with Keitel, who had no staff of his own at headquarters, without my participation, particularly as he was better trained in fact for these

matters (political and economic questions), than for the operational ones.”

Warlimont is charged under all four counts of the indictment. Since counts one and four have been eliminated by the action of the Tribunal, the remaining charges under counts two and three may be summarized as charging the criminal connection of the defendant with the following subjects: (1) The Commissar Order; (2) The Commando Order; (3) prohibited labor of prisoners of war; (4) murder and ill-treatment of enemy belligerents and prisoners of war; (5) deportation and enslavement of the civilian population; (6) plunder of public and private property and wanton destruction; (7) murder, ill-treatment and persecution of civilian population, in which he is charged with (a) criminal connection with the Barbarossa Order, (b) illegal executions of the civilian population, (c) discrimination, persecution, and execution of Jews by the Wehrmacht and cooperation with Einsatzgruppen and SD, (d) cooperation with the Einsatzgruppen of the Rosenberg Staff, (e) reprisals against families of French officers, (f) The Night and Fog Decree, and (g) other illegal orders. These we will take up in serial order.

1. *The Commissar Order*—Prior to the Russian campaign, Hitler had announced at a conference of high officers and their military commanders and their chiefs of staff his intention to wage war on Russia, which would be a clash between two ideologies. It would be necessary to fight a war of extermination; it would be necessary to forget the comradeship between soldiers.

Subsequently, on 6 May 1941, General Mueller of the OKH sent a letter to the Chief of the OKW, marked attention Warlimont or his deputy, inclosing a draft of the directives for the treatment of political functionaries. This draft was the first pertaining to the so-called Commissar Order. Warlimont sent this to the defendant Lehmann, who, after a telephone conversation with Warlimont on 8 May, returned an amended draft after having crossed out paragraph III and suggested the following words be substituted as a new paragraph III [1471-PS, *Pros. Ex. 54*]:

“The courts martial and the drumhead courts martial of the regimental and other commanders must not be charged with the execution of the measures indicated under I and III.”

The note of transmittal is signed by Lehmann. On 12 May, Warlimont submitted a memorandum concerning this matter to Jodl, which shows the OKH draft as altered by Lehmann. This reads as follows [884-PS, *Pros. Ex. 55*]:

"I * * *

"1. Political functionaries and commissars are to be removed.

"2. Insofar as they have been captured by troops, *an officer with disciplinary power* shall have a final decision as to whether the prisoner in question is to be removed or not. It is sufficient to determine whether the prisoner is a political functionary.

"3. Political commissars *among troops* shall not *be recognized as PW's* and shall be liquidated [erledigen] at the latest in the transit PW camps. No evacuation to the rear.

"4. Expert directors of economic or technical enterprises shall be seized only if they offer resistance to the German armed forces.

"5. The carrying out of military operations must not be hindered by these measures. *Planned searching and purging actions* are not contemplated.

"6. *In the army rear area*, functionaries and commissars, with the exception of political leaders among the troops, shall be turned over to the Special Commitment Squads (Einsatzkommandos) of the SD.

"II. On the other hand, memorandum No. 3 of Reichsleiter Rosenberg provides that only high and highest functionaries shall be liquidated, since functionaries on the state communal and economic level are indispensable for the administration of the occupied territory."

This memorandum was signed by Warlimont. Warlimont in his affidavit of 14 November 1945 states as follows [2884-PS, Pros. Ex. 113]:

"I recognize a document entitled 'Directives Regarding Treatment of Authorized Political Representatives of the Russian State for the Uniform Execution of the Mission Received on 31 March 1941', which is an excerpt from a proposed directive drafted by the OKH and dated 12 May 1941 (884-PS, Pros. Ex. 55). That document is a true and accurate statement of the proposals made by the OKH with respect to Soviet political functionaries and military commissars captured with Soviet troops. That document states that political functionaries and commissars among the Soviet prisoners of war are to be eliminated. That document bears my initials [signature] indicating that it had been sent to my division in the OKW and had been seen by me before submitting it to General Jodl, my immediate superior. I added to the document parts II and III before submitting it to General Jodl. In addition, on my own initiative, I sent a copy of the document to the OKW Legal Department for information, expecting that department to examine

the entire question and to render an opinion thereon to the Chief of the OKW."

On 6 June 1941, [NOKW-484, *Pros. Ex. 56*] the so-called Commissar Order was distributed to the OKH, OKL, and the OKM, and certain offices, with the request that it be distributed down only to the arm and air fleet commanders and that the other chiefs and commanders be informed by word of mouth. The cover letter is signed by the defendant. On 8 June, this order was distributed by von Brauchitsch with certain additional clauses, which read as follows [NOKW-1076, *Pros. Ex. 57*]:

"To I number 1—

"Action taken against a political commissar must be based on the fact that the person in question has shown by a special recognizable act or attitude that he opposes or will in future oppose the Wehrmacht.

"To I number 2—

"Political commissars attached to the troops should be segregated and dealt with by order of an officer, inconspicuously and outside the proper battle zone."

The idea for the murder of prisoners of war in the name of ideological warfare did not originate with Warlimont. However, the evidence establishes that he contributed his part to moulding it into its final form. It was distributed "by order" under his signature. There is nothing to indicate that those contributions which he made in any way softened its harshness, and we find the defendant guilty of a participating part in the formulation of this criminal order.

2. *The Commando Order*—On 7 October 1942, Hitler made a radio speech in which it was stated:

"All terror and sabotage troops of the British and their accomplices, who do not act like soldiers but like bandits, have, in future, to be treated as such by the German troops, and they must be slaughtered ruthlessly in combat wherever they turn up."

On 8 October the defendant Warlimont apparently was instructed by Jodl to put the announcement in the form of a military order. The defendant alleges he was given detailed instructions with regard to the contents of the order. On 8 October, von Tippelskirch, a subordinate of the defendant and Chief of WFSt/Qu (IV), issued a memorandum in which, after referring to the above radio announcement by Hitler, it was stated in paragraph II:

"Supplementary thereto, the Deputy Chief (WFSt) Armed

Forces Operations Staff issues the following order to section Qu, which is to be carried out speedily :

"1. Transposition into order form.

"2. Similar to the Barbarossa Order given previously, this order too, must—in accordance with WR and counterintelligence—be very carefully considered and worded. Distribution only as far as the armies, from there only orally. To be destroyed after reading.

"3. With regard to the contents of the order, the following must be considered :

"In those cases in which temporary arrest of persons takes place in our interest, they must be handed over through the counterintelligence to the SD, after intensive interrogation at which SD, too, must participate.

"Under no circumstances confinement in prisoner of war camps. Proceedings on the lines of this order are later on to be taken against the people from Norway."

This memorandum also refers to a telephone call to Ministerial-rat Dr. Huelle, a subordinate of Lehmann (in WR), concerning which the following entries were made :

"Members of terror and sabotage troops of the fighting forces of Great Britain, who can be proved to have disregarded the rules of honorable combat, are to be treated as bandits.

"They must be ruthlessly eliminated in combat or in flight.

"If military interests necessitate their temporary arrest or if they fall into German hands outside combat activities, they must be taken to an officer for immediate interrogation, and afterwards be handed over to the SD.

"Custody in prisoner of war camps is forbidden.

* * * * *

"He remarks further that the formulation could only be based on the facts as they appear in the press."

The significant part of this memorandum is contained in paragraph 2 which contains the order of the defendant as to this matter and which suggests certain procedure to be followed and certain provisions that must be *considered* in drafting the order. The defendant's contention that he received detailed instructions as to what the order was to contain is not borne out by the wording of these instructions. In the first place, with regard to the contents of the order, he states that "the following must be *considered*", which is not consistent with the contention that he had detailed instructions from Jodl. Nor is the substance of the order which he issued to section Qu. consistent with such contention.

The defendant has also introduced a rather elaborate and unconvincing defense to the effect that it was his intention to sabotage the order, first by conferences with counterintelligence and the legal section of the OKW, and secondly to sabotage it by having counterintelligence examine the persons captured, on the theory that counterintelligence under Canaris would see to it that they were not executed.

In connection with the first defense, it is to be pointed out that the instruction of the defendant was to the effect that the order must be prepared speedily. As to the second defense, the order of the defendant states that the following must be considered:

"In those cases in which temporary arrest of persons takes place in our interest, they must be handed over through the counterintelligence to the SD, after intensive interrogation at which SD, too, must participate."

By 8 October 1942, intensive interrogation had certainly come to have a sinister significance, particularly when carried out by the SD, which was to participate in such interrogations, and it is difficult to understand how the action of counterintelligence was to sabotage the order if the SD was to be present. Examination of this document can lead to but one conclusion; that it does not bear out the contention of the defendant of any intention on his part to sabotage the order; and it further bears out the fact that these provisions which were to be considered came from the defendant himself and not from Jodl and certainly not from the radio speech of Hitler, for these matters go beyond the radio speech.

In the light of these instructions of the defendant, it is significant that the order itself as finally issued contains the following:

"4. If individual members of such commandos, such as agents, saboteurs, etc., fall into the hands of the military forces by some other means, through the police in occupied territories for instance, they are to be handed over immediately to the SD. Any imprisonment under military guard, in PW stockades for instance, etc., is strictly prohibited, even if this is only intended for a short time."

Prior to the completed order, which it is noted was issued on 18 October 1942, only 10 days after the matter was submitted to the defendant, other proceedings were had with reference to the preparation of this order. On 9 October 1942, a teletype was sent to the Office Foreign Counterintelligence, inclosing a draft prepared by WR. This teletype was signed "by order" Warlimont. Certainly no time was lost in either the preparation of this draft by WR or its submission to counterintelligence.

This teletype also states: "A close examination—if necessary under cooperation of the Reich Leader SS—is requested."

Surely the suggestion of a conference on this matter with the Reich Leader SS cannot be assumed as a sabotage measure. The draft submitted also contains provisions pertaining to the matters discussed heretofore in relation to [Doc. 498-PS, Pros.] Exhibit 124.

On 10 October a teletype was transmitted to the OKW, WFSt, stating the objections of the Office Foreign Counterintelligence to the draft of the order submitted to it; and on 13 October a teletype to the OKW/WFSt signed by the Office Foreign Counterintelligence, making changes in its original teletype, was transmitted.

On 13 October 1942, a telegram, signed Canaris, was transmitted to the Armed Forces Operations Staff [Quartermaster Section] (Qu) Prisoner of War Affairs (K) relative to this matter and stating Canaris' objection to it.

On 14 October 1942, a file note was made by von Tippelskirch with reference to a telephone conversation with the Chief of the WR in which WR requests a phone call to the deputy chief of the [Armed Forces] Operations Staff and suggests a conference pertaining to the matter.

On 15 October 1942, a letter signed by Lehmann was sent to the Armed Forces Operations Staff, WFSt, with reference to a previous telephone conversation and for information to the Office Foreign Counterintelligence, discussing the subject of the treatment of prisoners of war in connection with the proposed Commando Order.

On 14 and 15 October 1942, various drafts pertaining to the proposed Commando Order were transmitted, apparently to Jodl. [Doc. 523-PS, Pros.] Exhibit 123 contains various drafts prepared by WFSt/Qu. dated 14, 15, and 17 October 1942, initialed by Warlimont. Pertaining to these drafts the statement of Jodl in his affidavit is quoted as follows:

"In reference to Warlimont's participation in the drafting, formulating, amending and execution of Hitler's 'Kommandobefehl' of 18 October 1942, and to the documents 506-PS, 531-PS, 1263-PS, and 1279-PS, submitted to me, I declare the following:

"Every time when the heading is 'Wehrmachtfuhrungsstab, Qu.', it referred to the quartermaster section. In this case, and as a rule—I say, as a rule, not always—they were matters which were handled by Warlimont directly with Field Marshal Keitel. Sometimes I saw one thing or another, but generally

not. He participated in such things much more than I did. I have worked but little with the quartermaster section. In order to keep a clear head, I did not bother with all these things. Therefore, Warlimont has participated to a greater extent, in all things where it says quartermaster section.

"Of course, I saw many things, but most of them I did not see. Of course, I have seen everything pertaining to operational things with which he dealt, except small matters of a subordinate nature, which he signed himself once in a while, such as unimportant individual orders about which he may have called me up before. Important matters were prepared by him, and then submitted to me."

This affidavit, while not particularly enlightening as to the Commando Order, is most enlightening as to the procedure followed in such matters, and definitely does not bear out the statement of Warlimont that he received detailed instructions from Jodl as to what was to be contained in the Commando Order which he was to draft. The exhibit shows, on page 27 [of original document], the initials of Warlimont. This was the final form of the draft which he submitted to Jodl. The remaining drafts in this exhibit were apparently prepared by Jodl himself. It is noted in this draft (paragraph 2) that the words "no matter whether as soldiers and/or in what uniform" are contained.

[Document 1263-PS, Pros.] Exhibit 122 shows certain changes in the defendant's handwriting were made therein. (*Tr. pp. 6988-9.*) These changes are not without significance. On [transcript] page 6993 the defendant claims "the changes in handwriting which I had to read to you, I did not invent myself but they had been ordered to me or at least ordered to this effect." Under the circumstances, the attempt to shift the responsibility for them, presumably to Jodl, is not convincing.

It is argued by the defendant Warlimont in his testimony that since Hitler drew up the final draft of this order himself, that he had no further connection therewith, and his responsibility thereto was terminated. The Tribunal does not agree with this contention. While it appears that Hitler drew up the final order, he had before him the ideas which had been expressed by the defendant in various drafts, and part of these were incorporated in the final order. It is significant that the Hitler order departs in many ways from the original radio announcement and goes much further. The ideas of the defendant are considered by the Tribunal to be a material part of the final product.

The record in this case shows that the Commando Order was carried out, and British, American, and Norwegian soldiers were executed under its provisions.

On 26 November 1942, the defendant Warlimont, in a note for personal report, advised Jodl that in the East the Army General Staff considered the destruction of the written Commando Order issued below army and staffs of other Wehrmacht branches of the same level, important in consideration of the situation in the East. Warlimont, on his own initiative, states in this note, "On other fronts also there exists the danger of this order falling into the hands of the enemy." Pursuant to this note and Jodl's order, a teletype was transmitted by the OKW/WFSt Qu., directing that all copies with the German troops in Africa and Finland were to be destroyed. A similar text was sent to the Navy, the Army and the Luftwaffe.

On 13 December 1942, the Armed Forces Commander in Norway sent a telegram to the OKW/WFSt stating the importance of interrogating captured commandos before shooting them, calling attention to the protest of the Reich Commissar and the Chief of the Security Police because this had not been done in the case of Egersund where commando liquidation had been immediate. The purpose of interrogations is clearly brought out by this document. This teletype was answered by the OKW/WFSt Qu (III), initialed by Warlimont, to the effect that retaining commandos for interrogation conformed to the Fuehrer Order of 19 October 1942.

The evidence in this case establishes that WFSt/Qu tried to assist the foreign office in concealing the nature of the Commando Order, and that the defendant had knowledge of and participated in this effort. Other evidence establishes that the defendant advised the Chief of Prisoner of War Affairs that commandos were not prisoners of war but criminals and therefore their deaths should not be reported to the home country. The defense of this inhuman act on the part of the defendant as found on transcript pages 7014 and 7015 is not sustained by the record. On 26 February 1944, the defendant prepared and sent a telegram to the Commander in Chief Southeast, Ia, with reference to landings of English commandos on the islands of Patmos and Piscopi, which reads as follows [510-PS, *Pros. Ex. 154*]:

"On the occasion of the reported landings by English commandos on Patmos on 19 February and on Piscopi on 23 February, reference is made once again to subject order."

The defendant claims that he knew this teletype order would not be carried out from conversations which he had with General Foertsch, Chief of Staff of the Southeast Command. The wording of the order is that of the defendant. It provides that with reference to a specific case, "reference is made once again to the

Commando Order". The teletype is addressed to the Commander in Chief, Southeast, Ia. It amounts to a direct order to him to apply the Commando Order. That Foertsch would receive this order we can only infer from his position as chief of staff. That he would ignore it, and his commander in chief would ignore it, we are asked to believe on the basis of some conversations of the defendant with him. As has been pointed out so frequently in this case, the chief of staff was charged with the responsibility of bringing such matters to the attention of his commanding general, and had no command authority over subordinate units of a command. The defendant could not assume that the order would not be carried out.

The defendant states that this order was signed "by order" and therefore it carried the weight of the Supreme Command of the German Wehrmacht. This Tribunal is not impressed with the defense that orders were issued by the OKW and OKH with the intention or understanding that they were not to be carried out, or meant something contrary to their express wording. The history of German arms and the record in this case do not indicate that the German Wehrmacht acted in an advisory capacity to subordinate units and their commanders' orders were issued to be obeyed as written.

In late May or early June 1944, the following teletype was prepared and transmitted to the Commander in Chief, Southeast, Ia, top secret [*NOKW-277, Pros. Ex. 155*]:

"Since details transmitted are sufficient for presentation to the Turkish Government, according to information received from the Foreign Office, the English radio operator Carpenter, and Greek sailor Lisgaris captured at Alimnia are no longer needed and are released for special treatment according to the Fuehrer order."

This was signed "by order" Warlimont. Pursuant to this teletype the Commander in Chief, Southeast reported these men were released for special treatment. Warlimont testified with reference to another document of 7 November 1943, when asked what he understood by special treatment:

"* * * at that time, I said to myself 'special treatment' means that these soldiers are not treated as prisoners of war. What further happened to them I didn't concern myself with."

Kipp, a subordinate of Warlimont, in his affidavit, states the meaning of the term as follows:

“Regarding the conception *special treatment* by the SD I state the following: We never gave it any thought in the WFSt as to what ways and means were used in carrying out this *special treatment*. It was, however, the general feeling that ‘*special treatment*’ meant that the persons involved were somehow eliminated by the SD, that is, were liquidated.”

This Tribunal finds that in May 1944, the defendant knew that the men whom he ordered released to the SD for special treatment were to be executed.

On 15 June 1944, the Chief of Staff of the Commander, Southeast, reported that pursuant to telephone instructions of Warlimont, the German Military Mission had arranged with the Bulgarian Army to treat enemy agents, saboteurs, etc., in accordance with the Commando Order. On 23 June 1944, in reply to an inquiry of the Commander in Chief West requesting instructions on the application of the Commando Order in the invasion of the West, Warlimont stated in a confidential memorandum the position of the WFSt as follows [531-PS, *Pros. Ex. 159*]:

“1. The Commando Order remains basically in effect even after the enemy landing in the West.

“2. Number 5 of the order is to be clarified to the effect, that the order is not valid for *those* enemy soldiers in uniform, who are captured in open combat in the immediate combat area of the beachhead by our troops committed there, or who surrender. Our troops committed in the immediate combat area means the divisions fighting on the front line as well as reserves up to and including corps headquarters.

“3. Furthermore, in doubtful cases enemy personnel who have fallen into our hands alive are to be turned over to the SD, upon whom it is incumbent to determine whether the Commando Order is to be applied or not.

“4. Supreme Command West is to see to it that all units committed in its zone are orally acquainted in a suitable manner with the order concerning the treatment of members of commando undertakings of 18 October 1942 along with the above explanation.”

This was signed Warlimont and not “by order”.

On 25 June 1944, an interoffice communication of Deputy Chief, WFSt to the Quartiermeister Section stated:

“Subject: Treatment of members of commando detachments.

“Chief WFSt desires that the following order be given without any formalities, but clearly and simply:

"1. All sabotage, etc., troops, encountered outside the actual combat area of Normandy will be eliminated, in special cases they will be delivered to the SD.

"2. Concise instructions will be given accordingly to all troops stationed outside the combat area of Normandy.

"3. The Commander in Chief West, starting immediately, will make daily reports on the number of saboteurs liquidated in this way. This number shall be given daily in the Wehrmacht report, in order to have a deterrent effect as it was already done in the same manner against previous commando operations. This applies in particular to the operations of the military commander."

This was signed by the defendant. This ruling was transmitted in substance by teletype, signed by Keitel, initialed by Warlimont, to the Commander in Chief West.

On 3 July 1944, he initialed a teletype "by order" to the effect that the order was not to be distributed further down than divisional staffs and comparable staffs, and that copies below this level were to be recalled and destroyed.

On 22 June, Warlimont initialed a letter to the WR stating that the Fuehrer order is to be applied, even if the enemy employs only one person for a task.

On 22 July, the opinion of various offices was obtained as to what should be done with regard to military missions captured with partisan groups. [Doc. 1279-PS, Pros.] Exhibit 165 contains opinions of various offices as to the action they believed should be taken. The document, in paragraph three, gives the opinion and proposal of the Armed Forces Operations Staff, which reads as follows:

"According to the orders issued to date even for example the British captured in the Roesselsprung operation must be treated as prisoners of war.

* * * * *

"The Commando Order has never yet been applied to such missions, its extended application to cover them has not yet been ordered. If the missions are to be treated otherwise than in accordance with the orders to date, it must first be decided whether a foreign mission acting with the partisan groups in the southeast is to be called a commando operation and therefore treated as such. Such a decision seems to be indicated even if it does not correspond completely to the wording of the Commando Order or to the previous definition of a commando operation (as an especially underhand and still unusual form

of warfare which must be combated with the appropriate countermeasures). The principle must be adopted from the start that all members of partisan groups, even in the Southeast, are fundamentally guerrillas. Indeed, they are treated as prisoners of war, for reasons of expediency, in order to obtain the largest possible number of deserters and workers. There is no reason for this with regard to the members of foreign missions who are not numerous. There is therefore no necessity to treat them in every case, in the same way as the members of partisan groups themselves. Basically, it would be far more appropriate to consider Anglo-American as well as Soviet Russian military missions as commando operations and to treat their members accordingly.

“The appended order is therefore proposed.”

This part of the document, including the appended order as proposed, is initialed by Warlimont. The minutes of the meeting also inclosed in this document show the handwritten note of the defendant Warlimont—

“Why still all these discussions *after* decisions have been taken according to paragraph 1?” (Initialed, Warlimont)

The final draft of the order, signed by Keitel, shows that the proposal initialed by Warlimont to the effect that military missions should be treated as commandos, became a part of the final order.

On 6 June 1944, Ambassador Neubacher sent a teletype message to the foreign office stating [NOKW-3240, *Pros. Ex. 1635*]:

“Wehrmacht Operations Staff, General Warlimont, gave the order to the Chief of Staff of Army Group F by telephone to hand over the captured war correspondents Talbot, Slapo, and Fowler to the SD, after they had been interrogated by military authorities and the foreign office, in accordance with the Fuehrer Order of 18 October 1942, on the treatment of prisoners from British commando operations.”

From this evidence it is apparent that not only did the defendant Warlimont contribute to the formulation of this order but that he participated in its enforcement.

3. *Prohibited labor of prisoners of war*—While the record in this case establishes many orders prepared by the sections of the WFSt under Warlimont's supervision pertaining to the use of prisoners of war, we are unable to find beyond a reasonable doubt any criminal connection of the defendant as to the illegal use of prisoners of war.

4. *Murder and ill-treatment of enemy belligerents and prisoners of war*—In the program adopted by the leaders of the Third Reich wherein they undertook to inspire the German population to murder Allied fliers by lynch law or “mob justice”, they were indeed sinking deeper into the morass of depravity. For in this they undertook to incite the German people to set aside the safeguards of law built up through centuries and to resort to mob violence. That such a plan was fostered and encouraged by the Third Reich is established by the record. It has been commented upon in the judgment of the IMT and was passed upon by Tribunal III in the Justice Case.

This plan constituting a crime against humanity, the question arises as to the connection of the defendant Warlimont with this criminal undertaking. As shown by the record, this plan as to so-called Allied terror fliers was divided into two parts. The first of these had to do with fliers who had been captured and were in the air force prison at Oberursel. Those who it was decided had taken part in alleged illegal activities were to be turned over to the SD for liquidation, contrary to the provisions of the Geneva Convention. In this regard the prosecution concedes that the proof does not establish that any orders pertaining to this were ever issued or carried out. The animus of the defendant in this matter, however, is established by documents which show his consent and approval of this proposal.

The second part of this illegal program provided that, through the Party and the agencies of propaganda under Goebbels, the German people were called upon to execute Allied fliers who fell into their hands and were assured that they would not be called to account for their actions in such cases. This was done by orders issued to the police, by information disseminated by the Party, by suspension of prosecutions against the populace, and also by preventing interference of the army in such cases. The record shows the defendant Warlimont was well informed on the entire matter. He attended numerous conferences and personally discussed the matter with Kaltenbrunner, one of the active participants in the whole procedure, who informed him that lynch law was to be the rule. There was much correspondence, in which he took a part, with the foreign office and with Goering, who was reluctant to consent to participation in this scheme for fear of reprisals. The authors of the plan desired on the one hand to intimidate the enemy and at the same time to cloak its operations in such a manner that it would not result in reprisals. The problem was to outline for publication certain alleged acts of Allied fliers which were contrary to international law and therefore deprived them of the status of prisoners of war. This was not easy to do.

At the conference of 6 June 1944, attended by the defendant, it is shown that he mentioned that [735-PS, *Pros. Ex. 346*]:

“* * * apart from lynch law, a procedure must be worked out for segregating those enemy aviators who are suspected of criminal action of this kind, until they are received into the reception camp for aviators at Oberursel; if the suspicion was confirmed, they would be handed over to the SD for special treatment.

“For this purpose the WFSt would cooperate with the Supreme Command of the Air Force to get out the necessary regulations for the use of the head of the camp at Oberursel.

“Obergruppenfuehrer Kaltenbrunner expressed his complete agreement with this view and that the SD take charge of those aviators segregated.”

On 14 June a draft was prepared by the quartermaster section of the OKW, and initialed by Warlimont, which contained a statement [734-PS, *Pros. Ex. 348*]:

“In connection with the press notices at home and abroad about the treatment of terror fliers who fall into the hands of the population, an unequivocal determination of the concept of those facts which characterize a criminal action in this sense is called for.”

Regarding this statement, Warlimont made the comment on the draft, “This is not quite the point”; and he further amended the draft by stating that the definition of criminal acts is necessary “only for publication”. The matter was taken up with the Foreign Office by Keitel in a letter initialed by Warlimont, requesting approval of the Foreign Office to the proposed action. On the same date a similar letter was sent to Colonel von Brauchitsch, Goering’s adjutant. This draft was corrected by Warlimont and contains his initials. This letter stated as follows:

“I. On the basis of preliminary discussions and pursuant to an agreement with the Reich Minister for Foreign Affairs and the Chief of the Security Police and SD the following are to be regarded as acts of terror when a case of lynch law is made public and/or to justify the handing over of prisoners of war among enemy fliers from the receiving (PW) camp for fliers at Oberursel to the SD for special treatment.”

On 23 June 1944, [NOKW-009, *Pros. Ex. 347*] a letter prepared by the WFS/Qu. [Verw. 1] addressed to the Commander in Chief of the Air Force, for the attention of Colonel von Brauchitsch, undertook to speed Goering’s decision with regard to this matter.

On 20 June, Ambassador Ritter answered Keitel's letter of 15 June 1944, enclosing a draft by the Foreign Office which states as follows [728-PS, Pros. Ex. 1638] :

"In spite of the obvious objections, founded on international law and foreign politics, the Foreign Office is basically in agreement with the proposed measures.

"In the examination of the individual cases a distinction must be made between the cases of lynching and the cases of special treatment by the Security Service (SD).

"I. In the cases of *lynch law* the sharp definition of the criminal acts, as given in numbers 1 to 4 of the letter of 15 June, is not very important. First of all no German official agency is directly responsible; death has already occurred before a German agency is concerned with the case. Furthermore the accompanying circumstances will, as a rule, be such that it will not be difficult to present the case in a most suitable manner when it is published. In the cases of lynch law it will therefore be mainly a question of *correctly dealing with the individual case when it is published.*"

Concerning the last statements of this above-quoted draft, a notation of Warlimont's appears on the margin as follows: "That is the whole point of our letter" (initialed Warlimont).

In paragraph II concerning airmen captured by the armed forces, Ritter shows that in his opinion these men acquired the legal status of prisoners of war. After this statement Warlimont placed a question mark and noted, "Precisely, this will be prevented by the proposed segregation". Ritter then went on to state:

"These rules are so precise that any attempt to disguise an individual case of violation by a clever wording of publication would be hopeless."

To this statement Warlimont wrote on the margin :

"No—through the segregation and immediately following special treatment."

Goering finally agreed in general to the procedure recommended and Warlimont wrote, "We finally have to *act*. What else is required for that?"

During all these discussions the defendant is shown to have had an active part and to have been concerned not only with the legality of the question, but with the possibility of handling the entire matter by publication in such a way as to avoid reprisals.

In a file note dated 2 October 1944 it is stated :

"The Herr Reichsmarschall agrees that the order OKW/WFS Qu (Administration 1) No. 05119/44 secret of 9 July 1944, concerning the conduct of soldiers, in case of 'mob justice' being attempted by the population on downed terror fliers, is issued within the Luftwaffe as an order of the Supreme Command of the Armed Forces, but *not* as an order of the High Command of the Luftwaffe." [NOKW-548, Pros. Ex. 355]

It is shown that the Air Force Administrative Command VI Tactical Group Ia issued on 11 December 1944 the following order, pertinent parts of which are quoted [NOKW-3060, Pros. Ex. 1462]:

"The Chief OKW has issued the following order (OKW/WFS/Qu 'Verw. 1' No. 01 119/44 secr. dated 9 July 1944) concerning the behavior of the soldiers in cases of self-help action taken by the civilian population against terror fliers shot down:

"Recently, it has happened that soldiers have actively protected Anglo-American terror fliers from the civilian population, thus causing justified resentment. You will take immediate steps in order to ensure by *oral instruction* of all subordinate units and command authorities that the soldiers do not counteract the civilian population in *such* cases by claiming the handing over to them of the enemy fliers as prisoners of war and by protecting, and thus ostensibly siding with, the enemy terror fliers.

"No fellow German can understand such attitude from the part of our armed forces. The inhabitants of the occupied territories, too, must not be restrained from either resorting to self-help out of their justified indignation against the Anglo-American terror fliers, or from giving other utterances to their justified resentment against the prisoners belonging to the enemy powers. In addition, I refer to the article by Reich Minister Dr. Goebbels published in the 'Voelkischer Beobachter', Berlin edition dated 27 May 1944, No. 148, and entitled: 'A comment on the enemy air terror.'"

The significant part of this order is that it was based on an order of the OKW WFS/Q (Verw. 1), dated 9 July, at the time when this matter was being discussed as outlined above. It is contended that from the date of this order it could not have been based upon any order actually issued by the WFSt but must have been based upon a personal order of Hitler as Commander in Chief of the Replacement Army. With this contention, this Tribunal cannot agree. Regardless of the date that this order was finally issued by the Luftgau Command, the date of the order referred to derives from the quartermaster section under Warlimont, and

the date was at the time when he was concerned with this entire matter.

We therefore find the defendant Warlimont connected with the illegal plan of the leaders of the Third Reich fostering the lynching of Allied flyers and that he contributed a significant part to this criminal program. The record shows many instances where the German population, pursuant to this plan, murdered Allied fliers who fell into their hands.

In commenting upon the defendant, Jodl stated:

"Developed better and better from year to year. In addition to his ever eminent mental qualities his far sightedness and his comprehensive knowledge and experiences, his National Socialist attitude also has become strongly marked. As my deputy and chief of the whole staff of irreplaceable value to me. Excellent. By the Fuehrer's order compelled to stay in present position."

5. *Deportation and enslavement of the civilian population*—The record in this case, from various communications, reports and conferences, establishes that the defendant Warlimont was well aware of the criminal program of the Third Reich as to the deportation and use of civilians from the occupied territories for slave labor in Germany. As to his connection therewith, [Doc. 3819-PS, Pros.] Exhibit 536 shows that Warlimont attended a conference in the Chancellery of the Third Reich, called for the purpose of taking intensive measures for the recruitment of foreign laborers. The minutes of this conference, in pertinent part, read as follows:

"The representative of the head of the OKW, General Warlimont, referred to a recently issued Fuehrer order, according to which all German forces had to place themselves in the service of the work of acquiring manpower. Wherever the Wehrmacht was and was not employed exclusively in pressing military duties (as for example, in the construction of the coastal defenses), it would be available but it could not actually be assigned for the purposes of the GBA [Plenipotentiary General for Labor Allocation]. General Warlimont made the following practical suggestions:

"a. The troops employed in fighting partisans are to take over in addition the task of acquiring manpower in the partisan areas. Everyone, who cannot fully prove the purpose of his stay in these areas, is to be seized forcibly.

"b. When large cities, due to the difficulty of providing food, are wholly or partly evacuated the population suitable for labor commitment is to be put to work with the assistance of the Wehrmacht.

“c. The seizing of labor recruits among the refugees from the areas near the front should be handled especially intensively with the assistance of the Wehrmacht.”

The Tribunal is of the opinion that these suggestions of the defendant Warlimont made at these conferences are themselves sufficient to connect him criminally with the illegal program of the Reich for recruiting slave labor. Further, we find from the evidence as shown in [Doc. NOKW-564, Pros.] Exhibit 1631 of 1 August 1944 and [Doc. NOKW-552, Pros.] Exhibit 1632 of 10 August 1944, shortly after the conference of 12 June 1944, that the methods which he suggested were put into operation.

The Tribunal finds the defendant guilty of criminal participation in and connection with the deportation and enslavement of civilians.

6. *Plunder of public and private property and wanton destruction*—The record in this case shows that the defendant Warlimont had knowledge of this matter, but we are unable to find from the evidence in this case beyond a reasonable doubt that he was connected therewith.

7. *Murder, ill-treatment, and persecution of civilian population.*

a. *Criminal connection with the Barbarossa Order*—The evidence in this case, including but not limited to Exhibits 590 and 593, establishes the criminal participation of the defendant in the formulation of the Barbarossa Jurisdiction Order and we so find. We have discussed this order in other parts of this judgment, and in particular as to the defendant Lehmann, and shall not go into it further here.

b. *Illegal executions of the civilian population*—The defendant is also charged with participation in the formulation of the so-called Hostage Order. This order is in fact not a hostage order in any meaning of the term but, regardless of the designation that may be given to it, it is a criminal and illegal order and we so find. It is claimed by the defendant that page two of this order was taken out and rewritten without his knowledge while page one and three remained unchanged. It is conceded by the defendant, however, that the type is the same on the three pages, and that the second page might have been written in the Regional Defense Division of the OKW. Careful examination of this document and the testimony of the defendant in regard thereto brings out further significant facts. Page two begins with paragraph two. It ends with the second paragraph under the heading “c”. It is obvious that page three refers to the last paragraph on the preceding page. From the statement “clever propaganda of this kind, etc.,” it is clear that the first paragraph on page three fol-

lows the last paragraph on page two. It is further evident that in the original unchanged document there must have been a paragraph three with subheadings a, b, and c. It is very unlikely that either Hitler or Keitel, in changing a draft of the defendants with which they were not satisfied, would have followed the paragraphing of the defendant in so doing. Apparently one of these paragraphs had to do with the number of people who were to be shot in atonement for each German soldier. In respect to that number, the defendant no longer remembers whether or not the original draft, prepared by the defendant, contained the figures 5 to 10 as the ratio established, and he states to the best of his recollection, no figures were contained in the original draft. It is apparent, however, from the evidence that some ratio was to be established. Keitel's testimony before the IMT regarding this matter merely shows that the ratio submitted by him to Hitler was changed from 10 and 5 to 100 and 50 by Hitler.

Paragraph 3(a) provides—

“It should be inferred, in every case of resistance to the German occupying forces, no matter what the individual circumstances, that it is of Communist origin.”

This provision in itself was illegal. Defendant's recollection on the whole matter appears to be somewhat vague but he recalls that in the headquarters it was general talk that Hitler added the zeros to the 5 and 10 figures. This we can readily believe. The first and third pages of this order, which the defendant admits having drawn, do not support the contention that the second page claimed to have been submitted by him made his draft legal. We are convinced that the original draft as submitted to Keitel was illegal regardless of the figures inserted or whether the ratio was left in blank to be filled in by his superiors.

Warlimont's defense that he immediately took steps to see that it would not be carried out throughout the wide domain of the Wehrmacht to which it was distributed is not convincing. His testimony that his was a negligible position is not consistent with such a far-reaching capacity to nullify an order of the OKW.

c. Discrimination, persecution, and execution of Jews by the Wehrmacht, and cooperation with the Einsatzgruppen and SD— From the record in this case showing the defendant's official position, his associates, both superior and inferior, from his many activities to which he has testified, and from the documents before us, this Tribunal is thoroughly convinced that the defendant knew of the extermination program which was being carried out by his superiors and associates. Just when he acquired this knowledge it would be impossible to determine, and we are unable

to find beyond a reasonable doubt from the evidence before us that he knowingly was connected with or participated in its execution.

d. Cooperation with the Einsatzgruppen of the Rosenberg staff—From his position as Jodl's deputy as liaison agent with the Rosenberg organization, we also are convinced of his knowledge of the illegal activities carried out by this organization. But we are, from the evidence before us, unable to find beyond a reasonable doubt that he was connected with its illegal activities.

e. Reprisals against families of French officers—The record in this case establishes the discreditable and inhumane attitude of the defendant toward innocent members of families of French officers, but we are unable to find from the evidence where he participated in any international criminal act in this matter.

f. The Night and Fog Decree—The question arises as to the connection which the defendant Warlimont had with this decree, but we are unable to find from the evidence beyond a reasonable doubt any criminal connection therewith.

g. Other illegal orders—On 1 July 1944 Warlimont sent the following teletype to the Chief of the WR [NOKW-2576, *Pros. Ex. 823*]:

“Subject: Combating of enemy terrorists in the occupied territories

“On account of events in Copenhagen, the Fuehrer has decreed that court martial proceedings against civilians in the occupied territories must be discontinued with immediate effect. WR is requested to submit suggestions for the draft of an order concerning the treatment of enemy terrorists and saboteurs among the civilian population in the occupied territories by 2 July, 2000 hours.

“*Policies*

“Terror can be countered only by terror, but court martial sentences only create martyrs and national heroes.

“If German units or individual soldiers are attacked in any manner, the commander of the unit and/or the individual soldier are bound to take countermeasures independently and, in particular, to exterminate terrorists. Terrorists or saboteurs who are arrested later, must be turned over to the SD.”

As a final paragraph, which is hardly adapted to relegate the Commando Order to the oblivion which he claims to have so earnestly sought, the defendant states:

“The Fuehrer Decree on the treatment of enemy commandos, dated 18 October 1942 (The Fuehrer No. 003830/42 top secret (mil.) OKW/WFSt) will remain in force as it does not apply to the civil population.”

The record in the case shows that the defendant, during the course of the war, was located at Hitler's headquarters and in constant contact with Keitel and Jodl, and attended almost daily conferences with Hitler.

We have found the defendant guilty of participating in many criminal orders which permeated the conduct of the war. He may not have furnished the basic ideas, but he contributed his part and was one of the most important figures of the group which formed them into the final product which, when distributed through the efficient agencies of the Wehrmacht and police, brought suffering and death to countless honorable soldiers and unfortunate civilians.

The defendant Warlimont is guilty under counts two and three of the indictment.

OTTO WOEHLER

Otto Woehler was born on 12 July 1894. He participated in the First World War as troop leader and was wounded three times. Following the war he became an officer in the Reichswehr, or One Hundred Thousand Man Army, and served in various capacities until 1 April 1938, when he was transferred to the staff of the Army Group 5 in Vienna under General List. This became the 14th Army and he continued to serve with this army as Ia throughout the Polish campaign. After this he was transferred and became Chief of the General Staff of XVII Corps. He participated as such in the Western Campaign.

In the fall of 1940 he was transferred and became Chief of Staff of the 11th Army which was newly activated. On 1 May 1942, he was transferred and appointed Chief of Staff of the Army Group Center where he remained for 10 months. In March of 1943, he was given command of I Army Corps as acting commanding general and later, on 1 June 1943, was designated as the commanding general of this corps. On 1 July 1943, he took over command of XXVI Corps which he held until approximately 14 August 1943. At approximately this time he was transferred to Army Group South and became Commander of the Army [Armee-Abteilung] Kempf which on 15 August, when he took over, was known at times as the Army Group [Armee-Gruppe] Woehler and ultimately became the 8th Army. He was Commander in Chief of the 8th Army until December 1944. On 22 December he was designated as Commander in Chief of Army Group South which he held until 6 April 1945.

He did not belong to the Nazi Party or any of its formations.

Aside from the charge of crimes against peace, heretofore dis-

posed of in this opinion, we think that charges under counts two and three of the indictment may be disposed of under the following headings: (1) The Commissar Order; (2) The Commando Order; (3) murder and ill-treatment of prisoners of war; (4) prohibited labor of prisoners of war; (5) The Barbarossa Jurisdiction Order; (6) hostages and reprisals; (7) plunder and wanton destruction; (8) deportation and enslavement of civilians; (9) murder, ill-treatment, and persecution of civilians.

1. *The Commissar Order*—The proof in this case shows the defendant, as chief of staff of the 11th Army, knew of the receipt of this order. It does not, however, establish any participation in its transmittal to subordinate units. It also shows that he knew of the enforcement of this order in the 11th Army but the responsibility for carrying out this order within the 11th Army must rest with the commander in chief and not with the chief of staff. Criminal acts or neglect of a commander in chief are not in themselves to be so charged against a chief of staff. He has no command authority over subordinate units nor is he a bearer of executive power. The chief of staff must be personally connected by evidence with such criminal offenses of his commander in chief before he can be held criminally responsible.

2. *The Commando Order*—The proof in this case does not establish that it was distributed by the defendant or that it was executed with his knowledge and consent.

3. *Murder and ill-treatment of prisoners of war*—As Chief of Staff of the 11th Army, he is charged with responsibility for an order issued by the OQu for "AOK". While part of this order is considered criminal by the Tribunal, the fact that this order was issued by a subordinate of the defendant in the staff organization over whom he had no command authority leads the Tribunal to conclude that the defendant was not connected therewith. The OQu was a subordinate of the chief of staff but he was also a subordinate of the commander in chief and to hold the chief of staff responsible for this order, we must necessarily make the assumption that it was not issued by the commander in chief without his intervention which the document in itself does not establish. The fact that this order was actually carried out by subordinate units as shown by evidence in the record is the responsibility, as stated above, of the commander in chief and not of the chief of staff.

As Commanding General of the I Army Corps, the record establishes that he reported to the AOK 18 the illegal shooting of two captured Red Army soldiers. The defendant made these reports as commanding general and apparently did nothing about them

but his acquiescence and approval are not considered established by the evidence.

4. *Prohibited labor of prisoners of war*—Documents in evidence show that while Commander in Chief of the 8th Army, units subordinate to Woehler used prisoners of war in the combat area and that such prisoners were allocated to regiments for the construction of field positions. It is the opinion of this Tribunal as heretofore stated, that the use of prisoners of war by regiments and forward units of command in a combat area constituted a use in a position of danger. We are further of the opinion from the evidence that the defendant knew and acquiesced therein. The fact that similar use was made of German prisoners by the enemy is only a factor in mitigation and not in defense.

5. *The Barbarossa Jurisdiction Order*—It is shown that this order was received by the 11th Army but no criminal connection with its distribution has been established by the evidence as to this defendant. Criminal acts thereof are to be charged against the commander in chief, not the chief of staff as heretofore stated. However, on 5 September 1941, an order was issued by the 11th Army, signed for the AOK by Woehler, as chief of staff. From the nature of this order, it would appear that it was not of that basic nature which necessarily would be submitted to a commander in chief. It is such an order as a chief of staff would normally issue of his own volition. Whether or not that be so, the wording of this order would certainly be a matter that would come within the jurisdiction of a chief of staff of an army. This order provides in paragraph 5 as follows:

“Guarding the front lines alone is not sufficient. Corps as well as the Commander of the Army Rear Area has to send patrols constantly to the main rear lines of communication for ‘raids’, which arrest all suspicious civilians and check whether they reside in the area. Civilians who are sufficiently suspected of espionage, sabotage, or of partisan activities are to be shot by the GFP after interrogation. Strangers in the area who are unable to establish the purpose of their stay credibly are, if possible, to be turned over to the SD detachments, otherwise to prisoner camps to be sent on to the SD detachments. Young boys and girls, which are preferentially employed by the enemy, are not to be excepted.”

Under this paragraph it is provided that civilians who are “sufficiently suspected” of certain offenses are to be shot, including boys and girls. The defendant’s explanation that this order does not mean what it says is not convincing. At its best it could only be construed as ambiguous and if it meant something other than

what it states, it was certainly the province of the chief of staff to see that that error was corrected. The Tribunal is of the opinion that it meant precisely what it stated and that the defendant was criminally connected therewith and is responsible therefor.

We are not impressed with the contention that suspects were interrogated before being shot. The record in this case shows that the purpose of such interrogations was primarily to obtain information of value to the German Army and not in the interest of the person interrogated under such orders.

The Kodyma incident had been suggested as establishing criminal responsibility upon the defendant. The record shows that the report on this matter came to Woehler's knowledge and was initiated by him and he testified that he called the matter to the attention of his commander in chief. If he did so, this was all that could be expected of him. The responsibility in this case rests with the commander in chief and was not the responsibility resting upon the chief of staff.

6. *Hostages and reprisals*—As regards this matter the charges against the defendant are based upon transactions which took place within the area of the 11th Army while he was chief of staff.

No personal action which he took or neglected to take within the scope of his authority is shown by the evidence and for the reasons above stated, the opinion of the Tribunal is that the proof fails to establish his criminal connection.

7. *Plunder*—The Tribunal is of the opinion that the evidence in this case fails to establish under this heading any connection of the defendant with criminal responsibility for plunder not justified by military necessity.

8. *Deportation and enslavement of civilians*—The evidence in this case shows that as Chief of Staff of the 11th Army, orders pertaining to the use of civilians were issued for the 11th Army which were signed by Woehler. These orders are not basic orders and would normally be issued by a chief of staff without even consulting the commander in chief and certainly without such orders being drawn by the commander in chief. These orders show the illegal use of civilians with which the defendant is criminally connected.

Further, the evidence in this case establishes the practice of compulsory illegal use of civilians under Woehler as Commander in Chief of the 8th Army by units subordinate to him. The evidence further shows that on 25 June 1944, an order was issued for the headquarters of the Army Group Woehler "by order," and signed by his quartermaster. This order provided for the

compulsory recruitment of civilians and others to the Reich for slave labor in the mines.

9. *Murder, ill-treatment, and persecution of the civilian population*—The evidence in this case establishes the elimination of so-called undesirables, mostly Jews, within the area of the 11th Army while Woehler was chief of staff. This murder program was carried out under the direction of Ohlendorf who appeared as a witness for the defense in this case. The approximate number of murders committed within this area was in the neighborhood of 90,000 including men, women, and children. The evidence establishes that this murder program was known in part at least to staff officers under Woehler. The defendant denies knowledge of this program.

The evidence establishes that he held various conferences with Ohlendorf and Ohlendorf testified that the matter was not specifically discussed because he assumed the defendant was aware of the program. This program was carried out over an extensive period of time and in many places within the occupational area of the 11th Army. It was executed by Einsatzgruppen and Sonderkommandos of the SIPO and SD attached to that army, sheltered, fed, and placed by that army. Certainly the slaughter of 90,000 people by these police units under these circumstances could not have escaped the knowledge of the chief of staff of that army unless he was grossly incompetent. The defendant did not indicate incompetence while on the stand and the comments of his various commanders as shown by his service record refute any such appraisal. But we need indulge in no general presumptions. The record establishes knowledge by the defendant of the extermination activities of these Einsatzgruppe units.

Ohlendorf whom the defendant called as his own witness, testified that staff officers of the 11th Army, over whom the defendant exercised supervision, knew of his activities. He also testified that he received cooperation from various units of the army, such as the furnishing of trucks to take his victims to the places of execution, and that at times the army called on him for assistance in these matters. Surely the knowledge of these staff officers was not kept from the chief of staff. Further, the documentary evidence in this case establishes the defendant's knowledge. Among those we cite:

[NOKW-3437, Pros.] Exhibit 1601—initialed by Woehler.

[NOKW-641, Pros.] Exhibit 871—bearing his signature.

[NOKW-3238, Pros.] Exhibit 1606—initialed by Woehler.

[NOKW-584, Pros.] Exhibit 781—pertaining to the execution of some 1,184 people in retaliation for activities in Yevpatoriya.

- [NOKW-1687, Pros.] Exhibit 780—which refers to the same instance and states that 1,300 were executed.
- [NOKW-1573, Pros.] Exhibit 883—A report of the Ortskommandantur, 14 November 1941, to the rear area of the 11th Army, which states that 10,000 Jews remaining were being executed by the SD.
- [NOKW-1632, Pros.] Exhibit 872—Report of Ortskommandantur at Melitopol, 13 October 1941, wherein it is shown that 2,000 Jews were executed by the SD; an instance which occurred within 15 to 20 miles of the headquarters of the 11th Army.
- [NOKW-1702, Pros.] Exhibit 861—A communication from the Ortskommandantur of Anayev of 3 September 1941, which reports the shooting of 300 Jews and Jewesses on 18 August 1941, to the commander of the rear area of the 11th Army.
- [NOKW-3236, Pros.] Exhibit 1607—A report to the 11th Army by Ohlendorf, initialed by Woehler.
- [NOKW-3234, Pros.] Exhibit 1609—A report by Ohlendorf, initialed by Woehler, showing the imprisonment of 227 Jewish suspects and showing the execution of Jews as hostages and the shooting of political functionaries of the Communist Party by the Einsatzgruppe unit.
- [NOKW-3237, Pros.] Exhibit 1595—A report of 4 August 1941, showing that 97 Jews were executed in Kodyma by units of the Einsatzgruppen and 24 soldiers subordinate to Salmuth, which instance Woehler states he reported to his commander in chief.
- [NOKW-3233, Pros.] Exhibit 1594—A report of 4 August 1944, by Ohlendorf to the effect that 68 Jews had been shot for Communist activities, and showing the establishment of a ghetto in Kishinev, and further stating that on 31 July, Jewish hostages were shot.

The defendant disavows knowledge of events occurring in the rear area of the 11th Army on the basis that the Oberquartiermeister or Qu. 2 did not report to him such matters in connection with the army rear area. Field Manual 90 for 1 June 1938, edition 1940, states "The Oberquartiermeister is subordinate to the Chief of the General Staff of the Army". As Chief of the General Staff of the 11th Army, the defendant was chief of staff for the whole army area including the army rear area. It was his duty as Chief of Staff of the 11th Army to consult with subordinates on his staff as to matters occurring therein and to advise his com-

manding general concerning such matters. We cannot believe that in neglect of that duty the defendant's knowledge of matters concerning the 11th Army stopped at the boundary of the rear area.

On this evidence the Tribunal can only find that the defendant Woehler had knowledge of the extermination activities of the Einsatzgruppen when he was Chief of Staff of the 11th Army.

He was not, however, the commanding officer, and his criminal responsibility must be determined from personal acts in which he participated or with which he is shown to have been connected. This resolves itself into the question as to whether as chief of staff he assigned Einsatzgruppen to various localities wherein they operated and carried on their illegal activities. That he did so is shown by both the testimony of Ohlendorf and by documents in evidence. [Doc. NOKW-3453 Pros.] Exhibit 1605 shows that the defendant on 3 July 1941 issued an order, signed by him, assigning a Sonderkommando to Stanca. This order states that the Sonderkommando performs its duties at the order of the chief of the Security Police and on its own responsibility.

On 14 July a similar order was issued assigning Einsatzkommando 11a to LIV Army Corps "in order to carry out its assignment in Kishinev". This order states:

"Einsatzgruppe D of the Security Police, except for the Sonderkommando in action, will continue to be subordinated in Piatra Neamt to AOK 11."

It states further:

"In accordance with information received from Army Group South, it is not intended to employ Einsatzgruppe D, in the army area."

On 22 July he signed an order stating that the Einsatzgruppe D "except Sonderkommando 11a and 10a is to be moved from Piatra Neamt to Iasi," and providing that "Sonderkommando 11b will be employed in the area of the 2d Rumanian Army with the task to carry out assignments of a political nature".

On 7 August he signed a similar order to the Einsatzgruppe D, stating "The Einsatzkommandos which are employed have to look after security in the combat area behind the combat troops from the counterintelligence point of view in addition to the tasks given them so far".

This same exhibit shows that on 20 September the defendant initialed a communication addressed to the 11th Army which was transmitted under date of 29 September to the counterintelligence officer to take action, concerning measures taken by the Ein-

satzgruppen of the 22d Infantry Division and also shows on 6 October 1941 from Army Headquarters with the subject "Measures taken by the Einsatzkommando with the 22d Infantry Division" and addressed to the Einsatzgruppe D, the following directive:

"The Einsatzkommando of the Security Police with the 22d Infantry Division is in the combat area of the division. It is expected that all measures in the town of Genitchek, especially public executions, setting up and arming the Ukrainian Home Guard, etc., will only be taken after previous agreement with the Ic of the division."

This is signed by the AOK, Chief of Staff, initialed by Riesen, R-i-e-s-e-n, and evidently bearing another initial "R", a major of the general staff corps. This directive to the Einsatzgruppen is also shown in [Doc. NOKW-641, Pros.] Exhibit 871.

Certainly these orders as to the location of Einsatzgruppe units were not such basic orders as can be charged to the commander in chief, but would clearly be within the sphere of authority of a chief of staff.

For the reasons herein stated, and on the whole record, we find the defendant guilty under counts two and three of the indictment.

RUDOLF LEHMANN

Rudolf Lehmann was born in 1890 at Poznan. After preliminary education, he studied law and received his doctor's degree in 1920 at Marburg. His practice, however, was interrupted by the First World War in which he participated as an officer in the reserve. From then on he followed the career of jurist in various capacities.

In 1925, he became an assistant in the Reich Ministry of Justice and continued in the Ministry in various capacities until 1937. In that year he became presiding judge at the newly created Reich Armed Forces Court which was the highest military court in the German Reich. He sat on the tribunal which was appointed by Hitler to investigate the charges against General Freiherr von Fritsch. He testified that he drew up the verdict in this case. On 15 July 1938, he became Chief of the Legal Department of the OKW, designated in the documents as WR, which position he held until the capitulation of Germany. He held this position as a civil servant. On 1 May 1944, he was given the military title of Generaloberstabsrichter which was in fact a general in the German Army, which corresponds to that of a lieutenant general in the Army of the United States. He was not a member of the Nazi Party or any of its formations. The record does not establish that any honors were conferred upon him by the Nazi Party.

Aside from the charge of crimes against peace, heretofore disposed of in this opinion, we think that charges under counts two and three of the indictment may be disposed of under the following headings: (1) The Commissar Order; (2) The Barbarossa Jurisdiction Order; (3) The Commando Order; (4) Night and Fog Decree; (5) Terror and Sabotage Decrees. These subjects will be discussed in the order herein designated.

1. *The Commissar Order*—The only connection which the defendant is shown to have had with the issuance of the Commissar Order was an immaterial change in the wording of section 3 as to courts martial and the Tribunal is unable to find from the evidence any criminal connection of the defendant Lehmann with the issuance of this order.

2. *The Barbarossa Jurisdiction Order*—In this judgment we have previously discussed the legality of the Barbarossa Jurisdiction Order and have found it to have constituted an illegal order. The question now arises as to the criminal connection of the defendant Lehmann therewith.

The defendant Lehmann first received an order concerning this matter sometime in late April of 1941. The early stages of the development of the order are shrouded in obscurity as far as they appear in the documents in evidence. The defendant Lehmann, in his testimony, has given a rather elaborate statement as to what these developments were and his connection therewith. We shall not go into these early developments extensively. From his testimony it would appear that the circumstances of the order as communicated to him by Keitel's adjutant so aroused him that he drew an impracticable order to the effect that legal officers would be dispensed with in the German Wehrmacht and sent into combat service. According to his testimony, his reaction to the communication he received was primarily based upon the effect of the order upon military jurisdiction.

The Barbarossa Jurisdiction Order which was finally produced is an excellent example of the fundamental and essential functions which a staff performs in producing a military order from an original idea. The record discloses conferences, telephone calls, and much correspondence, all independent of Hitler. In this way the details of the order were worked out. Many of these details originated in the minds of various staff officers and some in the mind of the defendant.

In summarizing the generally significant parts of these proceedings, it is shown that on 28 April 1941, the defendant prepared a draft of the Barbarossa Jurisdiction Order. On or about 6 May he received a copy of an order which had been prepared by the OKH, apparently by General Mueller, the General for Special

Assignments with the OKH, which embodied certain ideas of Generaloberst Halder, Chief of Staff of OKH. On 9 May the defendant reported to the Chief, WFSt, Department L (Warlimont) concerning certain discussions which he had with General Mueller and General Jeschonnek, and also as to discussions with the chiefs of the legal sections. The defendant had conferences with both General Mueller and General Jeschonnek concerning this matter. As an outgrowth of these activities a final and fourth draft was submitted to Keitel which, with a few minor modifications, was issued over the signature of Keitel and became what is known as the Barbarossa Jurisdiction Order.

In connection with these various conferences and various drafts and the correspondence connected therewith, it is apparent that the defendant's ideas for good or evil became a part of this order as issued. On the favorable side as to these details it can be said that he did not embody in the final draft which he submitted the inflammatory language which was contained in the first draft submitted by the OKH. Furthermore, in his favor in this connection, it is pointed out that that draft provided that inhabitants "who take part or intend to take part in the hostilities as guerrillas, etc.", and that in the defendant's final draft the words "or intend" were not included. His final text, however, contained the provisions as to collective punishments which left the door wide open to the decision of an officer of at least the rank of a battalion commander to impose such collective punishments as he saw fit.

This evidence also shows that due to the influence of the defendant the provision was finally inserted in the order to the effect that troops would dispose of all cases and that courts were to have no jurisdiction whatsoever, whereas General Mueller had urged that troops were to dispose of only those clear cases and that doubtful cases were to be left to the jurisdiction of the courts. The defendant's comments on this matter are significant as shown by the document where he states:

"The draft of the army comes very near to our own proposals. The only sentence missing is the provision that the courts of the armed forces have no jurisdiction at all over the indigenous inhabitants. General Halder wished to have this jurisdiction maintained for those cases in which the troops have no time for investigations and for the large number of offenses of minor kinds in which execution by shooting is now justified. I have objections to this, shared by General Jeschonnek.

"Once we take this step, we must take it fully. Otherwise it is to be feared that the troops will get rid just of those cases

which they consider awkward, namely, the doubtful cases by handing them over to the courts. Thus, the outcome will be contrary to the result we aim at."

In this decision his position was approved by the defendant Warlimont as is shown by the same page of the document. This provision in the order, which obviously was not derived from Hitler, or Keitel, or Jodl, is one of the most vicious parts of the order. The defendant's reasons for this provision appear from the documents and his own testimony to have been that in the event such cases were handed over to the courts, the courts would acquit the defendants for lack of evidence; that those acquittals would bring upon the military courts criticism by Hitler to the effect they were too lenient, as he had done with reference to certain decisions made during the Polish campaign. In other words, it is apparent that, in order to avoid criticism of military courts by the Fuehrer, he was ready to sacrifice the lives of innocent people.

The discussions about the disciplinary features of this order also show the part that a staff officer plays in the final structure of an order. The net result of the entire proceedings as to this order was that Lehmann became the main factor in determining the final form into which the criminal ideas of Hitler were put; that he modified those ideas within his own sphere up to a certain point and placed the whole into an effective military order which was transmitted to the troops and carried out.

Under the record, we find him responsible for criminal connection with, participation in, and formulation of this illegal order.

3. *The Commando Order*—The Commando Order is another example of the part a staff officer plays in the final structure of a military order. Like the preceding Barbarossa Jurisdiction Order, it cannot be said that the whole of the Commando Order, or the major part of it, is a product of one man's mind. We are not concerned with the question of determining just how far the ideas of any one man are embodied in these orders except insofar as ideas that can be traced to a given defendant show his own state of mind in contributing criminal parts to the criminal whole. The basic criminal offense is in the essential part a staff officer performs in making effective the criminal whole.

This was a criminal order in which the defendant Warlimont, as has been pointed out, was a major factor and the defendant Lehmann's activities were subordinate to a large extent. The defendant was well aware of the criminal nature of this order. This had been pointed out by Admiral Canaris in various telegrams with which he was familiar. He made certain sugges-

tions as to methods which might, by a strained construction, give some appearance of legality and be suitable for publication; constructions which he apparently did not believe himself.

We find no provisions in this order where he contributed to its inherent viciousness but he was one of those responsible for its final production in the form in which this criminal order was transmitted to the army and he was criminally responsible for a part of the vicious product.

4. *The Night and Fog Decree*—The Night and Fog Decree basically involved legal questions, and in this, as in the Barbarossa Jurisdiction Order, the defendant Lehmann was the major craftsman of its final form. It was the defendant Lehmann who conducted the negotiations whereby the Ministry of Justice was given the task of trying those persons charged under this decree before the Special and, later, the People's Courts, wherein they were deprived of the rudimentary rights which defendants have in the courts of any civilized nation.

His defense as to this charge is not without some merit, in that it was apparently the original idea of Hitler that these unfortunates were to be turned over to the tender mercies of the police for disposition. But for the reason stated above, we find him guilty as a participant of the final production of this terror program.

5. *Terror and Sabotage Decrees*—On 1 July 1944, from WFSt, Qu. Section, Lehmann received the following communication [NOKW-2576, *Pros. Ex. 823*]:

"Subject: Combating of enemy terrorists in the occupied territories.

"On account of events in Copenhagen, the Fuehrer has decreed that court martial proceedings against civilians in the occupied territories must be discontinued with immediate effect. WR is requested to submit suggestions for the draft of an order concerning the treatment of enemy terrorists and saboteurs among the civilian population in the occupied territories by 2 July, 2000 hours.

"Policies.

"Terror can be countered only by terror, but court martial sentences only create martyrs and national heroes.

"If German units or individual soldiers are attacked in any manner, the commander of the unit and/or the individual soldier are bound to take countermeasures independently and, in particular, to exterminate terrorists. Terrorists or saboteurs who are arrested later, must be turned over to the SD."

With this directive before him, he proceeded to make effective the illegal desires of his superiors, which apparently bore fruit

in the Terror and Sabotage Decree of 30 July 1944, signed by Hitler. In August 1944, apparently in conjunction with the quartermaster section of the OKW, he participated in the supplemental order enlarging the scope of the original decree. He was therefore in a minor capacity connected with both the order and the supplemental directives.

On the matters above noted and on the record, we find the defendant Lehmann guilty under counts two and three of the indictment.

PRESIDING JUDGE YOUNG: At this time the Tribunal will take a short recess after which the sentences will be pronounced.

SENTENCES

PRESIDING JUDGE YOUNG: One final concluding paragraph was omitted from the reading of the judgment. I shall now read it.

"In the event there shall be any variation between the reading or translation or the stenographic report of the judgment as read and the copy thereof signed and lodged in the office of the Secretary General the latter shall control in all particulars."

The reading of the opinion and judgment having been concluded, the Tribunal will now impose sentences upon those defendants who have been adjudged guilty in these proceedings. Each defendant receiving a sentence for a term of years shall receive credit upon the sentence imposed upon him for such a period or periods of time as he has been in confinement, whether as a prisoner of war or otherwise, since 7 May 1945.

As the name of each defendant is called, he will arise, proceed to the center of the dock and put on the earphones.

OTTO SCHNIEWIND, the Tribunal having found you not guilty, you will arise and retire with the guards. You will be released as heretofore ordered when the Tribunal presently adjourns.

HUGO SPERRLE, having been found not guilty, in accordance with the order heretofore made, will be released when the Tribunal presently adjourns.

The defendant Wilhelm von Leeb will arise.

WILHELM VON LEEB, on the count of the indictment on which you have been convicted, the Tribunal sentences you to three years' imprisonment. You will retire with the guards.

The defendant George Karl Friedrich-Wilhelm von Kuechler will arise.

GEORG KARL FRIEDRICH-WILHELM VON KUECHLER, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to twenty years' imprisonment. You will retire with the guards.

The defendant Hermann Hoth will arise.

HERMANN HOTH, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to fifteen years' imprisonment. You will retire with the guards.

The defendant Hans Reinhardt will arise.

HANS REINHARDT, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to fifteen years' imprisonment. You will retire with the guards.

The defendant Hans von Salmuth will arise.

HANS VON SALMUTH, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to twenty years' imprisonment. You will retire with the guards.

The defendant Karl Hollidt will arise.

KARL HOLLIDT, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to five years' imprisonment. You will retire with the guards.

The defendant Karl von Roques* will arise.

KARL VON ROQUES, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to twenty years' imprisonment. You will retire with the guards.

The defendant Hermann Reinecke will arise.

HERMANN REINECKE, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

The defendant Walter Warlimont will arise.

WALTER WARLIMONT, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

The defendant Otto Woehler will arise.

OTTO WOEHLE, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to eight years' imprisonment. You will retire with the guards.

The defendant Rudolf Lehmann will arise.

RUDOLF LEHMANN, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to seven years' imprisonment. You will retire with the guards.

DR. LATERNSE: Your Honors, on behalf of the entire defense, I should like to make a brief statement. The defense has ascertained that the judgment just pronounced is in contradiction with the decisions of other military tribunals in Nuernberg with respect to basic and important legal points. In accordance with Ordinance No. 11, the defense asks the Military Tribunals to make a decision on that point by calling a plenary session of all Tribunals.

* Defendant von Roques, while still serving sentence, died of natural causes on 25 December 1949, in the City Hospital, Landsberg/Lech, Germany.

The substantiation of this motion will be handed in later in view of the time period allowed in that ordinance.

This motion just read has been laid down in writing by me and I am now handing it over to the Secretary General.

PRESIDING JUDGE YOUNG: The motion may be filed.

* * * * *

PRESIDING JUDGE YOUNG: The motion filed last night before the close of the session has been translated and submitted to the Tribunal.

The Tribunal considered the judgments of other tribunals heretofore rendered in arriving at the judgment in this case, and is of the opinion there is no conflict with them and does not desire to hear argument on the motion. Accordingly, the motion for a plenary session filed on behalf of all of the defendants is overruled without prejudice to such further rights in the matter as defendants may have.

The Tribunal is now about to adjourn.

The Tribunal is adjourned without day.

DR. LATERNSEER: Your Honor, may I make a communication to the Court: May I make a statement to the Court?

PRESIDING JUDGE YOUNG: The Court has adjourned and I think it would not be proper to hear a statement to the Court. Adjourned.

THE MARSHAL: Military Tribunal V is adjourned without day. (The Tribunal adjourned *sine die*.)

XII. CONFIRMATION OF SENTENCES BY THE MILITARY GOVERNOR OF THE U.S. ZONE OF OCCUPATION

A. Introduction

On 10 March 1949, General Lucius D. Clay, Military Governor of the U.S. Zone of Occupation, confirmed by separate orders all sentences imposed upon defendants except the sentence in the case of the defendant von Leeb. Since the defendant von Leeb at the time of sentencing had already been in confinement for more than the term of his sentence (three years), he was released from prison immediately after the sentences were pronounced. This was done pursuant to a general provision in the sentences of the Tribunal that "Each defendant receiving a sentence for a term of years shall receive credit upon the sentence imposed upon him for such a period or periods of time as he has been in confinement, whether as a prisoner of war or otherwise, since 7 May 1945".

The orders of the Military Governor confirming the life sentence of the defendant Warlimont and the order confirming the sentence for a term of years of the defendant von Kuechler are reproduced below (section B).

B. Orders of the Military Governor confirming the sentences of defendants Warlimont and von Kuechler

HEADQUARTERS, EUROPEAN COMMAND

Office of the Commander-in-Chief

APO 742

Berlin, Germany

March 10, 1949

In the Case of The
United States of America

vs.

Wilhelm von Leeb, et al.

Military Tribunal V

Case No. 12

Order with respect to sentence of Walter Warlimont

In the case of the United States of America against Wilhelm von Leeb, et al., tried by United States Military Tribunal V, Case

No. 12, Nurnberg, Germany, the defendant Walter Warlimont, on 28 October 1948, was sentenced by the Tribunal to life imprisonment. A petition to modify the sentence, filed on behalf of the defendant by his defense counsel, has been referred to me pursuant to the provisions of Military Government Ordinance No. 7. I have duly considered the petition and the record of the trial, and in accordance with Article XVII of said Ordinance, it is hereby ordered that:

a. the sentence imposed by Military Tribunal V on Walter Warlimont be, and hereby is, in all respects, confirmed;

b. the defendant be confined in War Criminal Prison No. 1, Landsberg, Bavaria, Germany.

[Signed] Lucius D. Clay

LUCIUS D. CLAY

General, U. S. Army

Military Governor

and

Commander-in-Chief, European Command

HEADQUARTERS, EUROPEAN COMMAND

Office of the Commander-in-Chief

APO 742

Berlin, Germany

March 10, 1949

In the Case of The
United States of America

vs.

Wilhelm von Leeb, et al.

Military Tribunal V

Case No. 12

*Order with Respect to Sentence of
Georg Karl Friedrich-Wilhelm von Kuechler**

In the case of the United States of America against Wilhelm von Leeb, et al., tried by United States Military Tribunal V, Case No. 12, Nurnberg, Germany, the defendant Georg Karl Friedrich-Wilhelm von Kuechler, on 28 October 1948, was sentenced by the Tribunal to imprisonment for a term of 20 years. A petition to modify the sentence, filed on behalf of the defendant by his defense counsel, has been referred to me pursuant to the provisions of Military Government Ordinance No. 7. I have

* The sentences imposed upon the remaining defendants were confirmed in all respects by the Military Governor of the United States Zone of Occupation by individual orders.

duly considered the petition and the record of the trial, and in accordance with Article XVII of said Ordinance, it is hereby ordered that:

a. the sentence imposed by Military Tribunal V on Georg Karl Friedrich-Wilhelm von Kuechler be, and hereby is, in all respects confirmed;

b. all time spent in confinement by the defendant be credited against such period of imprisonment: to wit from 10 January 1946 to date;*

c. the defendant be confined in War Criminal Prison No. 1. Landsberg, Bavaria, Germany.

[Signed] Lucius D. Clay
LUCIUS D. CLAY
General, U. S. Army
Military Governor
and

Commander-in-Chief, European Command

* Each of the orders of the Military Governor confirming sentences for a term of years contains a similar provision stating the exact period of confinement to be credited against the sentence.

XIII. ORDER OF THE UNITED STATES SUPREME COURT DENYING WRITS OF HABEAS CORPUS

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 532 Misc. In the Matter of Hermann Hoth, Hans Reinhardt, Hans von Salmuth, Karl Hollidt, Karl von Roques, Hermann Reinecke, Walter Warlimont, Otto Woehler, and Rudolf Lehmann.

ORDER

"Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. The Chief Justice, Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Burton are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, Sec. 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U.S. 672 (1946); *Milch v. United States*, 332 U.S. 789 (1947); *Brandt v. United States*, 333 U.S. 836 (1948); *In re Eichel*, 333 U.S. 865 (1948); *Everett v. Truman*, 334 U.S. 824 (1948). Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge are of the opinion that argument should be heard on the motions for leave to file the petitions in order to settle what remedy, if any, the petitioners have. Mr. Justice Jackson took no part in the consideration or decision of these applications."

May 2, 1949

APPENDIX

Glossary of Abbreviations and Terms

- OKW Oberkommando der Wehrmacht—High Command, German Armed Forces.
- OKH Oberkommando des Heeres—High Command, German, German Army.
- OKL Oberkommando der Luftwaffe—High Command, German Air Force.
- OKM Oberkommando der Marine—High Command, German Navy.
- WFSt Wehrmachtfuehrungsstab—Armed Forces Operations Staff.
- SKL (skl) Seekriegsleitung—Naval Operations Staff.
- WR Wehrmachtrechtsabteilung—Armed Forces Legal Department.

- AOK Armeeeoberkommando—Headquarters, field army.
 KORUECK Kommandeur des Rueckwertigen Armeegebietes—
 Commander, Army Rear Area (field).
 Ia Operations officer at headquarters of army field
 units.
 Ib Staff officer for supply and administration at divi-
 sion and army group level.
 Ic G-2 (intelligence) officer at headquarters of army
 field units.
 Ic/AO Ic/Abwehroffizier—G-2 counterintelligence officer.
 SS Schutzstaffel—Elite guard or “Protective Force” of
 Nazi Party.
 SD Sicherheitsdienst—Security Service of SS.
 SIPO or SP Sicherheitspolizei—State Security Police.
 Gestapo Geheime Staatspolizei—Secret State Police (organi-
 zational component of SIPO).
 GFB Secret Field Police
 Politruk Political commissar attached to Soviet Army units
 below battalion level (companies, platoons).

Wehrmacht—German Armed Forces.

Heer—German Army.

Luftwaffe—German Air Force.

Kriegsmarine—German Navy.

Abwehr—Counterintelligence.

Generalquartiermeister—Chief of supply and administration at
 OKH.

Oberquartiermeister—Staff officer for supply and administration
 at army level.

Quartiermeister—Staff officer for supply and administration at
 corps level.

Ortskommandantur—town (locality) military headquarters.

Feldkommandantur—area (district) military headquarters.

Luftgau—Air Force Administration Area Command.

Einsatzgruppe—Execution and investigation unit of Security
 Police and SD operating with the armed forces in the field.

Einsatzkommando } subunits of an Einsatzgruppe.
 Sonderkommando }

Vortragsnotiz—Office memorandum, briefing notes, notes for oral
 report.

Gerichtsherr—Judge advocate with field army units.

Allgemeines Gericht } Civil court; ordinary court with criminal
 Zivilgericht } and civil jurisdiction in Germany.

Ziviljustiz—civil court system.

Gauleiter—Area (Party district) leader of Nazi Party.

Table of Comparative Ranks

U. S. Army	German Army	U. S. Navy	German Navy	SS	Civilian Officials in Legal Departments of German Armed Forces ¹
2d Lieutenant.....	Leutnant.....	Ensign.....	Leutnant zur See.....	Untersturmfuehrer.....	Reichskriegsgerichtssekretaer
1st Lieutenant.....	Oberleutnant.....	Lieutenant (junior grade).....	Oberleutnant zur See.....	Obersturmfuehrer.....	Heeresjustizinspektor Reichskriegsgerichtsinspektor Reichskriegsgerichtsobers- sekretaer
Captain.....	Hauptmann.....	Lieutenant (senior grade).....	Kapitaneuleutnant.....	Hauptsturmfuehrer.....	Heeresjustizoberinspektor Kriegsrichter Reichskriegsgerichtsoberein- spektor
Major.....	Major.....	Lieutenant Commander.....	Korvettenkapitane.....	Sturmbannfuehrer.....	
Lieutenant Colonel.....	Oberstleutnant.....	Commander.....	Fregattenkapitane.....	Obersturmbannfuehrer.....	Oberkriegsgerichtsrat
Colonel.....	Oberst.....	Captain.....	Kapitane zur See.....	Standartenfuehrer.....	Oberstkriegsgerichtsrat
Brigadier General.....	Generalmajor.....	Commodore.....	Konteradmiral.....	Brigadefuehrer.....	Reichskriegsgerichtsrat Reichskriegsanwalt
Major General.....	Generalleutnant.....	Rear Admiral.....	Vizeadmiral.....	Gruppenfuehrer.....	Oberreichskriegsanwalt Senatspraesident beim Reichskriegsgericht
Lieutenant General.....	General der Infanterie, der Artillerie, etc.....	Vice Admiral.....	Admiral.....	Obergruppenfuehrer.....	
General.....	Generaloberst.....	Admiral.....	Generaladmiral.....	Oberstgruppenfuehrer.....	
General of the Army.....	Generalfeldmarschall.....	Admiral of the Fleet.....	Grossadmiral.....	Reichsfuehrer.....	

¹ Oertzen'scher Taschenkalender fuer die Offiziere des Heeres (formerly Fircs), 1942 edition, pp. 371-373.

Legal officials of the German Armed Forces were nonmilitary members of the armed forces; they wore a uniform with insignia of equivalent rank.

² Equivalent to a senior colonel.

List of Witnesses in Case 12

[Note]—All the witnesses in this case appeared before the Tribunal. Prosecution witnesses are designated by the letter "P", defense witnesses by the letter "D". The names not preceded by any designation represent defendants testifying in their own behalf. Designation "1" shows witness called by defense although affidavit was submitted by prosecution. Designation "2" shows witness called by prosecution although affidavit was submitted by defense. Extracts from testimony in this case are listed in the index of documents and testimony.

	Name	Dates of testimony	Pages (mimeographed transcript)
D	ADALBERT, Prinz von Bayern.....	22 Apr 48.....	2554-2558
P	ALPEROWITSCH, Eduard.....	2 Aug 48.....	9034-9038
			(stricken from record)
D	BEGUELIN, Konstantin von.....	13 Jul 48.....	7693-7734
1	BERGER, Gottlob.....	8 Apr 48.....	1694-1696
P	BLUMENSTICK, Henck.....	3 Aug 48.....	9134-9150
D	BLUMENTRITT, Guenther.....	29 Jul 48.....	8822-8856
D	BOETTICHER, Hans.....	27, 28 Jul 48.....	8656-8727
D	BOGNER, Eduard.....	25 May 48.....	4737-4759
D	BRAEMER, Walter.....	23 Apr 48.....	2600-2651
P	BRAEUTIGAM, Otto.....	4 Aug 48.....	9159-9260
D	BRENNECKE, Kurt.....	22 Apr 48.....	2558-2579
D	BRUNS, Rolf.....	10 May 48.....	3680-3706
P	BRUNS, Walter.....	18 Feb 48.....	835-858
D	BUSSE, Theodor.....	9, 10 Jun 48.....	5637-5674
P	BÜSSON, Henri.....	12 Feb 48.....	566-580
D	BUTTLAR-BRANDENFELS, Horst Freiherr von.....	2 Jul 48.....	7103-7134
P	CROISSANT, Bernhard.....	30 Jul 48.....	8926-8954
D	DRABICH-WÄECHTER, Guenther von.....	26 Apr 48.....	2698-2715
D	EBEN, Hubert.....	11 May 48.....	3751-3761
1	EBERSTEIN, Friedrich Karl von.....	4 Mar 48.....	1436-1439
D	EISMANN, Hans Georg.....	14, 18, 19 May 48.....	4177-4233
D	FABRICE, Eberhard von.....	5 Aug 48.....	9310-9324
P	FRUECHTE, Hans.....	3 Aug 1948.....	9097-9134
D	GERSDORFF, Rudolf von.....	16 Apr 48.....	2155-2205
D	GRENFELL, Russel, Captain (British).....	28 May 48.....	4976-4982
1	HAENSCH, Walter.....	5 Mar 48.....	1489-1501
D	HALDER, Franz.....	12-16 Apr 48.....	1817-1864; 1867-2155
D	HAMMERSTEIN, Christian Freiherr von.....	21 Jul 48.....	8209-8232
D	HANDLOSER, Siegfried.....	8, 9 Jul 48.....	7446-7484
D	HARTENECK, Gustav.....	19, 20 May 48.....	4275-4403
D	HAYE, Helmuth.....	25 May 48.....	4780-4791
D	HEIDKÄMPFER, Otto.....	11, 12 May 48.....	3812-3878

	Name	Dates of testimony	Pages (mimeographed transcript)
D	HEINEMEYER, Walter	23 Apr 48	2651-2672
D	HERRMANN, Paul	6 Aug 48	9494-9500
P	HEUSINGER, Adolf	6, 9 Feb 48	233-268
D	HIMMEL, Max	11 May 48	3738-3751
	HOLLIDT, Karl	20-22, 24 May 48	4420-4678
	HOTH, Hermann	29, 30 Apr; 3, 4 May 48	3036-3289
D	JARACZEWSKI, Constanz von	26 Apr 48	2755-2765
D	JESSEL, Karl Friedrich	16, 19 Apr 48	2205-2276
D	KATNER, Liebhilde	22, 23 Jul 48	8350-8390
D	KLEMENTS, Wilhelm	13 Jul 48	7653-7693
D	KOBE, Gert	24, 25 May 48	4678-4715
D	KOLLER, Karl	18 Jun 48	6190-6249
D	KRAELL, Alexander	28 Jul 48	8727-8746
P-D	KRAFFT, Theodor	8 Apr 48	1622-1694
1	KRICHTBAUM, Wilhelm	4 Aug 48	9292-9299
	KUECHLER, Georg von	27-29 Apr 48	2787-3002
P	LAHOUSEN, Erwin	11, 12 Feb 48	432-549
1	LAMMERS, Hans Heinrich	4 Mar 48	1377-1410
D	LANDFRIED, Otto	26 Apr 48	2715-2755
D	LANGHEUSER, Rudolf	22 Apr 48	2580-2585
	LEEB, Wilhelm Ritter von	19-22 Apr 48	2277-2534; 7770-7771
	LEHMANN, Rudolf	15, 16, 19, 20, 26, 27 Jul 48	7909-8180; 8481-8582
D	LEIBBRANDT, Georg	23, 26 Jul 48	8441-8481
P	LINDE, Kurt	6 Feb 48	208-222
1	LINDOW, Kurt	4 Mar 48	1440-1458
P	LISSANCE, Arnold	5 Mar 48	1527-1532
D	MATTENKLOTT, Franz	19 May 48	4233-4274
D	MILCH, Erhard	17, 18 Jun 48	6119-6189
1	MUELLER, Eugen	8, 9 Apr 48	1698-1736
D	MUELLER, Georg	10 May 48	3641-3680
1	NEUMANN, Otto	9 Apr 48	1736-1749
D	NOTTI, Georg Peter Wilhelm Erwin	18 Jun 48	6254-6263
P-D	OHLENDORF, Otto	4, 6 Aug 48	9265-9291; 9465-9494
P	OHLEK, Paul	13 Feb 48	583-592
1	PATUTSCHNIK, Heinrich Mathias	4 Mar 48	1412-1434
D	PERPONCHER, Heinrich, Graf von	21 Jun 48	6276-6312
D	PLOCHER, Hermann	18 Jun 48	6249-6254
2	RAETSCH, Horst	3 Aug 48	9061-9080
D	REGER, Horst	21 Jul 48	8182-8232
	REINECKE, Hermann	2, 6-9, 12 Jul 48	7179-7445; 7484-7652
	REINHARDT, Hans	5-7, 10 May 48	3334-3639
D	RICHTER, Otto	23 Apr 48	2586-2599
2	RIED, Hadrian	23 Jul 48	8414-8436
D	RITTER, Karl	5 Aug 48	9362-9374
D	ROETTINGER, Hans	10, 11 May 48	3707-3738
D	ROQUES, Franz von	29, 30 Jul 48	8867-8925
	ROQUES, Karl von	2-4, 7, 8 Jun 48	5119-5530
2	RUSSWURM, Wilhelm	28 Jul 48	8749-8757
	SALMUTH, Hans von	12-14 May 48	3899-4177

	Name	Dates of testimony	Pages (mimeographed transcript)
D	SCHALL, Karl.....	1 Jun 48.....	5023-5093
P	SCHEMMEL, Nikolaus.....	10, 11 Feb 48.....	402-431
	SCHNEEWIND, Otto.....	25-27 May 48.....	4791-4957
P	SCHOENIG, Hans Erich.....	17 Feb 48.....	743-762
D	SCHRAMM, Otto.....	9 Jun 48.....	5567-5602
D	SCHREINER, Rudolf Friedrich.....	26 Apr 48.....	2766-2786
D	SCHULTE-MOENTING, Erich.....	27, 28 May 48.....	4957-4976
D	SCHUNTERMANN, Karl Erich.....	1, 2 Jun 48.....	5093-5119
D	SIXT, Friedrich Maria Heinrich.....	4 May 48.....	3290-3303
P	SMOLEN, Kazimierz.....	24, 25 Feb 48.....	956-999; 1028-1031
D	SODENSTERN, Georg von.....	22 Apr 48.....	2534-2553
	SPERRLE, Hugo.....	(did not take stand)	
D	STEINBECK, Hans.....	8, 9 Jun 48.....	5531-5566
P	STUMPF, Hans Juergen.....	17 Feb 48.....	763-783
P	TETTAU, Hans von.....	28, 29 Jul 48.....	8757-8778
2	THOMS, Helmuth.....	29 Jul 48.....	8779-8805
D	ULLERSPERGER, Wilhelm.....	29 Apr 48.....	3002-3017
P	VORWALD, Wolfgang.....	2 Aug 48.....	9007-9022
P	WAGNER, Gerhard.....	9 Feb 48.....	268-285
	WARLIMONT, Walter.....	21-25, 28, 30 Jun; 1, 2 Jul 48.....	6312-7103
D	WENCK, Walter.....	25 May 48.....	4715-4736
D	WESTERKAMP, Eberhard Karl Ludwig.....	11 May 48.....	3761-3811
P-D	WESTHOFF, Adolf.....	10 Feb 48; 13 Jul 48	336-402; 7735-7751
D	WESTPHAL, Siegfried.....	29 Jul 48.....	8856-8867
2	WESTREM, Reinhard von.....	23 Jul 48.....	8390-8408
	WOEHLER, Otto.....	10, 11, 14-17 Jun 48.....	5675-6083

INDEX OF DOCUMENTS AND TESTIMONIES IN CASE 12

Document No.	Exhibit No.	Description	Volume	Page
C-5-----	Pros. Ex. 1118-----	Letter from Admiral Raeder to Naval War Staff, 9 October 1939, concerning naval bases in Norway.	X	750
C-23-----	Pros. Ex. 1023-----	Memorandum of Navy High Command, 18 February 1938, on questions of type, shipbuilding plan.	X	518
C-23-----	Pros. Ex. 1023-----	Memorandum from Reich Defense Ministry to Commander in Chief of the Navy, September 1938, commenting on "Draft Study of Naval Warfare against England".	X	519
C-29-----	Pros. Ex. 993-----	Raeder's directive to the navy to support the German Armament Industry, 31 January 1933.	X	466
C-50-----	Pros. Ex. 594-----	The Barbarossa Jurisdiction Order, 13 May 1941, with transmittal letters from the High Command of the Armed Forces, 14 May 1941, and from the Naval War Staff, 17 June 1941.	X	1113
C-59-----	Pros. Ex. 1181-----	Order, 19 February 1941, directing further tactical measures against Greek territory.	X	909
C-62-----	Pros. Ex. 1145-----	Hitler directive for the preparation of the invasion of Luxembourg, Belgium, and Holland, and order from the High Command of the Armed Forces, 15 October 1939, concerning the attack on Holland.	X	805

Document No.	Exhibit No.	Description	Volume	Page
C-68-----	Pros. Ex. 1121-----	Letter from chief of the OKW, Keitel, to army, navy, air force and department National Defense, 27 January 1940, concerning "Study N".	X	753
C-71-----	Pros. Ex. 1119-----	Note for war diary of Naval War Staff, undated, concerning preparation for "Weser Exercise".	X	752
C-78-----	Pros. Ex. 1245-----	Notification from Armed Forces Adjutant's Office, 9 June 1941, and list of participants for conference "Barbarossa" on 14 June 1941.	X	1004
C-102-----	Pros. Ex. 1037-----	Directive No. 1 of the Supreme Commander of the Armed Forces, 11 March 1938, concerning Operation Otto.	X	589
C-120-----	Pros. Ex. 1079-----	Covering letter and directives from High Command of the Armed Forces to the army, navy, air force, 3 April 1939, concerning "Case White" and the annexation of Danzig.	X	649
C-120-----	Pros. Ex. 1079-----	Covering letter from Hitler, to army, navy, air force, and OKW, 10 May 1939, enclosing instructions for economic warfare.	X	653
C-120-----	Pros. Ex. 1079-----	Letter from High Command of the Armed Forces, 24 June 1939, concerning "Case White".	X	685
C-122-----	Pros. Ex. 1117-----	Extract from war diary of Naval War Staff, 3 October 1939, concerning Norway bases.	X	750

Document No.	Exhibit No.	Description	Volume	Page
C-126 B-----	Pros. Ex. 1090-----	Letter from High Command of the Army to High Command of the Armed Forces, 3 July 1939, concerning "Case White".	X	688
C-126 C-----	Pros. Ex. 1082-----	Directive from Commander in Chief of the Navy, 16 May 1939, concerning "Case White", initialed by Schniewind.	X	665
C-126 D-----	Pros. Ex. 1093-----	Resume of conference at the High Command of the Armed Forces, concerning advance measures for "Case White".	X	689
C-126 F-----	Pros. Ex. 1089-----	Letter from High Command of the Armed Forces to army, navy, air force, and Department National Defense of OKW, 22 June 1939, concerning preparation for "Case White".	X	683
C-126 G-----	Pros. Ex. 1099-----	Directive No. 1, for the conduct of the war, 31 August 1939, signed by Hitler.	X	703
C-136-----	Pros. Ex. 1056-----	Fuehrer order, 21 October 1938, concerning the future tasks of the armed forces.	X	613
C-138-----	Pros. Ex. 1057-----	Order of the High Command of the Armed Forces, 17 December 1938, concerning the Fuehrer order of 21 October 1938.	X	615
C-139-----	Pros. Ex. 1005-----	Directive, 2 May 1935, concerning preparation for the reoccupation of the Rhineland.	X	474

Document No.	Exhibit No.	Description	Volume	Page
C-141-----	Pros. Ex. 992-----	Directive, 10 February 1932, concerning concealment of torpedo equipment on PT boats.	X	465
C-153-----	Pros. Ex. 998-----	Naval command directive, 12 May 1934, concerning the armament plan for the third phase.	X	470
C-156-----	Pros. Ex. 1020-----	Extracts from "The Fight of the Navy against Versailles, 1919-1935", dealing principally with concealed rearmament.	X	433
C-159-----	Pros. Ex. 1013-----	Order, 2 March 1936, for the reoccupation of the Rhineland.	X	484
C-166-----	Pros. Ex. 997-----	Memorandum from Naval Command Office, 12 March 1934, concerning auxiliary cruisers.	X	470
C-174-----	Pros. Ex. 1129-----	Directive concerning preparations for the occupation of Denmark and Norway, 1 March 1940, signed by Hitler.	X	761
C-175-----	Pros. Ex. 1022-----	Letter from von Blomberg to commanders in chief of army, navy, and air force, 24 June 1937, inclosing a directive for the unified preparation for war by the armed forces.	X	488
C-182-----	Pros. Ex. 1038-----	Directive No. 2 of the Supreme Commander of the Armed Forces, 11 March 1938, concerning Operation Otto.	X	591
C-189-----	Pros. Ex. 1425-----	Memorandum on conversation between Hitler and Raeder, June 1934, concerning naval construction program.	X	472

Document No.	Exhibit No.	Description	Volume	Page
D-223-----	Pros. Ex. 1420-----	Letter from Minister of Defense to Friedrich Krupp A.G., 15 October 1932, concerning construction of medium tractors.	X	431
D-629-----	Pros. Ex. 1126-----	Letter from Keitel, Jodl, and defendant Warlimont, to Ribbentrop, 3 April 1940, concerning the occupation of Denmark and Norway.	X	771
D-762-----	Pros. Ex. 826-----	Hitler Order, 30 July 1944, concerning combating of terrorists and saboteurs in enemy countries.	XI	239
D-763-----	Pros. Ex. 828-----	Keitel order, 18 August 1944, extending the scope of the terror and sabotage decree of 30 July 1944.	XI	242
D-764-----	Pros. Ex. 829-----	Keitel directive, 18 August 1944, distributing the terror and sabotage decree of 30 July 1944, and the first implementing decree of 18 August 1944, concerning the terror and sabotage decree.	XI	240
D-765-----	Pros. Ex. 830-----	Invitation, 2 September 1944, by High Command of the Armed Forces, signed by defendant Lehmann, to conference on treatment of enemy civilians in occupied territory.	XI	244

Document No.	Exhibit No.	Description	Volume	Page
D-766-----	Pros. Ex. 834-----	Keitel order, 4 September 1944, further implementing the terror and sabotage decree of 30 July 1944, with instructions concerning "Night and Fog" prisoners.	XI	247
D-767-----	Pros. Ex. 832-----	Memorandum, 13 September 1944, on conference concerning treatment of non-German civilians in occupied territory.	XI	246
EC-338-----	Pros. Ex. 253-----	Comments by Canaris (chief of intelligence, OKW) 15 September 1941, concerning OKW directive, 8 September 1941, on the treatment of Soviet Russian PW's.	XI	2
EC-488-----	Pros. Ex. 1076-----	Letter from the Plenipotentiary General for Economy to the High Command of the Armed Forces, 28 January 1939, concerning future utilization of prisoner of war labor.	X	645
L-79-----	Pros. Ex. 1083-----	Minutes of Fuehrer conference, 23 May 1939, concerning indoctrination on the political situation and future aims.	X	671
L-323-----	Pros. Ex. 1122-----	Directive, 6 March 1940, signed by defendant Schniewind, concerning preparations for the occupation of Denmark and Norway.	X	767

Document No.	Exhibit No.	Description	Volume	Page
NG-077/665-PS-----	Pros. Ex. 800-----	Draft of implementation order for "Night and Fog" Decree with covering letter from Reich Ministry of Justice to the defendant Lehmann, 16 December 1941, requesting approval; and handwritten note on Lehmann's approval, 24 December 1941.	XI	200
NG-262-----	Pros. Ex. 820-----	Extract from survey of the disposition of "Night and Fog" proceedings compiled by Ministry of Justice on 30 April 1944.	XI	217
NIK-10202-----	Pros. Ex. 1449-----	Two memoranda on commencement in 1926 of tank development by Krupp.	X	426
NIK-11715-----	Pros. Ex. 1412-----	Memorandum, 6 December 1925, concerning trip of the chief of the army command to the Ruhr, 24-28 November 1925.	X	421
NIK-11981-----	Pros. Ex. 1411-----	Memorandum by Otto von Stuelpnagel, 20 September 1924, concerning revision of the Hague Convention and envisaging possibility of total war within 10 or 20 years.	X	419
NIK-12023-----	Pros. Ex. 1414-----	Interoffice memorandum of Reich Defense Ministry, 18 January 1927, concerning illegality of mobilization measures.	X	427

Document No.	Exhibit No.	Description	Volume	Page
NIK-12160.....	Pros. Ex. 1408.....	Extracts from the peace treaty between Germany and the Allied and Associated Powers, signed at Versailles on 28 June 1919, on limitations upon German armament.	X	416
NO-3146.....	Pros. Ex. 943.....	Extracts from operational situation report U.S.S.R. No. 94, 25 September 1941, concerning activities of the Einsatzgruppen.	X	1220
NO-3414.....	Pros. Ex. 362.....	Extract from Operational Order No. 8, by Heydrich, chief of the Security Police and SD, 17 July 1941, and enclosures, on segregation and treatment of certain categories in PW camps.	XI	5
NO-3417.....	Pros. Ex. 363.....	Letter of 26 September 1941 from Heydrich's office, enclosing letter of transmittal, signed by defendant Reinecke, and directives for the treatment of Soviet prisoners of war, 8 September 1941.	XI	11
NOKW-004.....	Pros. Ex. 149.....	Letter from Chief of Prisoners of War Affairs to Armed Forces Operations Staff, 18 May 1943, on reporting deaths of members of enemy commando units; and answer thereto, 25 May 1943, by defendant Warlimont. (<i>Photographic reproduction appears in Section VIII.</i>)	XI	92

Document No.	Exhibit No.	Description	Volume	Page
NOKW-005-----	Pros. Ex. 161-----	Interoffice memorandum from Armed Forces Operations Staff to Quartiermeister Section, 25 June 1944, signed by Warlimont, concerning the drafting of an instruction on the treatment of members of commando units in Normandy.	XI	105
NOKW-009-----	Pros. Ex. 347-----	Two letters from O K W / A r m e d Forces Operations Staff to Commander in Chief Air Force, 14 June 1944 and 23 June 1944, concerning treatment of enemy terror flyers.	XI	172
NOKW-010-----	Pros. Ex. 164-----	Note on telephone call by Commander in Chief West, 29 June 1944, initialed by Warlimont, concerning Commando Order.	XI	109
NOKW-013-----	Pros. Ex. 156-----	Teletype report from Commander in Chief Southeast to defendant Warlimont, 14 June 1944, concerning application of Commando Order by Bulgarian armed forces.	XI	96
NOKW-057-----	Pros. Ex. 28-----	Affidavit of Field Marshal Keitel, 27 September 1946, concerning the position and functions of defendant Warlimont.	X	273
NOKW-065-----	Pros. Ex. 36-----	Extracts from affidavit of General Jodl, 26 September 1946, concerning the position of defendant Warlimont and the organization and functioning of the Wehrmacht.	X	276

Document No.	Exhibit No.	Description	Volume	Page
NOKW-065-----	Pros. Ex. 36-----	Extracts from affidavit of General Jodl, 26 September 1946, concerning the operation "Weser Exercise".	X	754
NOKW-065-----	Pros. Ex. 36-----	Extracts from affidavit of General Jodl, 26 September 1946.	X	956
NOKW-118-----	Pros. Ex. 1091-----	Covering letter from High Command of the Army, 24 July 1939, enclosing special regulations concerning supply in "Case White".	X	690
NOKW-121-----	Pros. Ex. 29-----	Organizational charts of the Armed Forces Operations Staff (chart No. 1) and its Department National Defense (chart No. 2), as of 1 September 1939, with changes of organization up to 6 September 1944.	X	287
NOKW-147-----	Pros. Ex. 370-----	Extract of memorandum by Ministerialrat Letsch, Reich Labor Ministry, 22 December 1941, concerning conference with defendant Reinecke on the treatment of "segregated" Russian prisoners of war.	X	1089
NOKW-209-----	Pros. Ex. 590-----	Letter from defendant Lehmann to defendant Warlimont's office, 28 April 1941, transmitting Lehmann's draft of Barbarossa Jurisdiction Order.	X	1121

Document No.	Exhibit No.	Description	Volume	Page
NOKW-209-----	Pros. Ex. 590-----	Letter from defendant Lehmann to defendant Warlimont, 9 May 1941, concerning the proposed Barbarossa Jurisdiction Order, and enclosing a further draft.	X	1126
NOKW-212-----	Pros. Ex. 30-----	Comparative description of offices of the High Command of the Armed Forces and the High Command of the Army in the domain of the operational command according to rank.	X	289
NOKW-213-----	Pros. Ex. 163-----	Letter from Army Group G to subordinate units, 29 June 1944, transmitting OKW order concerning continued application of Commando Order. (<i>Photographic reproduction appears in Section VIII.</i>)	XI	108
NOKW-227-----	Pros. Ex. 155-----	Teletype from defendant Warlimont to Commander in Chief Southeast, 4 June 1944, concerning two prisoners captured on the island of Alimnia, and corresponding teletype from Commander in Chief Southeast, 5 June 1944, to counterintelligence officer, Army Group E.	XI	95
NOKW-229-----	Pros. Ex. 1087-----	Letter from Commander in Chief of the Army, von Brauchitsch, 15 June 1939, enclosing deployment directive for "Case White".	X	679

Document No.	Exhibit No.	Description	Volume	Page
NOKW-241-----	Pros. Ex. 1219-----	Notes for oral report, 28 April 1941, concerning Finland's participation in operation Barbarossa, signed by Warlimont.	X	982
NOKW-249-----	Pros. Ex. 1191-----	Letter from Department National Defense to Armed Forces Operations Staff, 6 April 1941, enclosing desires of the army and the air force for cooperation with Italy.	X	922
NOKW-250-----	Pros. Ex. 1165-----	Instructions regulating transborder traffic and communications before "Case Yellow", 27 March 1940, signed by defendant, Warlimont.	X	852
NOKW-473-----	Pros. Ex. 1523-----	Extract of report from 2d Army, 2 April 1943, concerning recommendations for changes and supplements to pamphlet "Combat directives for anti-bands warfare in the east."	X	1169
NOKW-484-----	Pros. Ex. 56-----	Letter signed by defendant Warlimont transmitting the Commissar Order, "Directives for the treatment of political commissars" to military leaders, 6 June 1941.	X	1054
NOKW-511-----	Pros. Ex. 1160-----	Memorandum from Army Group A, 12 January 1940, criticizing plans for the western offensive, and reply from the Commander in Chief of the Army, 16 January 1940.	X	837

Document No.	Exhibit No.	Description	Volume	Page
NOKW-517-----	Pros. Ex. 1157-----	Letter from General von Manstein, chief of staff of Army Group A, to Field Marshal von Brauchitsch, Commander in Chief of the Army, 18 December 1939, concerning western offensive.	X	832
NOKW-548-----	Pros. Ex. 355-----	Extract from war diary of Operations Staff Ic Foreign Air Forces West, 2 October 1944, concerning conduct of soldiers in cases of lynchings of Allied airmen by the population.	XI	178
NOKW-568-----	Pros. Ex. 1151-----	Army Group B directive, 16 November 1939, concerning invasion of Holland.	X	818
NOKW-579-----	Pros. Ex. 740-----	Report by Sonderkommando 10a, 2 August 1941, concerning operation against Jews in Kodyma.	X	1217
NOKW-586-----	Pros. Ex. 741-----	Proclamation by defendant von Salmuth to the inhabitants of Kodyma issued on 1 August 1941, and extract of report from SS Sonderkommando 10a to Einsatzgruppe D, 3 August 1941, concerning Kodyma affair.	X	1216
NOKW-621-----	Pros. Ex. 1161-----	Enclosure to instructions concerning war game "Yellow", and extract from list of participants distributed by Army Group A on 20 January 1940.	X	840
NOKW-629-----	Pros. Ex. 867-----	Activity report of Einsatzgruppe D to 11th Army Command, 9 October 1941.	X	1255

Document No.	Exhibit No.	Description	Volume	Page
NOKW-631-----	Pros. Ex. 568-----	Report from Ohlendorf, commander of Einsatzgruppe D, to 11th Army Headquarters, 12 February 1942, concerning confiscation of watches and money during anti-Jewish actions.	X	1259
NOKW-631-----	Pros. Ex. 568-----	Report from Einsatzgruppe D, to 11th Army, 12 February 1942, signed by Ohlendorf, concerning seizure of watches and rubles.	XI	308
NOKW-650-----	Pros. Ex. 738-----	Report from XXX Army Corps to 11th Army, 2 August 1941, concerning operations against Jews in Kodyma.	X	1215
NOKW-668-----	Pros. Ex. 618-----	Letter of transmittal from Army High Command (OKH) to major subordinate units in the east, 28 October 1941, requesting implementation of "Reichenau Order".	X	1214
NOKW-684-----	Pros. Ex. 719-----	Extracts from report of Secret Field Police Group 703 to counterintelligence officer, 3d Panzer Army, 24 November 1943, concerning espionage activity and allocation of children to work in Reich.	XI	275
NOKW-688-----	Pros. Ex. 608-----	Order of Panzer Group 3, 9 September 1941, concerning the treatment of partisans and partisan followers.	X	1158

Document No.	Exhibit No.	Description	Volume	Page
NOKW-711-----	Pros. Ex. 692-----	Extract from supplement to war diary of 3d Panzer Army, August 1941-January 1942, concerning execution of Partisans and PW's.	X	1152
NOKW-1076-----	Pros. Ex. 57-----	The Commissar Order with distribution list and covering letter by General von Brauchitsch, Commander in Chief of the Army, 8 June 1941, containing supplements to the order.	X	1055
NOKW-1165-----	Pros. Ex. 81-----	Report by SS Obergruppenfuehrer Jeckeln, 1 August 1941, addressed to Himmler, defendant von Roques, and others, concerning mopping-up operations.	X	1251
NOKW-1178-----	Pros. Ex. 694-----	Teletyped report from 17th Army to 11th Army, 15 January 1942, concerning shootings of partisans.	X	1156
NOKW-1295-----	Pros. Ex. 565-----	Extract of order of 11th Army Command, 3 January 1942, signed by defendant Woehler, concerning operational strategy in the east.	XI	307
NOKW-1300-----	Pros. Ex. 564-----	Extract of teletype from Army Group South to 11th Army, 22 December 1941, concerning dissemination of Fuehrer orders.	XI	310
NOKW-1816-----	Pros. Ex. 666-----	Extract from war diary of 18th Army, 2 July 1941, concerning reprisal action against Russians in Riga.	X	1154

Document No.	Exhibit No.	Description	Volume	Page
NOKW-1449-----	Pros. Ex. 95-----	Radio message from 61st Inf. Div. to 18th Army, 26 October 1941, concerning the shooting of commissars.	X	1085
NOKW-1531-----	Pros. Ex. 587-----	Letter from defendant von Kuechler, to generals under his command, 22 July 1940, concerning Russo-German relations.	X	954
NOKW-1531-----	Pros. Ex. 587-----	Extract of letter from commander of Army Rear Area 550, 20 August 1940, incorporating copy of letter from commander in chief of 18th Army, 22 July 1940, containing directives concerning ethnic struggle in the east.	X	1207
NOKW-1569-----	Pros. Ex. 72-----	Radio message from 269th Infantry Division to XLI Army Corps, 9 July 1941, concerning liquidation of Politruks.	X	1087
NOKW-1570-----	Pros. Ex. 73-----	Radio message from XLI Army Corps to Panzer Group 4, 9 July 1941, concerning liquidation of Politruks.	X	1087
NOKW-1573-----	Pros. Ex. 883-----	Extract from activity report, 14 November 1941, from Ortskommandantur I/853 to Commander Army Rear Area 553.	X	1258
NOKW-1578-----	Pros. Ex. 668-----	Extract from war diary of 121st Infantry Division, 7 October 1941, reporting reprisal executions.	X	1155

Document No.	Exhibit No.	Description	Volume	Page
NOKW-1580-----	Pros. Ex. 670-----	Extract from activity report of XXVIII Army Corps, 3 November 1941, concerning reprisal executions.	X	1155
NOKW-1605-----	Pros. Ex. 272-----	Excerpt from "Ten-day report" from Rear Area Army Group South (commanded by defendant von Roques), to the High Command of the Army, 20 December 1941, concerning PW deaths in transit camps; and remarks of PW district commander, 21 December 1941, on the plan concerning the release of Ukrainian prisoners of war.	XI	31
NOKW-1615-----	Pros. Ex. 257-----	Teletype from 24th Division to commander, Rear Area Army Group South, 15 October 1941, initialed by von Roques, concerning evacuation of PW's. <i>(Photographic reproduction appears in Section VIII.)</i>	XI	30
NOKW-1653-----	Pros. Ex. 1214-----	Extracts from activity report and war diary, 1 February-19 June 1941, of "Sector Staff East Prussia" (later redesignated "Army Group North") commanded by defendant von Leeb.	X	964
NOKW-1674-----	Pros. Ex. 74-----	Radio message from Panzer Group 4 to Army Group North, 10 July 1941, reporting liquidation of commissars.	X	1088

Document No.	Exhibit No.	Description	Volume	Page
NOKW-1727-----	Pros. Ex. 896-----	Extract from activity report from Ortskommandantur Yevpatoriya to commander of Army Rear Area 553, 21 December 1941, concerning the collection and storage of property of "Resettled" Jews.	XI	311
NOKW-1737-----	Pros. Ex. 126-----	Covering letter from High Command of the Army, 21 October 1942, distributing Commando Order to units in the east.	XI	86
NOKW-1744-----	Pros. Ex. 1197-----	Order from Commander in Chief of the Army, 6 September 1940, concerning transfer of units to the east.	X	957
NOKW-1878-----	Pros. Ex. 42-----	Extracts from handbook for German general staff service in wartime.	X	247
NOKW-1881-----	Pros. Ex. 913-----	Extract from activity report of Ortskommandantur Bakhchisarai to Army Rear Area 553, 31 March 1942, concerning burning down of village.	XI	312
NOKW-1903-----	Pros. Ex. 1506-----	Order of 17th Army, 25 November 1941, directing the establishment of a concentration camp, and enclosure, a directive for the treatment of the inmates.	X	1183

Document No.	Exhibit No.	Description	Volume	Page
NOKW-1906-----	Pros. Ex. 247-----	Letter from XXX Army Corps (commanded by defendant von Salmuth) to subordinate units, 7 August 1941, transcribing extracts from Army High Command Regulations concerning treatment of enemy civilians and Russian Prisoners of War, 25 July 1941.	XI	66
NOKW-2022-----	Pros. Ex. 977-----	Directive from 281st Security Division to Feldkommandatur 882, 24 March 1943, concerning the handing over of gypsies and Jews to the SD.	X	1194
NOKW-2042-----	Pros. Ex. 1156-----	Directive from Naval War Staff to Group West, 12 December 1939, concerning support of army operations, signed by Schniewind.	X	830
NOKW-2072-----	Pros. Ex. 682-----	Report and order from 281st Security Division, 23 June 1942, concerning shooting and treatment of gypsies.	X	1192
NOKW-2078-----	Pros. Ex. 1150-----	Entry in war diary of Naval War Staff, 15 November 1939, concerning new Fuehrer directive.	X	817
NOKW-2079-----	Pros. Ex. 848-----	Directive by Himmler, 21 May 1941, concerning assignment of Higher SS and Police Leaders in the army group rear area.	X	1242

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2080-----	Pros. Ex. 847-----	Brauchitsch directive, 28 April 1941, concerning "Commitment of Security Police and SD in Units of the Army" (The Wagner-Heydrich Agreement); and letter of transmittal, 2 May 1941, from Sector Staff Silesia (Army Group South).	X	1239
NOKW-2096-----	Pros. Ex. 88-----	Report from XXVIII Army Corps to 18th Army, 27 September 1941, concerning the shooting of a political commissar.	X	1086
NOKW-2100-----	Pros. Ex. 471-----	Order from XLIII Army Corps headquarters to subordinate units, 2 June 1943, concerning drafting of able-bodied population for labor.	XI	264
NOKW-2111-----	Pros. Ex. 296-----	Extract from report on partisan activities by the commanding general of Security Troops and commander of Rear Area Army Group North, 1-15 June 1942, concerning the shooting of gypsies.	X	1192
NOKW-2129-----	Pros. Ex. 951-----	Extract from activity report of 454th Security Division for period from 1-10 October 1941.	X	1257
NOKW-2181-----	Pros. Ex. 213-----	Extracts from war diary of commander of Army Rear Area 580, September 1942, concerning antipartisan warfare.	X	1160

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2265-----	Pros. Ex. 1124-----	Extracts of war diary of Naval War Staff, March 1940, concerning "Weser Exercise".	X	764
NOKW-2266-----	Pros. Ex. 1123-----	Directive from Naval War Staff, 12 March 1940, concerning alternate landing points in Norway.	X	769
NOKW-2268-----	Pros. Ex. 678-----	Extracts from XXVIII Corps activity report and correspondence for period 7-26 December 1941, concerning liquidation of insane at Markarevskaja Asylum.	X	1196
NOKW-2269-----	Pros. Ex. 1163-----	Directive of Naval War Staff to Naval Group West, 24 January 1940, initialed by defendant Schniewind.	X	839
NOKW-2276-----	Pros. Ex. 312-----	Extracts from war diary of commander of Army Rear Area 580, October 1942, concerning execution of Red army soldiers and deportation of civilians.	X	1163
NOKW-2311-----	Pros. Ex. 1162-----	Extracts from war diary of the Naval War Staff from 1-31 January 1940, concerning operation "Yellow".	X	836
NOKW-2336-----	Pros. Ex. 491-----	Supplement to activity report of 3d Panzer Army, 4 August 1943, concerning labor allocation of eastern civilian population.	XI	267

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2340-----	Pros. Ex. 484-----	Order from 3d Panzer Army to subordinate units, 19 July 1943, concerning drafting of eastern workers for labor in the Reich and labor draft proclamation.	XI	266
NOKW-2341-----	Pros. Ex. 444-----	Report from commander, Army Rear Area 590, Group VII, (Military Administration), to 3d Panzer Army; 29 November 1942, concerning recruitment and use of civilians for labor.	XI	261
NOKW-2351-----	Pros. Ex. 458-----	Administrative orders from 263d Infantry Division to Ortskommandanturen; 30 March, 1943, concerning use of civilians for building fortifications.	XI	263
NOKW-2361-----	Pros. Ex. 749-----	Extracts from war diary of commander of Army Rear Area 580, October-November 1942, concerning executions of partisans and other retaliatory measures.	X	1164
NOKW-2393-----	Pros. Ex. 440-----	Extract from monthly report of Economic Inspectorate North for July 1942 concerning transportation of civilians to the Reich for labor (Sauckel Plan).	XI	259

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2406-----	Pros. Ex. 541-----	Extract from situation report, 27 December 1944, from Army Economy Leader, 4th Army concerning request for foreign workers for Army Group Center (CinC Reinhardt), and use of civilian labor for field fortifications.	XI	284
NOKW-2449-----	Pros. Ex. 1239-----	Order for preparation of deployment "Barbarossa" from XXX Army Corps to subordinate units, 4 June 1941, signed by defendant von Salmuth.	X	1000
NOKW-2452-----	Pros. Ex. 1206-----	Deployment directive "Barbarossa", 5 February 1941, sent by defendant von Leeb to defendant von Kuechler.	X	971
NOKW-2460-----	Pros. Ex. 436-----	Extracts from monthly report for May 1942 from Economic Inspectorate North to Army Group Area North concerning the dispatch of conscripted labor to Reich.	XI	256
NOKW-2463-----	Pros. Ex. 1179-----	Activity report of the veterinary officer of the 50th Infantry Division commanded by Hollidt.	X	910
NOKW-2501-----	Pros. Ex. 696-----	Extract from 17th Army report, March-August 1942, disclosing the execution of civilians as spy suspects.	X	1157
NOKW-2508-----	Pros. Ex. 1182-----	Order, 19 February, 20 March, 3 and 5 April 1941, from Hollidt, concerning plans for attack on Greece.	X	910

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2510-----	Pros. Ex. 1226-----	Covering letter and combat directive from Fortress Staff Allenstein to subordinate units, 11 May 1941, signed by defendant Reinhardt.	X	987
NOKW-2523-----	Pros. Ex. 853-----	Copy of letter, 22 July 1941, from 11th Army, signed in draft by defendant Woehler, concerning photographs and reports of executions.	X	1209
NOKW-2531-----	Pros. Ex. 527-----	Report of Fortress Engineer Staff 7, 6 March 1944, concerning escape of Russian workers.	XI	276
NOKW-2538-----	Pros. Ex. 630-----	Orders to subordinate units, 21 and 26 November 1941, signed by defendant von Salmuth, concerning antipartisan warfare; and implementation instructions thereto distributed by subordinate 72d Infantry Division, 28 November 1941.	XI	63
NOKW-2542-----	Pros. Ex. 1190-----	Extract from war diary of Naval War Staff (section I), concerning invasion of Yugoslavia and Greece, and the subsequent division of Yugoslavia.	X	916
NOKW-2554-----	Pros. Ex. 1183-----	Extracts from war diary of the Naval War Staff (section 1), 7 and 24 March 1941, concerning the invasion of Greece and the U.S.S.R.	X	914

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2555-----	Pros. Ex. 1185-----	Extracts from war diary of the Naval War Staff (section I), 26 March 1941, concerning reports for OKW in accordance with "Marita" Directive.	X	916
NOKW-2561-----	Pros. Ex. 747-----	Extract from war diary of the 17th Army, 3 July 1942, concerning liquidation of partisans and agents.	X	1158
NOKW-2567-----	Pros. Ex. 1233-----	Assembly order for the Barbarossa attack by Fortress Staff Allenstein, 20 May 1941, and order, 7 June 1941, signed by defendant Reinhardt.	X	995
NOKW-2570-----	Pros. Ex. 492-----	Extracts from war diary, 13 July-18 September 1943, and appendix to war diary, XLIII Army Corps, concerning labor allocation of Russian civilian population.	XI	268
NOKW-2573-----	Pros. Ex. 806-----	Regulation from Armed Forces Legal Department, 24 September 1942, signed by defendant Lehmann, concerning execution of "Night and Fog" Decree.	XI	207
NOKW-2576-----	Pros. Ex. 823-----	Teletype, 1 July 1944, from Armed Forces Operations Staff/Qu.2 to Armed Forces Legal Department, signed by defendant Warlimont, requesting draft of order concerning treatment of "enemy terrorists".	XI	235

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2577-----	Pros. Ex. 825-----	Memorandum by the defendant Warli- mont, 30 July 1944, concerning draft of Terror and Sabo- tage Decree sub- mitted by Armed Forces Legal De- partment.	XI	237
NOKW-2579-----	Pros. Ex. 815-----	Covering letter 10 No- vember 1943, and directive from Armed Forces Le- gal Department, 6 November 1943, concerning treat- ment of "Night and Fog" prisoners.	XI	210
NOKW-2581-----	Pros. Ex. 819-----	Letter from Ministry of Justice to Armed Forces Legal De- partment, 26 April 1944, concerning ashes of executed "Night and Fog" prisoners.	XI	212
NOKW-2584-----	Pros. Ex. 1084-----	An "Estimate of the Situation compiled by Working Staff Rundstedt on 7 May 1939, and memoran- dum from Working Staff Rundstedt to Army Groups 3 and 5, and XVI Army Corps, 23 May 1939.	X	661
NOKW-2586-----	Pros. Ex. 1148-----	Letter from Brau- chitsch, 29 October 1939, enclosing de- ployment directive "Yellow", and cover letter from Army Group B, 5 Novem- ber 1939, distribut- ing this directive.	X	811
NOKW-2588-----	Pros. Ex. 1555-----	List distributed by General Halder, 2 February 1940, of army officers par- ticipating in opera- tional planning and measures.	X	847

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2599-----	Pros. Ex. 697-----	Extract from evening reports of subordinate units of 4th Panzer Army, 2 August 1942, regarding shooting of male civilians over 15 years of age.	X	1159
NOKW-2625-----	Pros. Ex. 1177-----	Letter by Warlimont, 16 January 1941, concerning the passage of the German army through Bulgaria, and letter of transmittal of timetable "Marita", 19 February 1941.	X	906
NOKW-2630-----	Pros. Ex. 1019-----	Article on "Condor Legion" published in "Voelkischer Beobachter", 31 May 1939.	X	493
NOKW-2637-----	Pros. Ex. 523-----	Directives issued by 3d Panzer Army in January, April and May 1944, concerning forced labor of civilians.	XI	281
NOKW-2648-----	Pros. Ex. 528-----	Report from 3d Panzer Army to High Command Army Group Center, 23 March 1944, concerning evacuation of Vitebsk and deportation of inhabitants for labor allocation.	XI	280
NOKW-2657-----	Pros. Ex. 1379-----	Covering letter from High Command of the Navy to Group Command East, 28 April 1939, signed by Schniewind enclosing directive for the preparation of operations against Danzig.	X	656

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2670-----	Pros. Ex. 1209-----	Combat Directive, 15 February 1941, for Operation "Barbarossa" from Army Group A to Army Group B (chief of staff, defendant, von Salmuth), and circular letter from General Halder, 21 March 1941, concerning conference on "Barbarossa".	X	973
NOKW-2672-----	Pros. Ex. 598-----	Extract from activity report 2 of Panzer Group 3, January-July 1941, concerning special treatment of commissars.	X	1085
NOKW-2672-----	Pros. Ex. 598-----	Extracts from activity report 2 of Panzer Group 3, January-July 1941, concerning treatment of commissars, partisans, etc.	X	1132
NOKW-2704-----	Pros. Ex. 1211-----	Deployment directive "Barbarossa", 12 March 1941, signed by defendant Hoth and transmitted to subordinate units.	X	976
NOKW-2705-----	Pros. Ex. 1202-----	Draft of deployment directive "Barbarossa", 22 January 1941, issued by the High Command of the Army.	X	960
NOKW-2706-----	Pros. Ex. 1229-----	Order from Sector Staff East Prussia to subordinate units, 17 May 1941, concerning preparations for "Barbarossa", signed by defendant von Leeb.	X	989
NOKW-2708-----	Pros. Ex. 41-----	Extracts from German Army Manual 90, "Supply of the Field Army", June 1938.	X	234

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2710-----	Pros. Ex. 1394-----	Report for war diary of the XV Corps, commanded by Hoth, 30 January 1940, concerning objectives of units in Case "Yellow".	X	842
NOKW-2713-----	Pros. Ex. 1396-----	Order of XV Army Corps, 16 March 1940, for the attack on Belgium, signed by defendant Hoth.	X	850
NOKW-2720-----	Pros. Ex. 1393-----	Two enclosures to the war diary of the XV Corps commanded by Hoth: (1) Notes on the preparations of XV Army Corps for the operations in the West, signed by Hoth; (2) Letter from Hoth to von Kluge on the same subject.	X	833
NOKW-2726-----	Pros. Ex. 1401-----	Letter from defendant Schniewind to High Command of the Armed Forces, 22 April 1941, concerning "Barbarossa".	X	980
NOKW-2730-----	Pros. Ex. 1403-----	Letter from defendant Schniewind, 9 May 1941, to Commanders in Chief of the Army, and of the Air Force, and Department National Defense, concerning Caucasian oil region.	X	985
NOKW-2731-----	Pros. Ex. 1383-----	Letter from High Command of the Navy to the German foreign office, 25 July 1939, concerning planned operations of the Navy in "Case White", signed by Schniewind.	X	693

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2761-----	Pros. Ex. 1385-----	Directive from Commander in Chief of the Navy to naval commander, 5 August 1939, concerning naval measures in connection with "Case White", signed by Schniewind.	X	696
NOKW-2822-----	Pros. Ex. 1389-----	Extracts from war diary of I Army Corps for August 1939.	X	706
NOKW-2879-----	Pros. Ex. 1380-----	Note and two enclosures concerning conference of 9 May 1939, attended by Schniewind.	X	669
NOKW-2882-----	Pros. Ex. 1382-----	Letter from High Command of the Navy to Naval Group Command East, 1 July 1939, concerning "Case White", signed by Schniewind.	X	686
NOKW-2883-----	Pros. Ex. 1372-----	Directives from Commander in Chief of the Navy, 23 November 1938, concerning occupation of Memel, initialed by Schniewind.	X	642
NOKW-2896-----	Pros. Ex. 1434-----	Extract from Hitler's speech to military leaders on his birthday, 20 April 1936; published in "Voelkischer Beobachter", 21 April 1936.	X	487
NOKW-2906-----	Pros. Ex. 1269-----	Memorandum, 26 November 1942, signed by defendant Warlimont, concerning the destruction of the Commando Order, and draft instruction to this effect, 28 November 1942.	XI	90

Document No.	Exhibit No.	Description	Volume	Page
NOKW-2909-----	Pros. Ex. 1320-----	Extracts from enclosures, 1-31 March 1942, to 10-day report of rear area Army Group South to OKH, concerning activities of Secret Field Police and SD.	X	1260
NOKW-2916-----	Pros. Ex. 1305-----	Extracts from report of 17th Army, April-July 1942, concerning the execution of civilians by secret field police and the execution of prisoners in Gorlovka concentration camp.	X	1157
NOKW-2961-----	Pros. Ex. 1306-----	Keitel order concerning antiband warfare, 16 December 1942; letter of transmittal and distribution list, 29 December 1942.	X	1166
NOKW-2963-----	Pros. Ex. 1303-----	Directive from commanding general of the XXX Corps, defendant von Sal-muth, 2 August 1941, concerning participation of soldiers in operations against Jews and Communists.	X	1219
NOKW-2981-----	Pros. Ex. 1593-----	Extracts from summaries on hands' activities in III Panzer Corps area and reports from III Panzer Corps to 8th Army, 15 October and 7 November 1943, on same subject.	XI	315
NOKW-3059-----	Pros. Ex. 1435-----	Extracts from a special edition of "Die Wehrmacht", a periodical published by the OKW, concerning the Condor Legion.	X	495

Document No.	Exhibit No.	Description	Volume	Page
NOKW-3060-----	Pros. Ex. 1462-----	Order by General Schmidt, 11 December 1944, transmitting order of chief OKW of 9 July 1944, concerning oral instructions to be given to soldiers not to protect enemy "terror" flyers from the German populace.	XI	179
NOKW-3115-----	Pros. Ex. 1439-----	Extract from "Voelkischer Beobachter", 6 February 1938, concerning the retirement of von Blomberg and von Fritsch.	X	515
NOKW-3115-----	Pros. Ex. 1439-----	Extract from "Voelkischer Beobachter", 6 February 1938, on Hitler taking over the command of the German Armed Forces.	X	516
NOKW-3129-----	Pros. Ex. 1432-----	Extracts from speeches by General Liebmann and von Blomberg, 15 October 1935, commemorating the 125th anniversary of the War Academy; published in "Berliner Boersenzeitung", 16 October 1935.	X	477
NOKW-3131-----	Pros. Ex. 1431-----	Extracts from speech by the chief of the general staff, Lieutenant General Beck, 15 October 1935, commemorating the 125th anniversary of the War Academy; published in "Berliner Boersenzeitung", 16 October 1935.	X	483

Document No.	Exhibit No.	Description	Volume	Page
NOKW-3132-----	Pros. Ex. 1419-----	Extracts from "Voelkischer Beobachter" of 2 and 6 February 1933, concerning relations between the armed forces and Hitler.	X	468
NOKW-3132-----	Pros. Ex. 1419-----	Extract from "Voelkischer Beobachter", 3 August 1934, reporting the taking of oath of allegiance to Hitler by armed forces.	X	473
NOKW-3133-----	Pros. Ex. 1429-----	Extracts from article by Reich Minister General von Blomberg on "The German Conscription", published in the "Voelkischer Beobachter", 20 March 1935.	X	473
NOKW-3140-----	Pros. Ex. 1359-----	Extracts from diary of General Halder, August 1939.	X	709
NOKW-3140-----	Pros. Ex. 1359-----	Extracts from diary of General Halder, December 1939-March 1940.	X	843
NOKW-3140-----	Pros. Ex. 1359-----	Extracts from diary of General Halder, June 1940-March 1941, concerning preparations for war against Russia.	X	942
NOKW-3140-----	Pros. Ex. 1359-----	Extract from the diary of General Halder, September-November 1941.	X	1195
NOKW-3234-----	Pros. Ex. 1609-----	Extracts from activity report of (SS) Sonderkommando XIa for the period 18 to 31 August 1941.	X	1252
NOKW-3238-----	Pros. Ex. 1606-----	Report from Einsatzgruppe D, to 11th Army, 12 February 1942, signed by Ohlendorf, concerning seized watches.	XI	309

Document No.	Exhibit No.	Description	Volume	Page
NOKW-3240-----	Pros. Ex. 1635-----	Telegram from Neubacher, German Special Plenipotentiary Southeast, to the Reich Foreign Minister, 6 June 1944, concerning application of Commando Order to war correspondents as ordered by defendant Warlimont, and foreign office memorandum thereto, 1 June 1944.	XI	97
NOKW-3292-----	Pros. Ex. 1556-----	Covering letter from 18th Army, 28 September 1941, transmitting Keitel order, 12 September 1941, concerning Jews in the occupied territories.	X	1210
NOKW-3346-----	Pros. Ex. 1510-----	Extract from war diary of 17th Army, 27 February 1942, reporting execution of hostages.	X	1156
NOKW-3358-----	Pros. Rebuttal----- Ex. 40	Teletype from 3d Panzer Army (commander, defendant Reinhardt) to subordinate units, 19 November 1942, concerning execution of Commando Order.	XI	89
NOKW-3411-----	Pros. Rebuttal----- Ex. 14	Letter of transmittal and "Reichenau Order" of 10 October 1941, distributed by XXVIII Army Corps of the 18th Army, commanded by defendant von Kuechler. (<i>Photographic reproduction appears in Section VIII.</i>)	X	1211

Document No.	Exhibit No.	Description	Volume	Page
NOKW-3422-----	Pros. Ex. 1602-----	Extract of teletype from defendant Woehler to army group, southern Ukraine, 31 May 1944, concerning treatment of Jews.	X	1264
NOKW-3437-----	Pros. Ex. 1601-----	Extract from 17th Army Corps Order No. 1, 23 July 1940, initialed by defendant Woehler.	X	1238
NOKW-3438-----	Pros. Ex. 1599-----	Extracts from war diary of 4th Army, 1 January - 31 March 1943, concerning devastation orders.	XI	306
NOKW-3442-----	Pros. Ex. 1600-----	Order from Army Group Center, 11 February 1943, signed by Woehler, concerning destructions in the area in front of the Buffalo line.	XI	313
NOKW-3453-----	Pros. Ex. 1605-----	Correspondence and reports concerning assignment and activity of Einsatzgruppe D and subunits, July 1941 to January 1942.	X	1244
NOKW-3475-----	Pros. Rebuttal----- Ex. 23	Orders from Army Group North to Corps Command Tiemann, 19 September 1943, and 30 September 1943, and enclosed order from High Command of the Army; 12 September 1943, concerning procurement of labor.	XI	270
NOKW-3482-----	Pros. Rebuttal----- Ex. 46	Extract from war diary of 3d Panzer Army (commander, defendant Reinhardt), 18 November 1942, concerning execution of the Commando Order.	XI	88

Document No.	Exhibit No.	Description	Volume	Page
NOKW-3485-----	Pros. Rebuttal----- Ex. 9	Special instructions for Case Barbarossa, issued by OKW on 19 May 1941, with enclosed "Directive for the conduct of the troops in Russia".	X	990
NOKW-3485-----	Pros. Rebuttal----- Ex. 9	Extract from directive of OKW, 8 May 1941, concerning economic organization to be set up in "Barbarossa" area.	XI	255
NOKW-3520-----	Pros. Rebuttal----- Ex. 106	Affidavit of Theodor Krancke, 16 June 1948.	X	777
NOKW-3531-----	Pros. Rebuttal----- Ex. 33	Extract from order by commanding general of Rear Area Army Group North, 22 June 1942, concerning subordination of commanders of prisoners of war, and "Service Regulations for the Commanders of PW's in the Operational Area."	XI	34
386-PS-----	Pros. Ex. 1033-----	Notes on Hitler conference of 5 November 1937.	X	505
388-PS-----	Pros. Ex. 1048-----	Extracts from file of documents on "Case Green", May-September 1938, kept by Hitler's Adjutant Schmundt.	X	600
440-PS-----	Pros. Ex. 1152-----	Hitler directive, signed by Keitel, 20 November 1939, concerning plans and preparations for invasion of Holland.	X	820
444-PS-----	Pros. Ex. 1173-----	Fuehrer Directive No. 18 to army, navy, air force, and OKW, 12 November 1940, concerning future prosecution of the war.	X	897

Document No.	Exhibit No.	Description	Volume	Page
446-PS-----	Pros. Ex. 1200-----	Directive No. 21 for Case Barbarossa, 18 December 1940, signed by Hitler, initialed by Keitel, Jodl, and Warlimont.	X	958
448-PS-----	Pros. Ex. 1176-----	Fuehrer Directive No. 22, 11 January 1941, concerning Mediterranean campaign, and letter, 29 January 1941, giving code names for measures in Directive No. 22, signed by defendant Warlimont.	X	903
498-PS-----	Pros. Ex. 124-----	The "Commando Order", 18 October 1942, signed by Hitler with a note by the defendant Warlimont concerning distribution of order.	XI	73
503-PS-----	Pros. Ex. 125-----	Letter from OKW, 19 October 1942, transmitting supplement to Commando Order signed by Hitler.	XI	76
506-PS-----	Pros. Ex. 158-----	Draft of a reply from defendant Warlimont to Armed Forces Legal Department, 22 June 1944, concerning application of Commando Order.	XI	100
510-PS-----	Pros. Ex. 154-----	Teletype from defendant Warlimont to Commander in Chief Southeast, 26 February 1944, concerning landing of British commandos in Dodecanese Islands.	XI	94
523-PS-----	Pros. Ex. 123-----	Draft of Commando Order with handwritten comments by Jodl, October 1942.	XI	85

Document No.	Exhibit No.	Description	Volume	Page
530-PS-----	Pros. Ex. 160-----	Draft of an order, 24 June 1944, signed by defendant Warlimont, concerning treatment of members of commando units in Normandy.	XI	103
531-PS-----	Pros. Ex. 159-----	Memorandum on treatment of members of commando units in Normandy, 23 June 1944, signed by defendant Warlimont.	XI	101
537-PS-----	Pros. Ex. 166-----	Draft of OKW Order, 30 July 1944, concerning treatment of members of military missions captured with partisan bands.	XI	125
551-PS-----	Pros. Ex. 162-----	OKW directive on application of Commando Order in area of Commander in Chief West, 25 June 1944, initialed by defendant Warlimont.	XI	106
665-PS-----	Pros. Ex. 800-----	See NG-077.	XI	200
669-PS-----	Pros. Ex. 798-----	Keitel letter of 12 December 1941, transmitting the first implementation decree to the "Night and Fog" Decree.	XI	198
671-PS-----	Pros. Ex. 799-----	Letter from Keitel to Reich Minister of Justice, 12 December 1941, transmitting "Night and Fog" Decree.	XI	199
711-PS-----	Pros. Ex. 824-----	Memorandum by defendant Warlimont, 1 July 1944, concerning execution of terrorists in Denmark.	XI	236
728-PS-----	Pros. Ex. 1638-----	Draft of letter from the foreign office to Chief OKW, 20 June 1944, concerning treatment of enemy "terror" flyers.	XI	175

Document No.	Exhibit No.	Description	Volume	Page
734-PS-----	Pros. Ex. 348-----	Draft of letter from O K W / A r m e d Forces Operations Staff to the foreign office, 14 June 1944, concerning treatment of enemy "terror" flyers.	XI	174
735-PS-----	Pros. Ex. 346-----	Minutes of meeting, 6 June 1944, concerning treatment of enemy flyers, signed by Warlimont.	XI	169
789-PS-----	Pros. Ex. 1153-----	Record of Hitler's speech at the conference on 23 November 1939.	X	828
798-PS-----	Pros. Ex. 1101-----	Fuehrer's speech to the commanders in chief, 22 August 1939.	X	698
835-PS-----	Pros. Ex. 831-----	Letter from the defendant Lehmann to the German Armistice Commission, 2 September 1944, concerning the handing over of alleged saboteurs and political prisoners to the Security Police and Security Service.	XI	243
836-PS-----	Pros. Ex. 804-----	Draft, undated, by Armed Forces Legal Department of a second order for the execution of the "Night and Fog" Decree.	XI	202
865-PS-----	Pros. Ex. 589-----	Fuehrer decree, 20 April 1941, appointing Alfred Rosenberg Commissioner for the central control of questions concerning the east European territory, and subsequent correspondence between Lammers, Keitel and Rosenberg.	X	978

Document No.	Exhibit No.	Description	Volume	Page
873-PS-----	Pros. Ex. 1220-----	Minutes of conference with chief of Department National Defense on 30 April 1941, concerning "Barbarossa".	X	984
877-PS-----	Pros. Ex. 53-----	Letter from High Command of the Army to High Command of the Armed Forces, attention of defendant Warlimont, 6 May 1941, transmitting drafts of Barbarossa and Commissar Orders.	X	1059
877-PS-----	Pros. Ex. 53-----	Army High Command draft of Barbarossa order, May 1941, addressed to army and army group commanders.	X	1124
883-PS-----	Pros. Ex. 1234-----	Letter from Department National Defense, 22 May 1941, concerning conference with Finland.	X	998
884-PS-----	Pros. Ex. 55-----	Memorandum signed by defendant Warlimont, 12 May 1941, concerning draft of Commissar Order.	X	1062
885-PS-----	Pros. Ex. 1236-----	Covering letter and timetable Barbarossa, 5 June 1941, distributed by High Command of the Armed Forces to three service branches and OKW agencies.	X	1002
888-PS-----	Pros. Ex. 1248-----	Letter from prisoner of war department, OKW, 16 June 1941, concerning PW matters for Case Barbarossa.	X	1007
1014-PS-----	Pros. Ex. 1102-----	Fuehrer speech (second), 22 August 1939.	X	702

Document No.	Exhibit No.	Description	Volume	Page
1263-PS-----	Pros. Ex. 122-----	Two drafts of memorandum on Commando Order, 14 and 15 October 1942, signed by Warlimont, transmitting draft of Commando Order and teletype message from Canaris' office, 10 October 1942, on same subject.	XI	80
1279-PS-----	Pros. Ex. 165-----	Memorandum of 22 July 1944, initialed by Warlimont, concerning treatment of members of foreign military missions captured with partisan bands.	XI	123
1471-PS-----	Pros. Ex. 54-----	Draft of Commissar Order, undated, prepared according to directives of 31 March 1941, and comment by defendant Lehmann, 8 May 1941.	X	1060
1541-PS-----	Pros. Ex. 1175-----	Fuehrer Directive No. 20, 13 December 1940, concerning operation Marita.	X	899
1676-PS-----	Pros. Ex. 341-----	Article entitled "A Word on the Enemy Air Terror", by Reich Minister Dr. Goebbels, published in the "Voelkischer Beobachter" Munich, 28 and 29 May 1944.	XI	166
1733-PS-----	Pros. Ex. 797-----	"Night and Fog" Decree of Hitler, signed by Keitel, 7 December 1941, concerning measures to be taken against persons offering resistance to German occupation.	XI	196

Document No.	Exhibit No.	Description	Volume	Page
1746-PS-----	Pros. Ex. 1180-----	Report of Fuehrer conference on Yugoslavia, 27 March 1941, and Fuehrer Directive No. 25, 27 March 1941, plus special instructions concerning Directive No. 25 issued by the OKW, 29 March 1941.	X	917
1780-PS-----	Pros. Ex. 1034-----	Extracts from diary of General Jodl, February - March 1938.	X	586
1780-PS-----	Pros. Ex. 1034-----	Extracts from diary of General Jodl, 1937-1938.	X	593
1796-PS-----	Pros. Ex. 1078-----	Notes for OKW War Diary, 7 April 1941, for period March-September 1939, concerning attack on Poland.	X	707
1796-PS-----	Pros. Ex. 1078-----	Notes for OKW War Diary, 7 April 1941, for period September 1939-April 1940, concerning attack on Lowlands.	X	802
1809-PS-----	Pros. Ex. 1170A----	Extracts from General Jodl's Diary (1940).	X	760
1932-PS-----	Pros. Ex. 811-----	Decree from SS Economic and Administrative Main Office to commanders of concentration camps, 7 June 1943, concerning "Night and Fog" prisoners.	XI	208
2288-PS-----	Pros. Ex. 1006-----	Extracts from Hitler's Reichstag speech, 21 May 1935, published in "Voelkischer Beobachter", 22 May 1935.	X	476

Document No.	Exhibit No.	Description	Volume	Page
2329-PS-----	Pros. Ex. 1147-----	Order signed by Brauchitach, CinC Army, 7 October and 15 November 1939, concerning preparations for invasion of Lowlands.	X	808
2360-PS-----	Pros. Ex. 1058-----	Extract from Hitler's Reichstag speech, 30 January 1939, published in "Voelkischer Beobachter", 31 January 1939.	X	598
2557-PS-----	Pros. Ex. 360-----	Sworn statement of Major Thomas R. Sealy, 2 November 1945, concerning ill-treatment and killing of American airmen by German civilians.	XI	181
2719-PS-----	Pros. Ex. 1171-----	Decree issued by State Secretary of the Foreign Office to German Diplomatic Missions, 28 April 1938.	X	896
2884-PS-----	Pros. Ex. 113-----	Affidavit of Walter Warlimont, 14 November 1945, concerning the treatment of Soviet political functionaries and commissars.	X	1064
3032-PS-----	Pros. Ex. 1251-----	Affidavit of defendant Walter Warlimont, 21 November 1945, concerning Hitler's plans for attacking the U.S.S.R.	X	955
3571-PS-----	Pros. Ex. 1063-----	Article from the German magazine "Wehrmacht", 29 March 1939, on the military occupation of Czechoslovakia, as reproduced in a report by the acting United States Military Attaché in Berlin.	X	616

Document No.	Exhibit No.	Description	Volume	Page
3798-PS-----	Pros. Ex. 1451-----	Extracts from the joint statement of Field Marshal von Manstein, Field Marshal von Brauchitsch, General Halder, General Warlimont, and General Westphal, signed in Nuernberg on 19 December 1945.	X	520
4005-PS-----	Pros. Ex. 1370-----	Extract from a speech by Gauleiter Rainer, 11 March 1942, mentioning the participation of General Keitel and defendant Sperrle in the Hitler-Schuschnigg conversations of 12 February 1938.	X	588
R-100-----	Pros. Ex. 1077-----	Information given to the Commander in Chief of the Army by the Fuehrer on 25 March 1939.	X	647
RF-388-----	Pros. Ex. 802-----	Letter from Armed Forces Legal Department to foreign office, 17 February 1942, signed by defendant Lehmann, concerning Belgian "Night and Fog" prisoners.	XI	213
TC-27-----	Pros. Ex. 1047-----	Text of diplomatic note from Czechoslovak Minister in London to the British Secretary of State for Foreign Affairs, 12 March 1938.	X	591
TC-31-----	Pros. Ex. 1115-----	Memorandum handed to the Norwegian Foreign Minister by the German Minister in Oslo on 2 September 1939.	X	749

Document No.	Exhibit No.	Description	Volume	Page
TC-36-----	Pros. Ex. 1141-----	Statement given to the King of the Belgians on 28 August 1939, by the German ambassador.	X	800
General Defense 79--	Defense Ex. 79-----	Supplement to expert legal opinion by Professor Reinhart Maurach (University of Munich), submitted on behalf of the defense in Case No. 12.	XI	44
Von Kuechler 60--	Von Kuechler Ex. 60-----	Hitler order, 29 June 1941, concerning the control of economy in the newly occupied eastern territories.	X	320
Von Kuechler 61--	Von Kuechler Ex. 61-----	Affidavit of Hans Steenbock, 26 May 1948.	X	321
Von Kuechler 119--	Von Kuechler Ex. 119-----	Decree of the Fuehrer 30 September 1942, on the execution of the decree concerning a Plenipotentiary General for the allocation of labor.	XI	260
Von Leeb 5-----	Von Leeb Ex. 38--	Letter from Field Marshal Ritter von Leeb to Herr and Frau von Schlenk-Barnsdorf, 13 October 1939.	X	863
Von Leeb 33-----	Von Leeb Ex. 42--	Letter from defendant von Leeb to the Commander in Chief of the Army Brauchitsch, 31 October 1939, concerning political and military state of affairs.	X	872

Document No.	Exhibit No.	Description	Volume	Page
Von Leeb 39a-----	Von Leeb Ex. 39---	Letter from Army Group C to chief of staff, Army Group B, defendant von Salmuth, 11 October 1939, transmitting memorandum by defendant von Leeb to General von Brauchitsch, concerning an attack on France and England by violating the neutrality of Holland, Belgium, and Luxembourg.	X	864
Lehmann 217-----	Lehmann Ex. 89---	Affidavit of Dr. Erich Lattmann, 15 May 1948.	X	1134
Lehmann 301-----	Lehmann Ex. 268--	Affidavit of Dr. Werner Huelle dated 29 February 1948.	XI	230
Lehmann 316-----	Lehmann Ex. 283--	Letter from French delegation to the German Armistice Commission, 3 August 1944, concerning investigation of the conditions of French "political prisoners."	XI	215
Reinecke 120-----	Reinecke Ex. 120---	Affidavit of Reinhard von Westrem, 21 June 1948.	XI	48
Reinhardt 208-----	Reinhardt Ex. 17---	Memorandum by Quartiermeister 2 of the 3d Panzer Army, 12 March 1944, concerning the report of fortress engineer Staff 7 dated 6 March 1944.	XI	278
Reinhardt 222-----	Reinhardt Ex. 18---	Extract from activity report of 3d Panzer Army, 1 January--30 June 1944, concerning condition of Russian workers.	XI	279
Reinhardt 302-----	Reinhardt Ex. 136--	Extract from the American "Rules of Land Warfare" concerning treatment of enemy property.	XI	317

Document No.	Exhibit No.	Description	Volume	Page
Reinhardt 303-----	Reinhardt Ex. 135_	Extract from the "British Yearbook of International Law" 1944, concerning violations of the law of war.	XI	318
Reinhardt 367-----	Reinhardt Ex. 92__	Extract from Enemy Intelligence Gazette No. 3 of 3d Panzer Army, 2 March 1942, concerning treatment of German prisoners of war.	XI	33
Von Roques 1-----	Von Roques Ex. 1__	Fuehrer's basic order on secrecy, 25 September 1941.	X	315
Von Roques 24-----	Von Roques Ex. 28_	Affidavit of Hans von Tettau, 30 April 1948.	XI	57
Von Roques 49-----	Von Roques Ex. 9__	Brauchitsch Order and OKH distribution list, 24 May 1941, amplifying Barbarossa Jurisdiction Order.	X	1118
Schniewind C-100---	Schniewind Ex. 58_	Minutes of report by Raeder to Hitler, 23 February 1940, on Operation "Weser Exercise".	X	759
Schniewind SKL 111-----	Schniewind Ex. 1-----	Organizational structure of the High Command of the German Navy (OKM).	X	290
Schniewind SKL 112-----	Schniewind Ex. 2-----	The Naval War Staff within the OKM (High Command of the Navy).	X	291
Schniewind SKL 113-----	Schniewind Ex. 5-----	Extract from "Nauticus 1939", yearbook for Germany's naval interests, containing comparison of naval strength of Germany, France, and Great Britain as of 1 September 1938.	X	518

Document No.	Exhibit No.	Description	Volume	Page
Schniewind SKL 229-----	Schniewind Ex. 42-----	Extracts from the White Book of the German foreign office, 1939, entitled "Documents explaining events leading up to the war".	X	741
Schniewind SKL 301-----	Schniewind Ex. 55-----	Affidavit of Theodor Krancke, 28 March 1948.	X	778
Schniewind SKL 308-----	Schniewind Ex. 49-----	Extract from war diary, Naval Operations Staff, 11-12 December 1939, concerning Norway.	X	752
Schniewind SKL 315-----	Schniewind Ex. 57-----	Official Norwegian and British statements, 19, 20, 24 February 1940, concerning Altmark incident.	X	756
Schniewind SKL 316-----	Schniewind Ex. 59-----	Entry in war diary of Naval Operations Staff, 4 March 1940, concerning attitude of Norway.	X	764
Schniewind SKL 323-----	Schniewind Ex. 64-----	Entry in war diary of Naval War Staff, 8 April 1940, concerning Allied mine laying in Norwegian waters.	X	772
Schniewind SKL 324-----	Schniewind Ex. 65-----	Entry in war diary of Naval War Staff, 26 April 1940, and extract from German White Book concerning British operational plans with respect to Norway.	X	778
Schniewind SKL 403-----	Schniewind Ex. 80-----	Entry in war diary of Naval War Staff, concerning intentions in the west, 2 October 1939.	X	882
Schniewind SKL 506-----	Schniewind Ex. 111-----	Extracts from the war diary of the Naval War Staff, 1-31 December 1940, concerning Operation Marita.	X	902

Document No.	Exhibit No.	Description	Volume	Page
Sperrle 79-----	Sperrle Ex. 79-----	Sworn deposition of Kurt von Schuschnigg, 14 June 1948, answering interrogatories submitted by counsel for the defendant Sperrle and by the prosecution.	X	618
Warlimont 46-----	Warlimont Ex. 48--	Affidavit of Herbert Buechs, 27 April 1948.	XI	193
Warlimont 69-----	Warlimont Ex. 67..	Affidavit of Werner Kreipe, 12 April 1948.	X	1033
Warlimont 106-----	Warlimont Ex. 104.	Extracts from British service publication "The Handbook of Modern Irregular Warfare".	XI	159

TESTIMONIES

	Volume	Page
Extract from the testimony of prosecution witness Hans <i>Fruechte</i> -----	XI	15
Extract from the testimony of defense witness Captain Russel <i>Grenfell</i> -----	X	718
Extracts from the testimony of defense witness Franz <i>Halder</i> -----	X	314, 532, 634, 711, 855, 925, 1083, 1205, 1264
Extract from the testimony of defense witness Otto <i>Heidkaemper</i> -----	XI	294
Extract from the testimony of prosecution witness General Adolf <i>Heusinger</i> -----	X	298
Extract from the testimony of defendant <i>Hollidt</i> ---	X	937
Extracts from the testimony of defendant <i>Hoth</i> ---	X	886, 1044, 1109, 1170
Extracts from the testimony of defendant <i>von Kuechler</i> -----	X	576, 742, 882, 1200, 1224
Extracts from the testimony of defendant <i>von Leeb</i> ...	X	563, 621, 722, 1034, 1090, 1188
		755

	Volume	Page
Extracts from the testimony of defendant <i>Lehmann</i>	{ X XI	316, 580, 1081, 1137 217, 249
Extract from the testimony of prosecution witness General Kurt <i>Linde</i> -----	X	292
Extracts from the testimony of defense witness General Franz <i>Mattenklott</i> -----	{ X XI	1189 69
Extract from the testimony of defense witness SS Major General Otto <i>Ohlendorf</i> -----	X	1277
Extract from the testimony of prosecution witness Paul <i>Ohler</i> -----	XI	24
Extract from the testimony of defendant <i>Reinecke</i>	XI	36
Extracts from the testimony of defendant <i>Reinhardt</i> ..	{ X XI	1047, 1101 164
Extract from the testimony of defendant <i>von Roques</i>	X	1283
Extracts from the testimony of defendant <i>von Salmuth</i> -----	X	888, 1186, 1228
Extract from the testimony of defense witness Karl <i>Schall</i> -----	XI	60
Extracts from the testimony of defendant <i>Schniewind</i> -----	X	727
Extract from the testimony of prosecution witness Hans <i>Schoenig</i> -----	XI	110
Extracts from the testimony of defendant <i>Warlimont</i> -----	{ X XI	282, 531, 798, 930, 1021, 1066 126, 182
Extract from the testimony of defense witness Reinhard von <i>Westrem</i> -----	XI	53
Extract from the testimony of defense witness Eberhard <i>Westerkamp</i> -----	XI	285
Extracts from the testimony of defendant <i>Woehler</i> ..	{ X XI	1236, 1291 318

"The Hostage Case"

Military Tribunal V

Case 7

THE UNITED STATES OF AMERICA

—against—

WILHELM LIST, MAXIMILIAN VON WEICHS, LOTHAR RENDULIC,
WALTER KUNTZE, HERMANN FOERTSCH, FRANZ BOEHME, HEL-
MUTH FELMY, HUBERT LANZ, ERNST DEHNER, ERNST VON
LEYSER, WILHELM SPEIDEL, and KURT VON GEITNER, *Defendants*



INTRODUCTION

The "Hostage Case" was officially designated *United States of America vs. Wilhelm List, et al.* (Case No. 7.) The name "Hostage Case" arises from the fact that the greater part of the trial was concerned with alleged hostage or reprisal actions of one kind or another. Less frequently the case was popularly called the "Southeast Case" because most of the alleged criminal conduct occurred while the defendants were acting as field commanders or chiefs of staff to field commanders in southeastern Europe.

The indictment, under four closely related counts, charged the defendants with the commission of war crimes and crimes against humanity during the period between Germany's invasion of Poland in September 1939 and Germany's unconditional surrender in May 1945. Generally speaking, the specifications of the criminal conduct charged may be summarized as follows: count one, the murder of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania in connection with alleged hostage or reprisal actions; count two, the plundering, looting, or wanton destruction of private and public property in Norway, Greece, Yugoslavia, and Albania; count three, participation in the initiation, distribution, or execution of illegal orders such as orders directing that enemy troops be denied quarters and the status and rights of prisoners of war; and count four, the illegal treatment of civilian populations by murder, torture, persecution, imprisonment in concentration camps, deportation to slave labor, and other related acts.

The defendant Boehme committed suicide after indictment and prior to arraignment. During the defense case, the case against the defendant von Weichs was severed for reasons of physical disability not permitting him to conclude his defense. Of the remaining 10 defendants who stood trial, the Tribunal found 8 guilty under one or more counts and 2 not guilty under any count.

The Hostage Case was tried in the Palace of Justice in Nuernberg before Military Tribunal V. The Tribunal convened on 117 trial days, and the trial lasted approximately 9 months, as shown by the following schedule:

Indictment filed	10 May 1947
Arraignment	8 July 1947
Prosecution opening statement	15 July 1947
Defense opening statements	15-16 September 1947
Prosecution closing statement	3 February 1948
Defense closing statements	4-7, 9 February 1948
Judgment	19 February 1948

Sentence	19 February 1948
Affirmation of sentences by Military Commander of the United States Zone of Occupation	18 January 1949
Order of the United States Supreme Court denying writs of habeas corpus	2 May 1949

The English transcript of the Court proceedings, including the judgment and the sentences, runs to 10,544 mimeographed pages. The prosecution introduced into evidence 678 written exhibits and the defense 1,025 exhibits. (Some of the exhibits contained several documents.) The Tribunal heard oral testimony of 16 witnesses called by the prosecution and 36 witnesses, excluding the defendants, called by the defense. Each of the 10 defendants who stood trial to the end testified on his own behalf, and each was subject to examination on behalf of the other defendants. The exhibits offered by both the prosecution and defense contained documents, photographs, affidavits, interrogatories, letters, maps, charts, and other written evidence. Most of the defense exhibits were affidavits. The prosecution called only 14 of the defense affiants for cross-examination and only 12 of them appeared in Court and were cross-examined. The Tribunal was in recess between 28 August 1947 and 15 September 1947 to give the defense additional time to prepare its case.

The members of the Tribunal and prosecution and defense counsel are listed in the ensuing pages. Prosecution counsel were assisted in preparing the case by Fred Kaufman and Guillaume Koch, interrogators, and Robert W. Blakesley, Mary Carter, Vincent Czeisler, Viola M. Farmakis, Frank Freudenthal, and Elizabeth Stewart, research and documentary analysts.

Much of the documentary evidence of the prosecution as well as the defense material ordered by the Tribunal was supplied by the Washington Screening Team.

Selection and arrangement of the Hostage Case material published herein was accomplished principally by Arnost Horlik-Hochwald, working under the general supervision of Drexel A. Sprecher, Deputy Chief of Counsel, and Director of Publications Office, U. S. Chief of Counsel for War Crimes. Henry A. Buxbaum, Emilie Evand, Gerhard Fischer, and Dr. Gerhard H. Rauschenbach assisted in selecting, compiling, editing, and indexing the numerous papers.

John H. E. Fried, Special Legal Consultant to the Tribunals, reviewed and approved the selection and arrangement of the materials as the designated representative of the Nuernberg Military Tribunals.

Final compilation and editing of the manuscript for printing was administered by the War Crimes Division, Office of the Judge Advocate General, under the supervision of Richard A. Olbeter, Chief, Special Projects Branch, with Max W. Carr as editor and John W. Mosenthal as research analyst.

ORDER CONSTITUTING TRIBUNAL V
HEADQUARTERS, EUROPEAN COMMAND

28 June 1947

GENERAL ORDERS }
No. 70 }

PURSUANT TO MILITARY GOVERNMENT ORDINANCE
NO. 7

1. Effective as of 28 June 1947, pursuant to Military Government Ordinance No. 7, 24 October 1946, entitled "Organization and Powers of Certain Military Tribunals", there is hereby constituted Military Tribunal V.

2. The following are designated as members of Military Tribunal V:

CHARLES F. WENNERSTRUM	Presiding Judge
EDWARD F. CARTER	Judge
GEORGE J. BURKE	Judge

3. The Tribunal shall convene at Nuernberg, Germany, to hear such cases as may be filed by the Chief of Counsel for War Crimes or by his duly designated representative.

BY COMMAND OF GENERAL CLAY:

C. R. HUEBNER
Lieutenant General, GSC
Chief of Staff

OFFICIAL:

GEORGE E. NORTON, JR
Lieutenant Colonel, AGD
Asst. Adjutant General

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War Department
Attn: Operations Branch
AG AO—I
1—OPO Reports Section
800—H2 EUCOM

MEMBERS OF THE TRIBUNAL

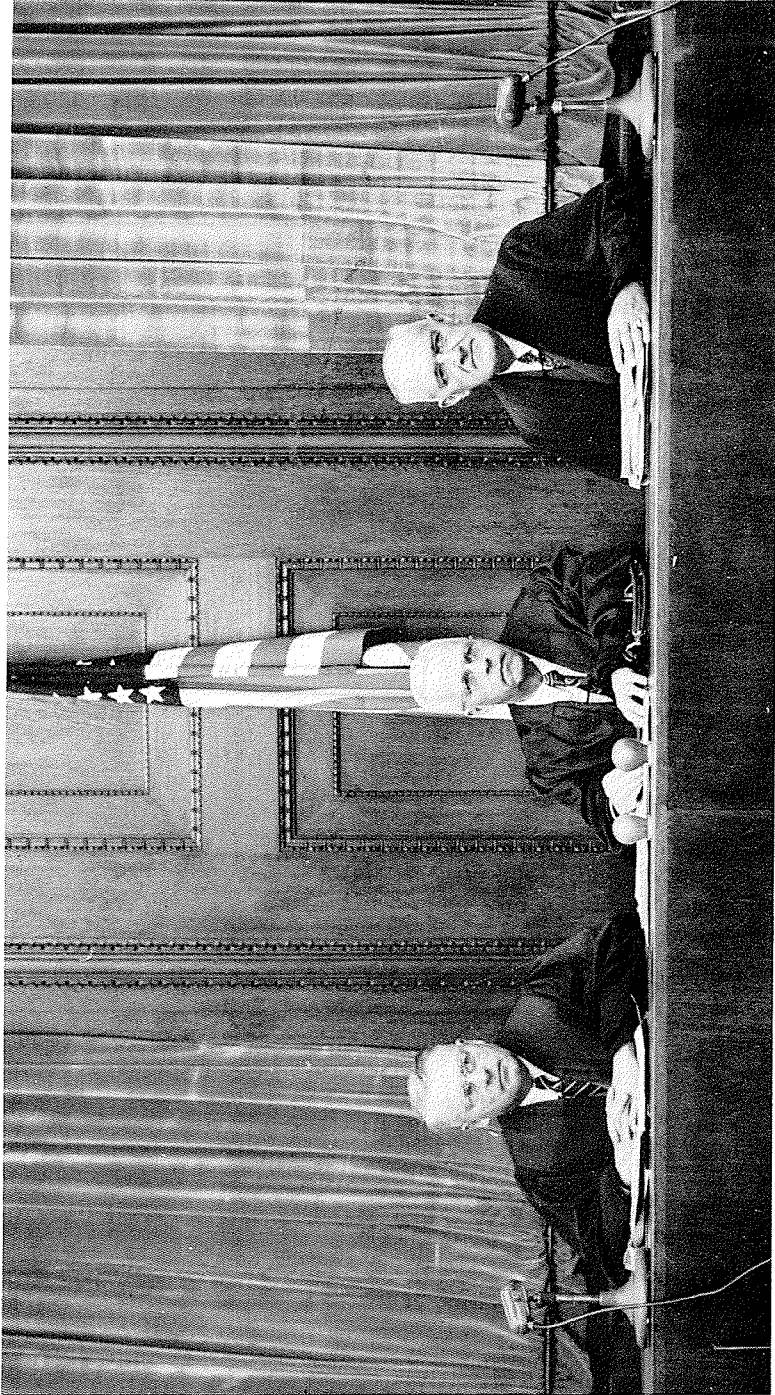
JUDGE CHARLES F. WENNERSTRUM, Presiding,
Justice of the Supreme Court of the State of Iowa.

JUDGE EDWARD F. CARTER, Member,
Judge of the Supreme Court of the State of Nebraska.

JUDGE GEORGE J. BURKE, Member,
Attorney, Member of the Bar of the State of Michigan. Appointed by
the Supreme Court of the United States in 1941 as member of the Ad-
visory Committee on Rules of Criminal Procedure for the district courts
of the United States.

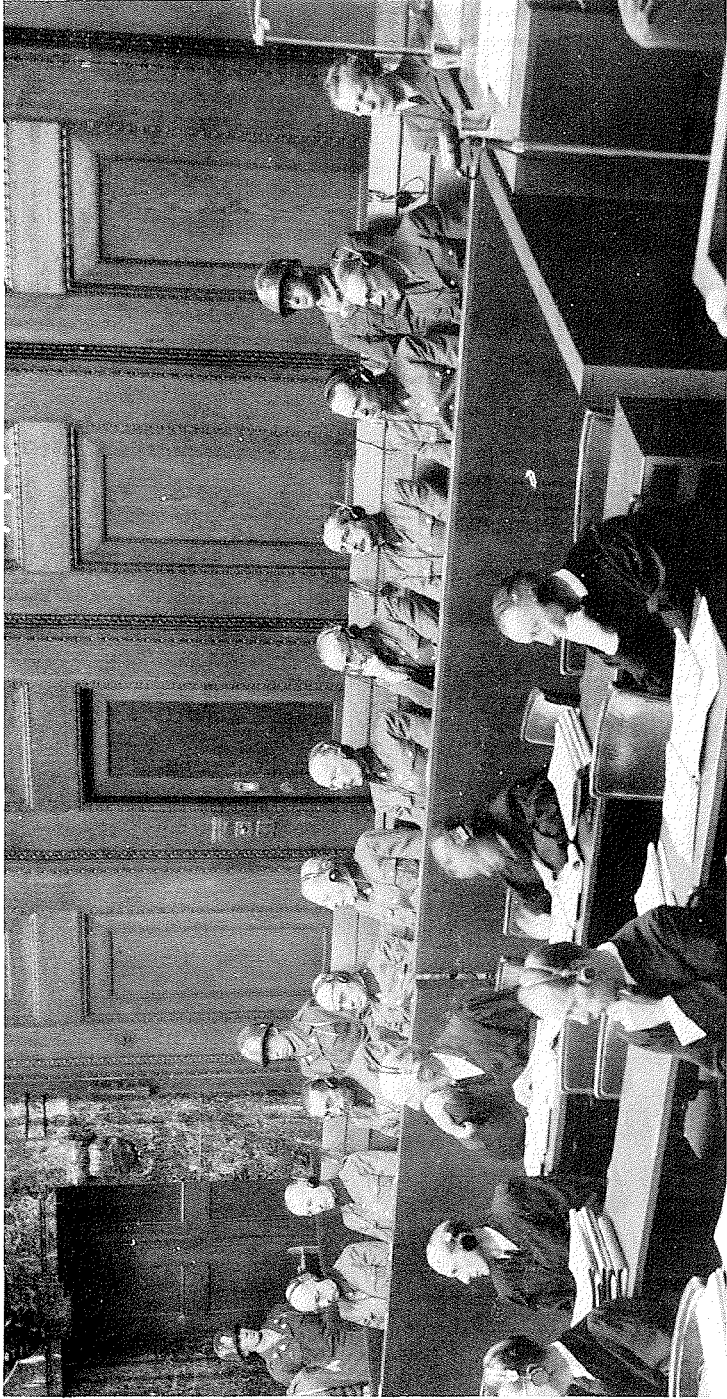
ASSISTANT SECRETARIES GENERAL

MAJOR MILLS C. HATFIELD.....	8 July 1947 to 7 August 1947
JOHN L. STONE.....	11 August 1947 to 12 August 1947
MAJOR MILLS C. HATFIELD.....	13 August 1947 to 19 August 1947
JOHN L. STONE.....	20 August 1947 to 22 August 1947
M. A. ROYCE.....	25 August 1947 to 27 August 1947
MAJOR MILLS C. HATFIELD.....	28 August 1947
CAPTAIN EVERT C. WAY.....	15 September 1947 to 19 February 1948



TRIBUNAL V—CASE SEVEN

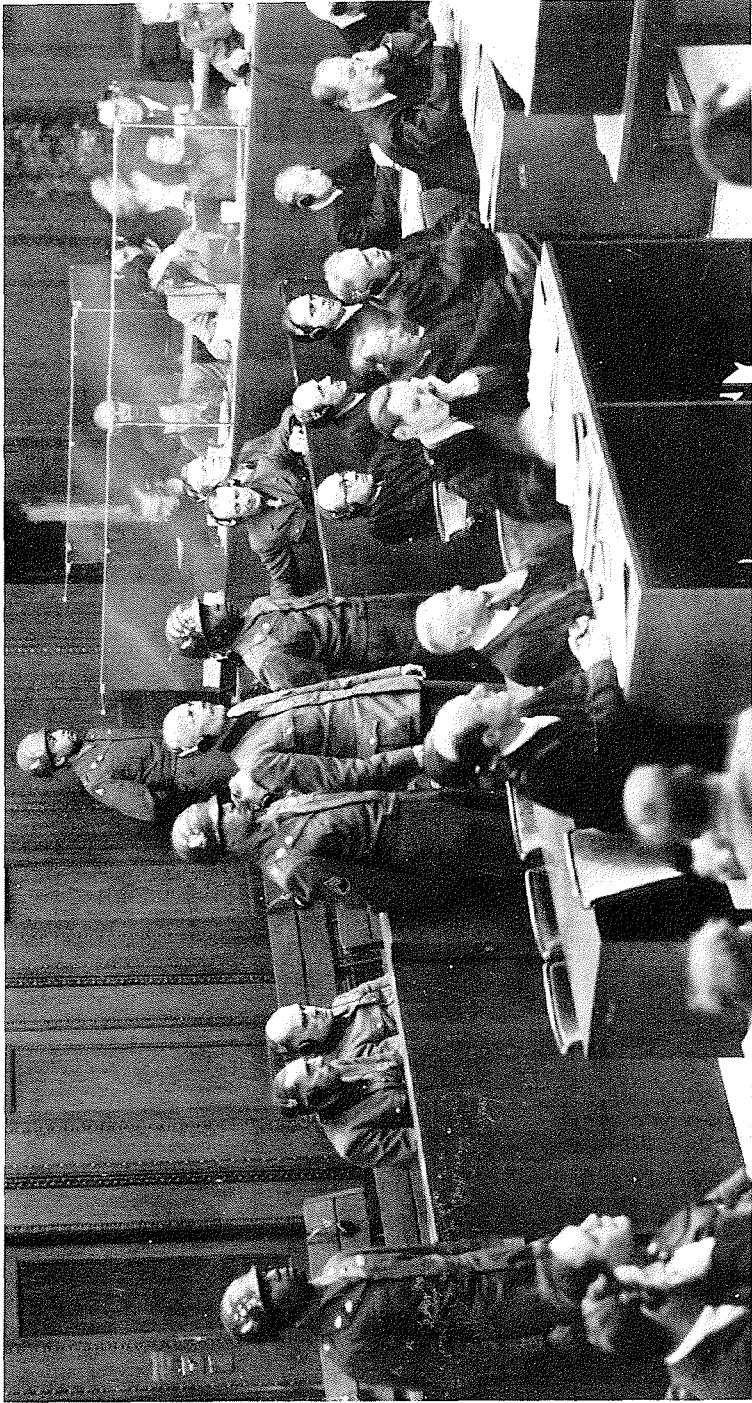
Edward F. Carter; Charles F. Wennerstrum, Presiding; George J. Burke



The defendants in the dock, 15 July 1947. Left to right, Wilhelm List, Walter Kuntze, Hermann Foertsch, Kurt von Geitner, Maximilian von Weichs, Lothar Rendulic, Ernst Dehner, Ernst von Leyser, Hubert Lanz, Helmuth Felmy and Wilhelm Speidel. Defense counselors in foreground.



Seated along the railing at top of photograph are visiting clergymen observing the trial. Mr. Theodore Fenstermacher, Associate Chief Prosecutor, is at the speaker's podium.



Flanked by guards, defendant Lothar Rendulic stands in front of the dock to receive a sentence of 20 years' imprisonment.

PROSECUTION COUNSEL

Chief of Counsel:

BRIGADIER GENERAL TELFORD TAYLOR

Deputy Chief Counsel:

MR. JAMES M. MCHANEY

Chief Prosecutors:

MR. CLARK DENNEY

MR. THEODORE F. FENSTERMACHER

Associate Counsel:

MR. GEORGE B. FULKERSON

MR. WALTER RAFF

DEFENSE COUNSEL

<i>Defendants</i>	<i>Defense Counsel</i>	<i>Associate Defense Counsel</i>
BOEHME, Franz ¹	Dr. Friedrich BERGOLD	—
DEWNER, Ernst Friedrich	Dr. Hans GAWLIK	Dr. Heinrich KLUG
FELMY, Helmuth Walter Wolfgang	Dr. Heinz MUELLER- TORGOW	Johannes DOHME
FOERTSCH, Hermann	Dr. Gerhard RAUSCHEN- BACH	Guenther HINDEMITH
GEITNER, Kurt Ritter von	Dr. Fritz SAUTER	Dr. Walter SCHMITT
KUNTZE, Walter	Dr. Georg MENZEL	Dr. Walter BEIER
LANZ, Hubert Karl	Dr. Fritz SAUTER	Herbert GEITNER
LEYSER, Ernst Hans Ulrich von	Dr. Edmund TIPP	Dr. Walter GROSS
LIST, Wilhelm Siegmund Walter	Dr. Hans LATERNER	Dr. Hans Wilhelm LIER
RENDULIC, Lothar	Stefan FRITSCH	Dr. Oskar VON JAGWITZ
SPEIDEL, Wilhelm	Dr. Joseph WEISGERBER	Dr. Erich BERGLER
WEICHS, Maximilian von ²	Dr. Hans LATERNER	Dr. Harold LUCHT

¹ Committed suicide after indictment and prior to the arraignment.

² The defendant von Weichs became ill on 6 October 1947, and was granted permission to be absent from the trial. The medical commission which was appointed upon application of the counsel for the defendant, 12 December 1947, found the defendant's physical condition prevented his further participation in the trial. The defendant's case was severed from that of the remaining defendants before the conclusion of the trial by order of Military Tribunal V, 7 January 1948.

I. INDICTMENT, INCLUDING APPENDIX LISTING POSITIONS OF THE DEFENDANTS

The United States of America, by the undersigned Telford Taylor, Chief of Counsel for War Crimes, duly appointed to represent said Government in the prosecution of war criminals, charges the defendants herein with the commission of war crimes and crimes against humanity, as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. These crimes included murder, ill-treatment, and deportation to slave labor of prisoners of war and other members of the armed forces of nations at war with Germany, and of civilian populations of territories occupied by the German armed forces, plunder of public and private property, wanton destruction of cities, towns, and villages, and other atrocities and offenses against civilian populations.

The persons accused as guilty of these crimes and accordingly named as defendants in this case are:

WILHELM LIST—Generalfeldmarschall (General of the Army); Commander in Chief 12th Army, April–October 1941; Wehrmachtsbefehlshaber Südost (Armed Forces Commander Southeast), June–October 1941; Commander in Chief Army Group A, July–September 1942.

MAXIMILIAN VON WEICHS—Generalfeldmarschall (General of the Army); Commander in Chief 2d Army, April 1941–July 1942; Commander in Chief Army Group B, July 1942–February 1943; Commander in Chief Army Group F and Supreme Commander Southeast, August 1943–March 1945.

LOTHAR RENDULIC—Generaloberst (General); Commander in Chief 2d Panzer Army, August 1943–June 1944; Commander in Chief 20th Mountain Army, July 1944–January 1945; Wehrmachtsbefehlshaber Nord (Armed Forces Commander North), December 1944–January 1945; Commander in Chief Army Group North, January–March 1945; Commander in Chief Army Group Courland, March–April 1945; Commander in Chief Army Group South, April–May 1945.

WALTER KUNTZE—General der Pioniere (Lieutenant General, Engineers); Acting Commander in Chief 12th Army, October 1941–August 1942.

HERMANN FOERTSCH—General der Infanterie (Lieutenant General, Infantry); Chief of Staff 12th Army, May 1941–August 1942; Chief of Staff Army Group E, August 1942–August 1943; Chief of Staff Army Group F, August 1943–March 1944.

FRANZ BOEHME—General der Gebirgstruppen (Lieutenant General, Mountain Troops); Commander XVIII Mountain Army Corps, April–December 1941; Plenipotentiary Commanding General in Serbia, September–December 1941; Commander in Chief 2d Panzer Army, June–July 1944; Commander in Chief 20th Mountain Army and Wehrmachtsbefehlshaber Nord (Armed Forces Commander North), January–May 1945.

HELMUTH FELMY—General der Flieger (Lieutenant General, Air Force); Commander Southern Greece, June 1941–August 1942; Commander LXVIII Army Corps, June 1943–October 1944.

HUBERT LANZ—General der Gebirgstruppen (Lieutenant General, Mountain Troops); Commander 1st Mountain Division October 1940–January 1943; Commander XXII Mountain Army Corps, August 1943–October 1944.

ERNST DEHNER—General der Infanterie (Lieutenant General, Infantry); Commander LXIX Army Reserve Corps, August 1943–March 1944.

ERNST VON LEYSER—General der Infanterie (Lieutenant General, Infantry); Commander XV Mountain Army Corps, November 1943–July 1944; Commander XXI Mountain Army Corps, July 1944–April 1945.

WILHELM SPEIDEL—General der Flieger (Lieutenant General, Air Force); Commander Southern Greece, October 1942–September 1943; Military Commander Greece, September 1943–June 1944.

KURT VON GEITNER—Generalmajor (Brigadier General); Chief of Staff to the Commanding General in Serbia, July 1942–August 1943; Chief of Staff to the Military Commander of Serbia and Military Commander Southeast, August 1943–October 1944.

Reference is hereby made to the Appendix to this indictment for a fuller statement of the positions held by each of the defendants herein.

COUNT ONE

1. Between September 1939 and May 1945, all of the defendants unlawfully, wilfully, and knowingly committed war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, the murder of hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania, by troops of the German armed forces under the command and jurisdiction of, responsible to, and acting

pursuant to orders issued, executed, and distributed by, the defendants herein. The victims of these crimes included persons from all walks of life—doctors, lawyers, clergymen, artists, teachers, laborers, farmers—who, regardless of age or sex, were rounded up from the streets, from their homes, or from their places of work, and placed in prison camps and stockades. When attacks by lawfully constituted enemy military forces, and attacks by unknown persons, against German troops and installations took place, these persons were, without benefit of investigation or trial, summarily hanged or shot. They were executed at arbitrarily established ratios varying from 50 to 100 for each German soldier killed and 25 to 50 for each German soldier wounded.

2. Other thousands of noncombatants, arbitrarily designated as “partisans,” “Communists,” “Communist suspects,” “bandits,” and “bandit suspects,” also without benefit of investigation or trial, were terrorized, tortured, and murdered, in retaliation for attacks by lawfully constituted enemy military forces and attacks by unknown persons against German troops and installations.

3. These acts of collective punishment were part of a deliberate scheme of terror and intimidation, wholly unwarranted and unjustified by military necessity and in flagrant violation of the laws and customs of war, to compel the inhabitants of the aforementioned territories to furnish information concerning the size, strength, and disposition of their national armies, to reduce the manpower potential of the armies of resistance, and to decimate for future generations the native populations of these occupied territories.

4. Pursuant to, and in implementation of, this scheme of terror and intimidation, the defendants herein issued, executed, and distributed, to troops under their command and jurisdiction, orders for the execution of 100 “hostages” in retaliation for each German soldier killed, 50 “hostages” in retaliation for each German soldier wounded, 10 “hostages” in retaliation for each person under German protection killed, 5 “hostages” in retaliation for each person under German protection wounded, and up to 100 “hostages” in retaliation for each attack upon any “object” under German protection.

5. The murders and other crimes charged in this count included, but were not limited to, the following:

a. On or about 28 April 1941, the Commander in Chief of the 2d Army ordered the execution of 100 Serbs, taken from all classes of the population, in retaliation for the death of one German soldier and the wounding of two others, and publicly announced that “in the future 100 Serbs will be ruthlessly shot for

every German harmed as a result of a surprise attack conducted by Serbs.”

b. On or about 3 September 1941, in Serbia, troops of the LXV Hoeheres Kommando (Corps Command), under the command and jurisdiction of the 12th Army, executed 20 “Communists” in reprisal for the death of three German soldiers killed in a surprise attack on the Rtanj mine.

c. On or about 30 October 1941, the Plenipotentiary Commanding General of Serbia, in his 10 day report to the Commander in Chief of the 12th Army and Supreme Commander Southeast, stated that the following executions had taken place: “405 hostages in Belgrade (total up to now in Belgrade, 4,750), 90 Communists in Camp Sabac, 2,300 hostages in Kragujevac, and 1,700 hostages in Kraljevo.”

d. On or about 29 November 1941, in Belgrade, Yugoslavia, troops under the command and jurisdiction of the commanding general in Serbia executed 100 “hostages” in retaliation for the killing of a German sergeant.

e. On or about 17 March 1943, the commanding general in Serbia ordered troops under his command and jurisdiction to execute 10 “Communists” in retaliation for the destruction of 14 telegraph poles southwest of Topola, Serbia, during the night 25–26 February 1943.

f. On or about 27 June 1943, troops under the command and jurisdiction of the commanding general in Serbia executed 350 “Communists” in retaliation for the murder of three German customs officials.

g. On or about 15 August 1943, troops under the command and jurisdiction of the commanding general in Serbia executed 150 hostages in retaliation for the murder, on 9 August 1943, of two German soldiers and the wounding of two others on the road near Pozarevac, Serbia.

h. On or about 15 September 1943, the military commander of Serbia and Military Commander Southeast ordered troops under his command and jurisdiction to execute 450 “Communist suspects” in retaliation for the attack of 1 September 1943, on a German column near Crkvice, Serbia, as a result of which seven German policemen were killed and four wounded.

i. On or about 15 September 1943, in Croatia, as a measure of revenge for a railway raid, troops of the 173d Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, executed 40 “hostages” at the place of the raid.

j. On or about 30 September 1943, in retaliation for sabotage on an electric installation, troops under the command and jurisdiction of the XXII Mountain Corps executed 17 civilians.

k. On or about 28 September 1943, in Croatia, troops of the 173d Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, executed 40 "hostages" in retaliation for an attack on a railway.

l. On or about 3 October 1943, in reprisal for an attack on a motorcycle escort in which a noncommissioned officer was killed, troops under the command and jurisdiction of the XXII Mountain Corps "executed four hostages at once" and reported that "further retaliation measures were continuing."

m. On or about 10 October 1943, in retaliation for a raid on a freight train 12 km. southeast of Vinkovci, Croatia, troops of the 187th Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, executed 20 "bandit suspects" taken from near the place of the raid.

n. On or about 26 November 1943, in retaliation for an attack by "bandits" on the road Tripolis-Sparta, Greece, troops under the command and jurisdiction of the LXVIII Infantry Corps executed 100 "hostages" at the site of the attack.

o. On or about 2 December 1943, in retaliation for an attack on a railway station southeast of Tripolis, Greece, troops under the command and jurisdiction of the LXVIII Infantry Corps executed 50 "hostages."

p. On or about 5 December 1943, in Aighion, Greece, troops under the command and jurisdiction of the LXVIII Infantry Corps shot 50 "hostages" in reprisal for recent attacks.

q. On or about 10 January 1944, troops under the command and jurisdiction of the military commander of Greece executed 50 "Communists" in retaliation for the murder of two German policemen.

r. On or about 21 March 1944, troops under the command and jurisdiction of the military commander of Greece executed 52 "hostages" in Tripolis, Greece, and 44 "hostages" in Sparta, Greece, as a retaliation measure.

s. On or about 28 March 1944, while carrying out a mopping-up operation, troops of the 7th SS "Prinz Eugen" Division and detachments of the 369th "Devil's" Division, under the command and jurisdiction of the 2d Panzer Army, raided numerous peaceful Croatian villages, burned the inhabitants alive, and set fire to their property. Three hundred persons were killed at Krivodol, five in Smilici, 40 in Legatori, 65 in Grubisipici, 80 in Bandovina-Blazevici, 645 in Vostani, and 700 in Rudi. In Otok 22 persons and in Ovrlije 150 persons were burned to death, in Sladovici seven persons were shot and the entire village burned to the ground.

t. On or about 5 April 1944, troops of the 4th SS (Police)

Panzer Grenadier Division, under the command and jurisdiction of the LXVIII Infantry Corps, brutally murdered 215 persons, mostly old men, women, and children, in the village of Klissura, Greece, in retaliation for the death of two German soldiers killed in the neighborhood of that village by members of Greek "partisan" units.

u. On or about 10 June 1944, troops of the 4th SS (Police) Panzer Grenadier Regiment [Division], under the command and jurisdiction of the LXVIII Infantry Corps, shot and killed, in the village of Distomon, Greece, 300 "bandits" and "bandit suspects" and set the village on fire.

v. On or about 11 August 1944, in reprisal for an attack east of Kukes, Albania, in which two cars were set on fire, troops of the 21st SS "Skanderbeg" Division under the command and jurisdiction of the XXI Mountain Corps, hanged six "hostages" at the place of the attack.

w. On or about 15 August 1944, in Athens, Greece, troops under the command and jurisdiction of the Military Commander of Greece executed 200 Greek citizens and 100 "Communists" in retaliation for the death of the German General Krech.

6. The acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly, and constitute violations of international conventions, of the Hague Regulations 1907, of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by Article II of Control Council Law No. 10.

COUNT TWO

7. Between September 1939 and May 1945, all of the defendants unlawfully, willfully, and knowingly committed war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, the plundering and looting of public and private property, the wanton destruction of cities, towns, and villages, frequently together with the murder of the inhabitants thereof, and the commission of other acts of devastation not justified by military necessity, in the occupied territories of Norway, Greece, Yugoslavia, and Albania, by troops of the German armed forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed,

and distributed by, the defendants herein. The defendants ordered troops under their command and jurisdiction to burn, destroy, and level to the ground entire villages and towns, and, on numerous occasions, to execute the inhabitants of such villages and towns. Such arbitrary, inhumane, and disproportionately harsh measures of reprisal dislocated hundreds of families, made thousands of peaceful noncombatants homeless and destitute, and brought untold suffering, humiliation, misery, and death to vast numbers of innocent civilians.

8. This program of wholesale devastation was carried out not only as part of a cruel, senseless pacification-through-terror scheme, wholly unwarranted and unjustified by military necessity and in flagrant violation of the laws and customs of war, but also in furtherance of a long-range plan to despoil and retard for decades the economic and industrial potential of the occupied territories.

9. The acts of destruction and other crimes charged in this count included, but were not limited to, the following:

a. On or about 10 October 1944, the Commander in Chief of the 20th Mountain Army, the defendant Rendulic, issued an order, to troops under his command and jurisdiction, for the complete destruction of all shelter and means of existence in, and the total evacuation of the entire civilian population of, the northern Norwegian province of Finmark. During the months of October and November 1944, this order was effectively and ruthlessly carried out. For no compelling military reasons, and in literal execution of instructions to show no sympathy to the civilian population, the evacuated residents were made to witness the burning of their homes and possessions and the destruction of churches, public buildings, food supplies, barns, livestock, bridges, transport facilities, and natural resources of an area in which they and their families had lived for generations. Relatives and friends were separated, many of the evacuees became ill from cold and disease, hundreds died from exposure or perished at sea in the small boats and fishing smacks used in the evacuation, while still others were summarily shot for refusing to leave their homeland—in all, the thoroughness and brutality of this evacuation left some 61,000 men, women, and children homeless, starving, and destitute.

b. On or about 25 September 1941, in Serbia, troops under the command and jurisdiction of the commanding general in Serbia were ordered to burn, and did burn, villages and farms in and around the plains of Drina and at the bend of the Sava River.

c. During the months of September and October 1941, in the course of so-called “punitive expeditions” (Strafexpeditionen), troops under the command and jurisdiction of the 12th Army burned and completely destroyed the following villages in the

Valjevo district of Serbia: Grabevica, Divci, Dracic, Jovanja, Selic, Loznica, Lukavac, Petnica, Popucke, Babjic, Susoke, Skela, Grabovac, Zabrizje, Stubline, Pricevic, and Beoluzevic.

d. On or about 15 August 1943, during the course of a reprisal raid south of Arilje, Serbia, troops under the command and jurisdiction of the commanding general in Serbia burned 460 houses.

e. On or about 24 September 1943, during the execution of "Action Kammerhofer," troops of the 173d Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, set fire to two Croatian villages.

f. On or about 5 October 1943, in retaliation for the murder of a regimental commander and for telephone "sabotage," troops under the command and jurisdiction of the XXII Mountain Corps destroyed the Greek village of Akmotopos and executed its entire population.

g. On or about 16 October 1943, troops of the 187th Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, arrested the inhabitants of the Croatian villages of Paklonica and Vocarica as "hostages" and then burned the villages to the ground.

h. On or about 15 November 1943, troops of the 187th Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, burned the village of Jamena, Croatia.

i. On or about 27 November 1943, troops of the 173d Reserve Division, under the command and jurisdiction of the LXIX Reserve Corps, burned the Croatian village of Grgurevci.

j. On or about 1 December 1943, in the course of retaliation activities against "bandits" in the district of Korca, Greece, troops under the command and jurisdiction of the XXII Mountain Corps destroyed one village and shot all of the able-bodied male inhabitants found therein.

k. On or about 15 December 1943, in the course of continuing retaliation activities in the district of Kalavritha, Greece, troops under the command and jurisdiction of the LXVIII Infantry Corps burned four villages, completely leveled Kalavritha, destroyed two convents, and executed 511 male "hostages."

l. During the period January 1944—March 1945, troops of the 392d Infantry Division, under the command and jurisdiction of the XXI Mountain Corps, burned, plundered, and looted the Croatian villages of Dreznica, Pisac, Tuzevic, and Vojvodersa.

m. On or about 28 March 1944, troops of the 7th SS "Prinz Eugen" Division under the command and jurisdiction of the 2d Panzer Army burned, plundered, and looted the Dalmatian villages of Otok, Ovrnje, Ruda, and Dolac Donji.

n. On or about 15 May 1944, troops under the command and

jurisdiction of the LXVIII Infantry Corps burned fifty houses in the village of Kimi, Greece, in retaliation for an attack on a German truck.

o. On or about 11 July 1944, troops of the 369th "Devil's" Division, under the command and jurisdiction of the 2d Panzer Army, destroyed by fire the Croatian villages of Zagnjesde and Udora, executing the male population of those villages and transporting the female population to the concentration camp at Stolac, Croatia.

p. On or about 13 August 1944, pursuant to an order of the Commander in Chief Army Group F and Supreme Commander Southeast, the defendant Weichs, the Greek village of Karpenision was burned to the ground.

10. The acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly, and constitute violations of international Conventions, of the Hague Regulations 1907, of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by Article II of Control Council Law No. 10.

COUNT THREE

11. Between September 1939 and May 1945, all of the defendants unlawfully, willfully and knowingly committed war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, the initiation and drafting of certain illegal orders, and their subsequent issuance and distribution to, and execution by, troop units of the German armed forces under the command and jurisdiction of, and responsible to, the defendants herein. Such illegal orders directed *inter alia* that enemy troops be refused quarter and be denied the status and rights of prisoners of war, and that surrendered members of the military forces of nations at war with Germany be summarily executed. Such illegal orders further directed that regular members of the national armies of Greece, Yugoslavia, and Italy be designated and treated by troops of the German armed forces subordinate to the defendants herein as "partisans," "rebels," "Communists," and "bandits," and that the relatives of the members of such national armies be held responsible for said members' lawful acts of warfare. These orders were carried out thoroughly and ruthlessly, and as a result thousands of soldiers and prisoners of war were murdered and ill-treated.

12. The murders and other crimes charged in this count included, but were not limited to, the following:

a. On or about 28 April 1941, the Commander in Chief of the 2d Army issued and distributed, to troops under his command and jurisdiction, an order stating that "whoever appears in the Serbian uniform with a weapon in his hand transgresses international law and is to be shot to death immediately," that "if in any area (of Serbia) an armed band appears, then even the men capable of bearing arms who are seized are to be shot to death, because they were in the proximity of the band, if it cannot immediately be ascertained with certainty that they were not connected with the band," and, further, "that the bodies of all persons shot to death are to be hanged up and left hanging."

b. During a period of time after June 1941, all of the defendants herein issued, executed, and distributed, to troops under their command and jurisdiction, an order for the summary execution of political commissars, even though such persons were regularly attached to, and wore the recognized uniform of, members of the established military forces of enemy belligerents.

c. On or about 23 July 1941, the Commander in Chief 12th Army and Supreme Commander Southeast issued and distributed, to troops under his command and jurisdiction, an order to punish resistance in the occupied territories of Greece and Yugoslavia "not by legal prosecution of the guilty, but by spreading terror and applying draconic measures."

d. On or about 2 October 1941, the Plenipotentiary Commanding General in Serbia ordered troops under his command and jurisdiction to execute 2,100 Yugoslavian prisoners of war in retaliation for the death of 21 German soldiers.

e. On or about 4 October 1941, the Plenipotentiary Commanding General in Serbia issued an order to troops under his command and jurisdiction to give no quarter to members of the Yugoslav National Army.

f. On or about 14 October 1941, the Plenipotentiary Commanding General in Serbia ordered troops under his command and jurisdiction to arrest all wives, and male relatives aged 15 years and over, of members of the Yugoslav National Army and to confine them in concentration camps.

g. On or about 2 November 1941, the Plenipotentiary Commanding General in Serbia issued an order to troops under his command and jurisdiction to continue the practice of shooting, after a short interrogation, all "partisans" captured in combat.

h. During a period of time after 18 October 1942, all of the defendants herein, except the defendant List, issued, executed, and distributed to troops under their command and jurisdiction an

order to execute in battle, or within 24 hours after capture, all members of Allied "commando" and "military mission" units, whether or not such persons were regularly attached to, and wore the recognized uniform of duly authorized members of the established military forces of enemy belligerents.

i. On or about 11 September 1943, the Commander in Chief and the Chief of Staff of Army Group F and Supreme Command Southeast, the Commander in Chief 2d Panzer Army, the commanders of the LXVIII Infantry Corps, XXII Mountain Corps, LXIX Reserve Corps, and XV Mountain Corps, and the military commander of Serbia, and Military Commander Southeast, issued, executed, and distributed to troops under their command and jurisdiction an order for the execution of one staff officer and 50 men of each division of the surrendered Italian Army which, prior to its surrender, had sold, given away, or destroyed its weapons, and for the execution of one officer and 10 men of each such division which, prior to its surrender, had made a motor vehicle unusable.

j. On or about 24 September 1943, the Commander of the XXII Mountain Corps ordered troops under his command and jurisdiction to execute the captured Italian General Gandin, and all officers of his staff.

k. On or about 28 September 1943, in Croatia, troops under the command and jurisdiction of the 2d Panzer Army executed 300 captured officers of the Italian "Bergamo" Division.

l. On or about 1 November 1943, troops of the 100th Jaeger Division, under the command and jurisdiction of the 2d Panzer Army, executed two captured colonels, the operations and supply officers, respectively, of the Italian 9th Army.

13. The acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly and constitute violations of international conventions, of the Hague Regulations 1907, of the Prisoner of War Convention (Geneva 1929), of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by Article II of Control Council Law No. 10.

COUNT FOUR

14. Between September 1939 and May 1945, all of the defendants unlawfully, willfully, and knowingly committed war crimes and crimes against humanity, as defined in Article II of Control Council Law No. 10, in that they were principals in, accessories

to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, the murder, torture, and systematic terrorization, imprisonment in concentration camps, arbitrary forced labor on fortifications and entrenchments to be used by the enemy, and deportation to slave labor, of the civilian populations of Greece, Yugoslavia, and Albania, by troops of the German Armed Forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed, and distributed by, the defendants herein. Great numbers of citizens—"democrats, nationalists, Jews, and gypsies"—were arbitrarily seized and thrown into concentration camps where they were systematically beaten, tortured, ill-treated, and murdered, while other masses of the civilian population were forcibly conscripted for labor in the Reich and the occupied territories, transported in trains without adequate heat or sanitary conditions, and there, separated from family and friends, were made to labor long hours under inhumane conditions.

15. The murders, imprisonment in concentration camps, deportation to slave labor, and other crimes charged in this count included, but were not limited to, the following:

a. On or about 23 September 1941, troops of the 342d Division, under the command and jurisdiction of the XVIII Mountain Corps, were ordered to place the entire male population, between the ages of 14 and 70, of the town of Sabac, Serbia, in a concentration camp.

b. On or about 6 October 1941, the Plenipotentiary Commanding General in Serbia ordered troops of the 342d Infantry Division, under the command and jurisdiction of the XVIII Mountain Corps, to clear the district south of Mitrovica and northeast of Ravnje of its entire population and to erect in the nearby town of Zasaviza a concentration camp capable of accommodating 30,000 persons.

c. On or about 11 October 1941, the Plenipotentiary Commanding General in Serbia ordered the execution of 2,200 Jews from a concentration camp in Belgrade, Yugoslavia.

d. On or about 10 August 1943, the Chief of Staff Army Group E and Supreme Command Southeast issued, executed, and distributed to troops subordinate to that command an order to deport the male population of whole villages in the occupied territories of Greece and Yugoslavia for forced labor in Germany, and "to answer attacks on German soldiers and damage to German property in all cases by the shooting or hanging of hostages, the destruction of surrounding villages, etc."

e. On or about 30 November 1943, during "Aktion Hafenfahrt,"

troops of the 100th Jaeger Division, under the command and jurisdiction of the 2d Panzer Army, were ordered to arrest and deport to the concentration camp at Semlin all "Communists" in the Albanian cities of Durazzo and Shijeb.

f. On or about 2 December 1943, the Commander in Chief of the 2d Panzer Army ordered troops under his command and jurisdiction engaged in the Operation "Panther" to evacuate the male population of Croatian towns and villages for deportation to forced labor in Germany.

g. On or about 3 December 1943, during Operation "Panther," the Commander of the XV Mountain Corps ordered troops under his command and jurisdiction to deport the able-bodied population of numerous Croatian villages to Germany for forced labor.

16. The acts and conduct of the defendants set forth in this count were committed unlawfully, willfully, and knowingly and constitute violations of international conventions, of the Hague Regulations 1907, of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by article II of Control Council Law No. 10.

Wherefore, this indictment is filed with the Secretary General of the Military Tribunals and the charges herein made against the above-named defendants are hereby presented to the Military Tribunals.

TELFORD TAYLOR
Brigadier General, USA
Chief of Counsel for War Crimes
Acting on behalf of the United States
of America

Nuernberg, 10 May 1947

APPENDIX TO THE INDICTMENT

Statement of Military Commands Held by Each of the Defendants, September 1939 to May 1945

The following is a list of the high military commands held by each of the defendants in the German armed forces during the period September 1939–May 1945. Each of the defendants, in holding and exercising these commands committed war crimes and crimes against humanity as set forth in this indictment.

LIST

The defendant Wilhelm List during the period September 1939–May 1945 was: (1939) commander in chief, 14th Army during the campaign against

Poland; (1939–1940) commander in chief, 12th Army in the west; (1941) commander in chief, 12th Army and Supreme [Armed Forces] Commander Southeast during the campaign against, and subsequent occupation of, Greece; (1942) commander in chief, Army Group A on the eastern front; retired on 10 September, 1942.

Decorations

Ritterkreuz [*Knight's Cross*]; Slowakisches Siegerkreuz [*Slovakian Victory Cross*]; Grosskreuz des Heiligen Alexander mit Schwert [*Grand Cross of the Holy Alexander with Sword*]; Grosskreuz des Ungarischen Militaerischen Verdienstordens mit Schwert [*Grand Cross of the Hungarian Military Order of Merit with Sword*]; Michael der Tapfere II. und III. Klasse [*Order of Michael the Brave 2d and 3d Class*]; Grossoffizier des Orden vom Haus Savoyen mit Schwert [*Officer of the Order of the House of Savoy with Sword*].

Promotions

(1939) Generaloberst (general); (18 July 1940) Generalfeldmarschall (general of the army).

WEICHS

The defendant Maximilian von Weichs during the period September 1939–May 1945 was: (1938–1939) commanding general, XIII Infantry Corps during the occupations of Austria, the Sudetenland, and Czechoslovakia, and during the campaign against Poland; (1940–1942) commander in chief, 2d Army during the campaigns against the Low Countries, France, Yugoslavia, and Russia; (1942–1943) commander in chief, Army Group B on the eastern front; (1943–1945) commander in chief, Army Group F and Supreme Commander Southeast during the occupations of Greece, Yugoslavia, and Albania; (March–May 1945) Fuehrer Reserve.

Decorations

Spange zum E.K. und zum E.K. 1 [*Clasp to the Iron Cross 2d Class and Iron Cross 1st Class*]; Eichenlaub zum Ritterkreuz des E.K. [*Oak Leaf to the Knight's Cross of the Iron Cross*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Grosskreuz zum Ungarischen Verdienstorden [*Grand Cross to the Hungarian Order for Meritorious Service*]; Orden der Italienischen Krone [*Order of the Italian Crown*]; Bulgarischer St. Alexander Orden [*Bulgarian St. Alexander Order*]; Kroatischer Zvonimir Orden [*Croatian Zvonimir Order*].

Promotions

(1936) General der Kavallerie (lieutenant general, cavalry); (1940) Generaloberst (general); (1943) Generalfeldmarschall (general of the army).

RENDULIC

The defendant Lothar Rendulic during the period September 1939–May 1945 was: (1939) chief of staff, XVII Infantry Corps during the campaign against Poland; (1940) commanding general, 14th Infantry Division during the campaigns against the Low Countries and France; (1940–1942) commanding general, 52d Infantry Division during the occupation of France and

the campaign against Russia; (1942–1943) commanding general, XXXV Army Corps on the eastern front; (1943–1944) commander in chief, 2d Panzer Army during the occupation of Yugoslavia and Albania; (1944) commander in chief, 20th Mountain Army in Finland and Norway and commander in chief, Armed Forces in Norway [armed forces commander, Norway]; (1945) commander in chief, Army Group North in East Prussia, commander in chief, Army Group Courland, and commander in chief, Army Group South.

Decorations

Eisernes Kreuz I and II [*Iron Cross 1st and 2d Class*]; Deutsches Kreuz in Gold [*German Cross in Gold*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Ostmedaille [*Eastern Medal*]; Eichenlaub mit Schwertern zum Ritterkreuz [*Oak Leaves with Swords to the Knight's Cross*].

Promotions

(September 1939) Oberst (colonel); (December 1939) Generalmajor (brigadier general); (1941) Generalleutnant (major general); (1942) General der Infanterie (lieutenant general, infantry); (1944) Generaloberst (general).

Became a member of the Austrian Nazi Party in 1932.

Austrian Military Attache in Paris, France (1934–1936).

KUNTZE

The defendant Walter Kuntze during the period September 1939 to May 1945 was: (1940, 1941) commanding general of XXIV [and XLII] Infantry Corps during the campaigns against the Low Countries, France, and Russia; (1941) deputy of Field Marshal List, commander in chief, 12th Army and Armed Forces Commander Southeast; (1942–1945) in charge of training of replacement army; (autumn 1944) in charge of work on the West Wall.

Decorations

Spange zum E.K. II und E.K. I [*Clasp to Iron Cross 2d Class and Iron Cross 1st Class*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Deutsches Kreuz in Silber [*German Cross in Silver*]; Schutzwallehrenzeichen [*Medal of the Atlantic Wall*]; Grosskreuz zum Bulgarischen Militaerischen Verdienstorden [*Grand Cross to the Bulgarian Order for Meritorious Military Service*]; Grossorden der Krone Koenig Zvonimirs [*Order of the crown of King Zvonimir*].

Promotions

(1938) General der Pioniere (lieutenant general, engineers).

FOERTSCH

The defendant Hermann Foertsch during the period September 1939–May 1945 was: (1939) chief of staff of Wehrkreis (Service Command) VIII; (1939–1940) chief of staff of XXVI Infantry Corps in the west; (1940) commanding officer of the General Staff Courses in Berlin; (1941) liaison officer of OKH (Army High Command) with 12th Army in the Balkan campaign against Greece; (1941) chief of staff of 12th Army; (1942–1943) chief of staff of Army Group E and later of Army Group F; (summer 1944) commanding general of the 21st Infantry Division on the eastern front;

(1944) commanding general of the X Infantry Corps; (1945) commander in chief, 1st Army on western frontier of the Reich.

Decorations

Spange zum Eisernen Kreuz II. Klasse und I. Klasse [*Clasp to the Iron Cross 2d Class and 1st Class*]; Deutsches Kreuz in Gold [*German Cross in Gold*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*].

Promotions

(1938) Oberst (colonel); (1942) Generalmajor (brigadier general); (1943) Generalleutnant (major general); (1944) General der Infanterie (lieutenant general, infantry).

Publications

Most important publications—*Kriegskunst Heute und Morgen* [*The Art of Warfare Today and Tomorrow*].

BOEHME

The defendant Franz Boehme during the period September 1939–May 1945 was: (1939–1940) commanding general, 32d Infantry Division during the campaigns against Poland, the Low Countries, and France; (1940–1941) commanding general, XVIII Infantry Corps, and (1941) Plenipotentiary Military Commander in Serbia; (1942–1943) commanding general, XVIII Infantry Corps in Finland; (1944) commander in chief, 2d Panzer Army; (1945) commander in chief, 20th Mountain Army and armed forces commander, Norway.

Decorations

Eisernes Kreuz I. Klasse und II. Klasse [*Iron Cross 1st and 2nd Class*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Deutsches Kreuz in Gold [*German Cross in Gold*].

Promotions

(1939) Generalleutnant (major general); 1940 (General der Gebirgstruppen (lieutenant general, mountain troops).

FELMY

The defendant Helmuth Felmy during the period September 1939–May 1945 was: (1939–1940) commander of Luftflotte (Air Fleet) II; (1941) head of the German Military Mission to Iraq; (1941) Military Commander Southern Greece and Commander Special Staff F (staff of former Military Mission Iraq, at that time located in Greece); (1942–1944) commanding general of LXVIII Infantry Corps on eastern front, in Greece, Yugoslavia, and Hungary; (1944–1945) commanding general of XXXIV Infantry Corps in Yugoslavia.

Decorations

Spange zum E.K. II und I [*Clasp to the Iron Cross 2d Class and 1st Class*]; Deutsches Kreuz in Gold [*German Cross in Gold*].

Promotions

(1938) General der Flieger (lieutenant general, air force).
Became a member of the Nazi Party in 1940.

LANZ

The defendant Hubert Lanz during the period September 1939–May 1945 was: (1939–1940) chief of staff of Wehrkreis (Service Command) V; (1940) chief of staff of XVIII Mountain Corps, during the campaigns against the Low Countries and France; (1940–1943) commanding general of 1st Mountain Division during the campaigns against Yugoslavia and Russia; (1943) deputy commander of the XLIX Mountain Corps in Russia; (1943–1945) commanding general of XXII Mountain Corps in Greece and Hungary.

Decorations

Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Eichenlaub zum Ritterkreuz [*Oak Leaf to the Knight's Cross*].

Promotions

(1939) Oberst (colonel); (1940) Generalmajor (brigadier general); (1942) Generalleutnant (major general); (1943) General der Gebirgstruppen (lieutenant general, mountain troops).

DEHNER

The defendant Ernst Dehner during the period September 1939–May 1945 was: (1940) commander of the 87th Infantry Regiment in Belgium; (1941–1942) commanding general of the 106th Infantry Division during the campaign against Russia and on occupation duty in Northern France; (1942) commanding general of the LXXXII Infantry Corps; (1943–1944) commanding general of LXIX Reserve Corps in Croatia; (1944) Military Commander Southern France.

Decorations

Silberne Spange zum Preussischen Eisernen Kreuz I. und II. Klasse [*Silver clasp to Prussian Iron Cross 1st and 2d Class*], Infanterie-Sturmabzeichen [*Infantry Assault Medal*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Medaille "Winterschlacht im Osten" [*Medal of the Winter Battle in the East*]; Orden vom Heiligen Zvonimir [*Order of the Holy Zvonimir*].

Promotions

(1936) Oberst (colonel); (1940) Generalmajor (brigadier general); (1942) Generalleutnant (major general); (1942) General der Infanterie (lieutenant general, infantry).

LEYSER

The defendant Ernst Leyser during the period September 1939–May 1945 was: (1939–1940) commander of 169th Infantry Regiment during the campaign against Poland, the Low Countries, and France; (1941) commanding general of the 269th Infantry Division in Russia; (1942) commanding general of the XXVI Corps in Russia; (1943–1944) commanding general of XV Mountain Corps in Croatia; (1944–1945) commanding general of XXI Mountain Corps in Albania.

Decorations

Spange zum Eisernen Kreuz I. und II. Klasse [*Clasp to the Iron Cross 1st and 2d Class*]; Ritterkreuz des Eisernen Kreuzes [*Knight's Cross of the Iron Cross*]; Deutsches Kreuz in Gold [*German Cross in Gold*].

Promotions

(1937) Oberst (colonel); (1941) Generalmajor (brigadier general); (1942) Generalleutnant (major general); 1942 General der Infanterie (lieutenant general, infantry).

SPEIDEL

The defendant Wilhelm Speidel during the period September 1939–May 1945 was: (1939) chief of staff Luftflotte (Air Fleet) I during the campaign against Poland; (1940) chief of staff Luftflotte (Air Fleet) II during the campaigns against Poland, the Low Countries and France; (1940–1942) commanding general and commander of the German Air Force Mission in Rumania; (1942) Military Commander Southern Greece; (1943–1944) Military Commander Greece; (1944–1945) commander of the Liaison Staff OKL (Air Force High Command) Southeast; (1945) commander, Special Field Police Regiment III.

Decorations

Spange zum Eisernen Kreuz I. und II. Klasse [*Clasp to the Iron Cross 1st Class and 2d Class*]; various Rumanian and Bulgarian decorations.

Promotions

(1937) Oberst (colonel); (1939) Generalmajor (brigadier general); (1940) Generalleutnant (major general); (1942) General der Flieger (lieutenant general, air force).

GEITNER

The defendant Kurt von Geitner during the period September 1939–May 1945 was: (1939) commander of an infantry replacement regiment; (1940) operations officer of Wehrkreis (Service Command) VIII; (1940) chief of staff, XLV Infantry Corps during the occupation of France; (1941) attached to staff of Army Group Center during the campaign against Russia; (1942) chief of staff to the commanding general and commander in Serbia; (1943) chief of staff to the military commander of Serbia and Military Commander Southeast.

Decorations

Spange zum Eisernen Kreuz I. und II. Klasse [*Clasp to the Iron Cross 1st and 2d Class*]; Kriegsverdienstkreuz II. Klasse [*War Merit Cross 2d Class*].

Promotions

(1936) Major der Reserve (major, reserve officer); (1940) Oberstleutnant (lieutenant colonel); (1942) Oberst (colonel); (1944) Generalmajor (brigadier general).

Became a member of the Nazi Party in spring, 1938.

II. ARRAIGNMENT

Extracts from the official Transcript of Military Tribunal V in the matter of the United States of America vs. Wilhelm List, et al., defendants, sitting at Nuernberg, Germany, on 8 July 1947, Justice Wennerstrum presiding.

PRESIDING JUDGE WENNERSTRUM: Military Tribunal V will come to order.

The Tribunal will now proceed with the arraignment of the defendants in Case No. 7 pending before this Tribunal. The Secretary General will call the roll of the defendants. The defendants will stand and answer their names when they are called.

[The Secretary General then called the roll of the defendants: Wilhelm List, Maximilian von Weichs, Lothar Rendulic, Walter Kuntze, Hermann Foertsch, Franz Boehme, Helmuth Felmy, Hubert Lanz, Ernst Dehner, Ernst von Leyser, Wilhelm Speidel, and Kurt von Geitner.]

MR. DENNEY: May it please Your Honor, the prosecution has been advised by the custodian of the jail that since the serving of the indictment on the defendant Franz Boehme, he has now become deceased, and with that in mind we would request that Your Honors strike his name from the list of defendants.

PRESIDING JUDGE WENNERSTRUM: It is the order of the Tribunal that the name of the defendant just mentioned by counsel be stricken from this indictment.

THE SECRETARY GENERAL: May this Honorable Tribunal please, the defendants are all present and in the dock.

PRESIDING JUDGE WENNERSTRUM: Mr. Secretary General and Counsel, the Tribunal desires to make this comment and inquiry at this time. We are advised that at a previous session and proceedings the indictment has been read to these defendants. This Tribunal is desirous that a record be made at this time as to whether or not these defendants desire that the indictment be read again to them, and unless each of the defendants waive the reading of the indictment it will be read again to the defendants at this time.

DR. LATERNSER: I am authorized to declare in the name of the defense—I am Dr. Laternser, defense counsel for the defendants Field Marshals List and von Weichs—that the defendants waive the reading of the indictment.

PRESIDING JUDGE WENNERSTRUM: May I inquire of counsel as to whether or not he is authorized to represent all the defendants in the waiving of the reading of the indictment at this time.

DR. LATERNSER: Yes, Mr. President, I am.

PRESIDING JUDGE WENNERSTRUM: The record may then show that each of the defendants, by their counsel, unless otherwise

indicated here at this time, waives the reading of the indictment again to them. There being no indication of the desire of counsel or defendants that the indictment be again read, the record may then show that the reading at this time is waived by all defendants. Mr. Secretary General you will call the defendants one by one for arraignment.

THE SECRETARY GENERAL: Wilhelm List.

PRESIDING JUDGE WENNERSTRUM: Defendant Wilhelm List, have you counsel?

DEFENDANT LIST: Yes.

Q. Has the indictment in the German language been served upon you at least 30 days ago?

A. Yes.

Q. Have you had an opportunity to read the indictment?

A. Yes.

Q. Have you read the indictment?

A. Yes.

Q. Defendant Wilhelm List, how do you plead to this indictment, guilty or not guilty?

A. Not guilty.

PRESIDING JUDGE WENNERSTRUM: Be seated.

[At this point the other defendants were arraigned. Each was asked the same questions as the defendant List, and each gave similar answers. All of the defendants pleaded "Not guilty."]

* * * * *

PRESIDING JUDGE WENNERSTRUM: The pleas of the defendants, as here made, will be entered by the Secretary General in the records of this Tribunal. The Court or Tribunal desires to inquire if there are any other matters which are desired to be presented to this Tribunal at this time.

MR. DENNEY: The prosecution has nothing to say.

PRESIDING JUDGE WENNERSTRUM: Do counsel for any of the defendants desire to present any matters to the Court at this time?

DR. LATERNSEK: The defense likewise has no request to make at this time.

PRESIDING JUDGE WENNERSTRUM: This Tribunal is advised that the Tribunal will be in recess now until 15 July, one week from today.

We wish to state—and I am speaking for the Tribunal—that we are desirous that this trial be expedited as promptly as possible. In making that statement, however, we do not intend, nor will it be our purpose, in any way to limit either the prosecution or counsel or any of the defendants. It will be the intention of

this Tribunal to carry on the proceedings as expeditiously as possible, keeping in mind at all times that the rights of the prosecution and the defendants will be respected in every degree.

The Tribunal, therefore, will be in recess until Tuesday morning, 15 July 1947, at 0930 hours.

III. OPENING STATEMENTS

A. Extracts from Opening Statement of the Prosecution¹

GENERAL TAYLOR: May it please Your Honor. This is the first time, since the conclusion of the trial before the International Military Tribunal, that high ranking officers of the Wehrmacht have appeared in this dock, charged with capital crimes committed in a strictly military capacity. The conviction and execution of Keitel and Jodl, pursuant to the judgment and sentence of the International Military Tribunal, gave rise to widespread public comment, not only in Germany but also in the United States and England. Since that time, there have been several other noteworthy trials of German military leaders.

In the British zone of occupation, Generals von Falkenhorst² and Blumentritt³ have been tried for the murder of prisoners of war. General Sepp Dietrich and his subordinates have been charged in the American zone with responsibility for the Malmédy⁴ massacre. General von Mackensen and Maelzer faced a British military court in Italy in connection with the Ardeatine Caves massacre of Italians.⁵ In Yugoslavia and Greece, Generals Alexander Loehr and Friedrich Wilhelm Mueller have been tried and condemned for war crimes committed in southeastern Europe.

Most recently, Field Marshal Albert Kesselring was tried by a British Military Court in Italy.⁶ The court found him guilty of responsibility for the Ardeatine Caves atrocity, as well as for other war crimes against Italians committed by troops under his command in northern Italy. It sentenced him to be shot to death. This sentence of capital punishment against one of the outstanding military figures of the recent war again stimulated much discussion, and encountered not inconsiderable criticism, particularly in England. Whether or not as a result of such criticism, about 10 days ago the British reviewing authorities commuted the death sentences against Kesselring, von Mackensen, and Maelzer to life imprisonment.

¹ Complete opening statement is recorded in mimeographed transcript, 15 July 1947, pp. 10-123.

² Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, London, vol. XI, p. 18, Case No. 61, "Trial of Generaloberst Nikolaus von Falkenhorst."

³ Tried by British military court at Wuppertal, 25 March-1 April 1947, for war crimes and found not guilty.

⁴ United States *vs.* Valentin Bersin, et al., the "Malmédy Case," D-A Case File No. 6-24.

⁵ Law Reports of Trials of War Criminals, *op. cit. supra*, vol. VIII, p. 1, Case No. 43, "Trial of General von Mackensen and General Maelzer."

⁶ *Ibid.*, p. 9, Case No. 44, "Trial of Albert Kesselring."

Because of the unusually deep interest which cases of this type have aroused, not only in military and legal circles but throughout the general public, and because the scope and sweep of this case is much greater than any of the previous cases to which I have referred, the prosecution may fairly be required, in opening this case, to do much more than outline the evidence which will be adduced in support of the indictment. Indeed, as this case progresses, I think it will rapidly appear that the evidentiary questions are of secondary importance. That the killings charged in the indictment occurred, that they were carried out by troops under the command of these defendants, and that they were in fact ordered by the defendants will not, I believe, be denied. The naked facts are terribly clear.

Nor, after the evidence is laid before you, can the true meaning of this case be drawn from learned arguments by counsel, analyzing and refining the laws of war as they are written in the Hague Conventions and in textbooks on international law. Of necessity, we will hear much discussion of hostages, and reprisals, and the necessary qualifications of belligerent armed forces. But the exposition of these technical problems of the law of land warfare, important as it may be, does not reach to the heart of this or similar cases in the year 1947.

The doubts which have been expressed concerning the wisdom and value of trials such as this one arise from a variety of conceptions and misconceptions. To some extent, these doubts are the natural result of the passage of time. Hostilities in Europe ended over two years ago, the devastated and stricken condition of Germany has aroused sympathy, and there is general desire to wipe the unhappy past from memory. So we hear it suggested by some that the present plight of Germany should shield men such as these from the consequences of crime, if criminals they be. But Germany is not the only devastated and stricken land, and for every crime there is not only a criminal but a victim. In the minds of many peoples are memories so mordant that they cannot be forgotten. If the course of justice is stayed, these sores will only fester the longer and spread the wider. We can not restore the moral fabric of Europe by laying a shroud over unshriven and unburied corpses.

Other and quite different doubts have been raised by some who, with a blurred vision of military discipline, suppose that military men are a sort of race apart, who are not responsible for their actions because they are expected to obey orders. But the law and code of the German Army itself says that it is the duty of every soldier to refuse to obey orders that he knows to be

criminal. This may be hard for the ordinary soldier acting under pistol-point orders from his lieutenant. It is far less difficult for high ranking commanders such as the men in the dock. These men are not named in the indictment because they are generals; they are named because they are charged with the responsibility for crimes. They must be acquitted if, under the law and the evidence, that responsibility cannot justly be attributed to them, but they cannot be acquitted merely because they are generals, any more than they can be indicted for that reason alone.

More fundamental and more cogent, I believe, are doubts of those who question the wisdom and justice of attempting, by criminal prosecution, to enforce the laws of war with meticulous precision. Wars, such people say, are not fought on the dueling ground, and a polished observance of ritual cannot be expected. Furthermore, there is a general feeling, not without substantial basis, that some of the laws of war as written in the Hague Conventions are obsolete, and on both sides were honored only in the breach. Then, too, it is felt, and rightly, that violations of the laws of war are committed in the best regulated armies, and it is therefore urged that the commanders should not be held to a strict and rigorous account for occasional lapses. I think that unarticulated doubts of this latter description underlie the criticism leveled against the death sentence which was imposed upon Kesselring, particularly criticism emanated from high ranking Allied commanders who fought against him. The degree of Kesselring's guilt is, of course, not at issue in this proceeding, but in the course of it we will of necessity find occasion to draw certain comparisons and contrasts between the charges which were laid against Kesselring and those which are laid against the defendants here in the dock.

This case will achieve international meaning and significance, I believe, only if we adopt a realistic and practical approach to such questions. And I believe that such an approach has been adopted in the framing of this indictment, in the selection of evidence in support thereof, and in the basic theory of the prosecution's case. The prosecution fully recognizes that the laws and usages of warfare must be altered and adapted to reflect the developments in this terrible art which man has learned to practice with such appalling proficiency. We have not sought and will not seek in this case to make murderers out of soldiers for the violation of rules framed in 1907, if those rules today are outmoded and generally disregarded.

So, too, the prosecution takes full account of the true nature of modern warfare as it relates to the responsibilities of commanders. We would not have arrested the defendants, we would not have requested that this court be constituted, and we would not have brought charges against these men, if they were to be accused of mere carelessness or responsibility for occasional or sporadic crimes committed by their troops.

On the contrary, we charge that these men inaugurated and executed a deliberate program of terror and extermination which was boundless in its arrogant contempt for the inhabitants of the lands which the Wehrmacht invaded and overran. It is perhaps the most elementary principle of human intercourse—the bare subsistence level of civilization—that human life should not be destroyed needlessly, or merely because it is regarded as inferior. This is not an elevated or noble principle, although the entire structure of human dignity is built upon it. This principle merely enunciates mankind's instinct of self-preservation, and its observance protects man from self-destruction. It is so deeply rooted in civilization that the world insists on its observance in war as well as in peace, and the laws of war are, essentially, nothing more than a gloss on this fundamental rubric. It is for denying and undermining the very basis of civilization that these men are indicted.

Let us turn, then, to the indictment in which the charges against these men are set forth. Counts one and two of the indictment relate to murders and other crimes committed against civilian inhabitants of Greece, Yugoslavia, Norway, and Albania during the German occupation of those countries. Count three charges the killing, in violation of the rules of war, of prisoners of war and other members of the armed forces of countries at war with Germany, and of members of the Italian armed forces after Italy's capitulation to the Allied nations. Count four accuses the defendants of ordering and committing murders and other crimes in furtherance of the "racial" and economic policies of the Third Reich—the slaughter of Jews, the imprisonment and mistreatment of other segments of the civilian population, and the deportation of thousands to slave labor in Germany.

Count one, more particularly, charges the murder of many thousands of civilians under the color of retaliation or "reprisal" for attacks on German forces or military installations. As will appear from the evidence, these killings were carried out pursuant to a plan and system, embodied in orders issued, distributed, and executed by the defendants and others, which called for the

retaliatory killing of civilians at arbitrarily established ratios, such as 100 civilians for every German soldier killed, and 50 for each soldier wounded. Usually the Germans referred to victims of these mass executions as "hostages."

As I said at the outset, the proof of these acts will present no difficulty. The evidence is all set forth in orders, reports, and other documents issued and circulated by the defendants themselves. Lest Your Honors find it hard to credit what the written word so starkly exhibits, the oral testimony of eyewitnesses will also be spread on the record.

The laws of war do, of course, recognize that in certain circumstances belligerents may take steps by way of reprisal. The taking of hostages, too, has been practiced between nations since ancient times. The killing of hostages is a much more recent development; it is not the emblem of an enlightened way of life, and most of the precedents are found in history of the German Army and its exploits during the First World War. Furthermore, as will clearly appear, most of the victims who met their death before German firing squads at Belgrade, or Kraljevo, or Athens, or Klissura were not "hostages" in any true sense of the word.

We will, in due course, endeavor to set forth in some detail the rules of war as they relate to "reprisals" and "hostages." At this point I wish to make only two observations. Both the London Charter and Control Council Law No. 10 declare the killing of hostages to be a violation of the laws of war. This declaration is binding on the Tribunal and the prosecution alike, and the prosecution believes that it is an accurate statement of the law. But the theory of the prosecution's case under count one does not rest on this rule. We may concede for purposes of argument that the execution of hostages may under some circumstances be justified, harshly as those words may ring in our ears. But the law must be spared the shame of condoning the torrent of senseless death which these men let loose in southeastern Europe.

Count two of the indictment speaks in terms of destruction and devastation, totally unjustified by military necessity. Here, too, the victims were the peoples of Norway, Yugoslavia, Greece, and Albania, who saw their homes in flames, their towns and villages erased, and their possessions looted and scattered.

Count three of the indictment is quite different from the first two counts. The victims of the crimes charged in count three were not civilians and noncombatants; they were, for the most part, members of the Yugoslav and Greek armed forces who continued to resist the German invader after the defeat of the major units of the Greek and Yugoslav armies and the replacement of their national governments by "puppet" governments or

German military occupational administration. Pursuant to orders issued and executed by the defendants, these troops who continued to resist were not recognized by Germany as belligerents, and when captured were commonly denied the status of prisoners of war and were shot or hanged. We will subsequently discuss the rules of war pertaining to the qualifications of belligerent armed forces.

Count three also charges other crimes against members of the armed forces of various other allied nations, particularly in pursuance of the notorious German order of October 1942, under which numerous Allied "commandos" were coldly murdered after their capture. It also charges the murder of many officers and men of the Italian armed forces at the time of and shortly after Italy's surrender to the Allies.

Count four, finally, strikes a still more somber note. The crimes charged therein were in no way related to military operations. We find the defendants and their troops helping to "purge" southeastern Europe of the so-called "inferior peoples" such as Jews, and "politically unreliable" individuals such as "democrats" and "nationalists." We find them helping to enslave and deport the inhabitants of these lands to join the millions of other unfortunates from all over Europe who were sucked into Germany to work for their conquerors in mines and factories. We see the German Army in a shameful role as the servant and tool of Himmler, Sauckel, and other Nazi worthies.

Such, in summary, are the charges in this indictment. The Tribunal will observe, from the dates of the particular incidents set forth as illustrations of the charges, that all four counts cover the 3½ years from April 1941 to approximately October 1944. All four types of crime were committed throughout this period, and often a single episode involved the commission of crimes under all four counts. Consequently, in outlining the evidence today and in presenting it during the next few weeks, the prosecution proposes to proceed chronologically, rather than by count. We believe this will be conducive to a more orderly and intelligible presentation. However, in presenting particular documents or witnesses, we will, of course, specify which count or portion of a count the particular piece of evidence supports.

Before taking up the evidence in more detail, it will be helpful to spend a few moments in outlining the structure and organization of the German military machine, and the way in which it functioned in occupied countries, particularly in southeastern Europe. The prosecution has already submitted to the Tribunal, and to defense counsel, a brief memorandum on the organization of the German Army, together with a series of charts showing the chain of com-

mand of the more important military units in southeastern Europe and northern Norway, with several maps of Yugoslavia, Greece, and Norway, and other mechanical aids to the understanding of this case.* One of these charts has been enlarged for display on the wall of the courtroom.

DR. LATERNSEER (counsel for defendant List): Mr. President, I am sorry I have to interrupt at this moment. I am surprised to hear right now the Tribunal has been presented by the prosecution with an information referring to the defense. We are now in a criminal procedure. As far as I know, the person who makes a statement has to prove that it is true. I don't know now how the prosecution wants this information to be understood. If it should be regarded as evidence before this Tribunal, I must object to the information already submitted to this Tribunal, for a summary of the prosecution is not a means of the evidence. We know the criminal procedure, and we know that it consists of evidence and documentary evidence. I cannot see from the information that I have received, that the document in question has been signed by anybody.

However, if it is merely information that is not evidence, then informing the Tribunal by this material, as far as I know foreign law, can only be right when the defense agrees with it. For information of the Tribunal can merely be affected when everybody agrees. In any case if this information is supposed to be evidence, it has to be rejected. We are merely dealing with statements of the prosecution which have now to be proved, for which evidence has to be submitted. I just want to make an example now and I shall soon finish. This information also refers to this chart, Chart D. It is supposed to serve as information for the Tribunal, to brief the Tribunal. The moment when I entered the Court I saw two basic mistakes in this chart. The mistakes are in the chart although in the first trial before the Military Tribunal the position of the OKW was discussed at large.

From this sketch we can see that the OKW and the OKM and OKH—they were supposed to be one group but that was never the case. The OKW was merely a working staff of Hitler's and if one regards the results of the first trial, this staff cannot be put right or left in the chart beside that little box, that means "Hitler," this is a basic mistake.

I shall soon finish. The next mistake results from the fact that, for instance, Army Group F is connected with a line supposed to mean technical subordinates. That also is not correct. I therefore ask the Tribunal to ask the prosecution that the in-

* The memorandum referred to was entitled "Basic Information," and is reproduced in part in Section IV B.

formation which was submitted by the prosecution be withdrawn for the assumptions contained in this information the prosecution will have to submit evidence.

GENERAL TAYLOR: May it please Your Honors, the document in question is, as I stated quite briefly, not evidentiary. It is in the nature of a brief. Dr. Laternser, who has been before the IMT, is fully familiar with the procedure. There has been such a brief submitted before every trial that has taken place in this courtroom. It is not evidentiary. It is to enable the Tribunal and defense counsel to follow the opening statements.

The matters contained therein will, to be sure, be supported by documents which will be submitted during the prosecution's case in chief.

PRESIDING JUDGE WENNERSTRUM: The Tribunal, speaking through the presiding judge, wishes to state that this document which I now have before me was considered by the Tribunal as merely informative. The members of this Tribunal are members of courts in the States who have had many years of not only trials but appellate experience, and I am certain that I speak the thoughts of my associates when I say to counsel that we shall only decide this case upon the evidence as presented.

It should be kept in mind that the members of this Tribunal have been in this city, here and its surrounding country, for only about one month. Naturally we are desirous, and it is necessary, that we become informed on the procedure that is to be followed in these cases. It is necessary that we learn about the type of the case and the things that will be presented, but I assure counsel for the defense, the defendants, and all other parties concerned that the decision of this Court will be based solely upon the evidence as presented, and after counsel for the defendants and the defendants themselves have had a full and fair opportunity to present any matters in rebuttal which may have been presented on behalf of the prosecution.

You may proceed, General Taylor.

THE SUPREME COMMAND OF THE GERMAN ARMED FORCES

GENERAL TAYLOR: When Hitler came to power in 1933, the German armed forces (which then consisted only of the army and navy, since the air force did not yet officially exist) were controlled and administered by a cabinet department called the Reich Defense Ministry. Under the Reich Defense Minister, at that time von Blomberg, the highest officers of each branch of the service were called respectively, the Chief of the Army Staff that

being General von Fritsch, and the Chief of the Naval Staff, Admiral Raeder.

In May 1935, when Germany started openly to overthrow the armament restrictions of the Versailles Treaty, von Blomberg was given the title of Reich Minister for War and Commander in Chief of the Armed Forces, and von Fritsch and Raeder were thereafter called the Commanders in Chief of the Army and Navy, respectively. However, the German Air Force, which was officially born at about the same time, was not subordinated to von Blomberg. It was established as an independent institution under Goering, who took the title of Air Minister and Commander in Chief of the Air Force.

In February 1938, there was a general reorganization of the German military set-up. Von Blomberg and Fritsch were both retired, and Hitler himself took the title of Supreme Commander of the Armed Forces (Oberster Befehlshaber der Wehrmacht). At the same time Hitler created the Armed Forces High Command (Oberkommando der Wehrmacht, usually referred to as OKW), with authority over all three branches of the armed forces. Wilhelm Keitel was installed as Chief of the OKW, and remained in this capacity until the end of the war in 1945. The OKW was, in effect, Hitler's personal staff for all matters pertaining to the armed forces, and Keitel's function was that of Hitler's executive officer for the administration of the armed forces and the application of Hitler's policies.

As is shown by the chart on the wall* (chart "D" in the explanatory pamphlet which the prosecution has submitted), the three components of the armed forces were directly subordinated to Hitler and the OKW. Admiral Raeder continued as Commander in Chief of the Navy (OKM) until 1943, when he was relieved by Admiral Doenitz. Goering continued to head the air force (OKL) until the last month of the war. As Supreme Commander of the Army to replace von Fritsch, Hitler selected General (later field marshal) Walter von Brauchitsch.

THE GERMAN ARMY

The German Army, needless to say, was by far the largest and most important of the three branches of the Wehrmacht. Von Brauchitsch continued as commander in chief only until December 1941, at which time Hitler relieved him and himself took the title of Commander in Chief of the Army in addition to that of Supreme Commander of the Armed Forces. This dual capacity led to a merging and overlapping of the functions of OKW and

* Chart "D" is reproduced on p. 794.

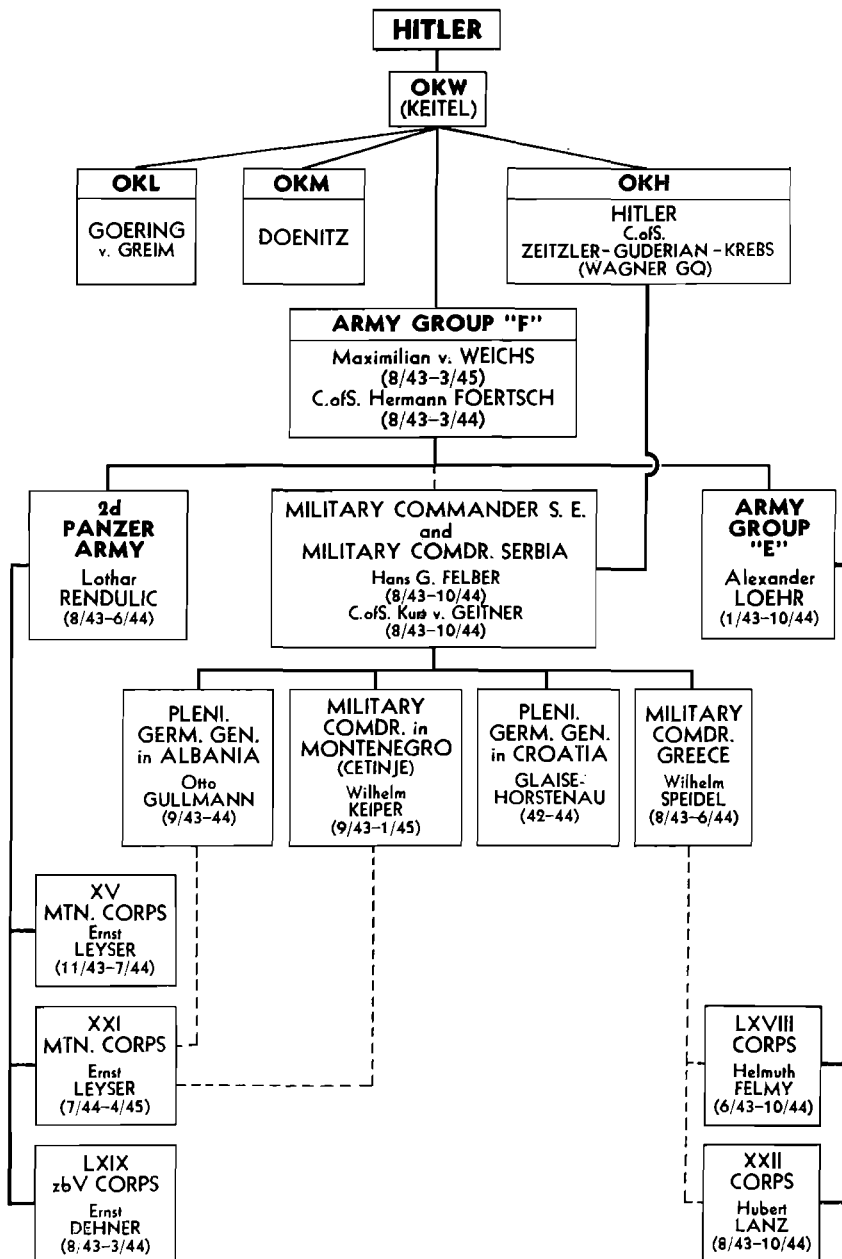


Chart D—CHAIN OF COMMAND OF ARMED FORCES HIGH COMMAND AND ARMY GROUP F (CINC SOUTHEAST)
(August 1943—March 1945)

OKH, and at times we may find it difficult to differentiate between their respective responsibilities.

The field formations of the German Army were normally subordinated to OKH, although, as we will see shortly, as the war progressed they were on numerous occasions subordinated to OKW. The largest field formation in the German Army, as in most others, was known as an "army group," which was, ordinarily, a headquarters controlling two or more "armies."

Army groups and armies were usually commanded by field marshals and Generalobersten, ranks which are the equivalent of a five-star and four-star general, respectively, in our own military hierarchy. A German "army," however, was sometimes commanded by a mere "general" which is the same as a lieutenant general (three stars) in the American Army.

Below the "army" were the lower formations which followed the same general pattern in the German Army as in others—in order from top to bottom, came the corps and the division, and then the smaller units such as regiments, battalions, and companies. The important types of divisions were the infantry division, the armored or Panzer division, and the motorized or Panzer Grenadier division, but the Germans used a number of other special types. In southeastern Europe, where many miscellaneous units were employed, we will frequently encounter the mountain division, the security division ("Sicherungsdivision," usually composed of older soldiers), and the reserve division (usually composed of units still undergoing training). There were also infantry divisions formed from the personnel of the German Air Force and known as German Air Force field divisions (Luftwaffenfelddivisionen).

Side by side with the corps and divisions of the regular German Army we find similarly designated formations of Heinrich Himmler's SS. Not content with his powerful position as head of the SS and of all German police forces, Himmler inaugurated the recruitment and formation into military units of hundreds of thousands of SS men trained and equipped for front-line combat duty. This strictly military part of the SS was known as the Waffen (Armed) SS, and by the end of the war it comprised no less than 30 divisions, as well as several corps headquarters and an army headquarters. Himmler's divisions were consecutively numbered and carried special names. In southeastern Europe, during the period covered and by this case, the 7th SS Mountain Division "Prinz Eugen," the 8th SS Cavalry Division "Florian Geyer," and several others were very active. During the early part of the war, these SS soldiers were almost all volunteers, frantically devoted to the ideals, if such they may be called, of the

SS. Later in the war a number of SS divisions were formed by forcible conscription from the populations of occupied countries. For some purposes, chiefly administrative in nature, the Waffen SS units remained under Himmler's control, but for operational purposes they were under the command of the German Army, and their employment differed little from that of the regular divisions of the army.

As I stated earlier, the field forces of the German Army were normally under the OKH, but not infrequently, particularly during the latter part of the war, they came to be subordinated directly to OKW. This was particularly true in territories which the German Army had overrun and where military occupational authorities were established. In such regions, the Germans often appointed a senior over-all commander, to whom the heads of the army, navy, and air force units in that region were all responsible. Such a commander, with local authority over all three branches of the armed forces, was called an "armed forces commander" (Wehrmachtsbefehlshaber). In southeastern Europe, where the army was the all-important branch of the service, the armed forces commander was almost invariably an army general.

While the armed forces commander had authority over all units of the German armed forces in an occupied region, the administration of the area, in conformity with German rules and policies, was commonly entrusted to an army general designated as "Military Commander" (Militaerbefehlshaber). He had the primary mission of insuring security and order, and for this purpose had at his disposal the German police forces and, often, security divisions and regiments of the army. On matters of military government policy, the military commander usually took his orders direct from OKH, but as commander of the security and police forces allotted to him, he was tactically subordinate to the armed forces commander in his territory.

Himmler's police and intelligence empire also reached into the occupied territories. Reflecting Himmler's leadership of both the SS and the German police, a Himmler emissary in the occupied territories was called a "Higher SS and Police Leader" (Hoeherer SS- und Polizeifuehrer), usually abbreviated HSSPF. His principal functions were to control the local police authorities and carry out other special missions of a security nature. The HSSPF's remained personally responsible to Himmler, but for tactical purposes were subordinated to the senior military commander in their territory.

* * * * *

GERMAN MILITARY POLICY WITH RESPECT TO "HOSTAGES"

Before turning to the particulars of the evidence, and to put this case in its proper setting, we may remind ourselves that the war crimes of the German Army were not confined to southeastern Europe. In particular, the practice of taking and executing so-called "hostages" from the civilian population was instituted at the very outset of the war, and was deliberately planned in advance.

In July 1939, when plans for the invasion of Poland were being laid, the High Command of the Army distributed to the army field commanders a series of directives for the maintenance of security in Poland. This initial step was relatively circumspect; the field commanders were told that "hostages" could be taken, but that their execution would have to be approved in each instance by the High Command of the Army.

The subsequent history of this order might be styled "the rake's progress." About two months later, when Poland had been conquered, the German military commander in the Polish city of Poznan ordered that:

"* * * hostages are to be taken from the Polish civilian population in every village in which troops are billeted * * * In the event of attacks on members of the Wehrmacht or persons who are German by race, hostages are to be shot. Only senior officers holding the rank of a division commander will issue orders to shoot hostages."

The "war diary" of a German rear area commandant carries the story forward. Two weeks later, on 15 October 1939, two hostages were shot in the village of Buk because a sentry had been shot at. Three days later, according to the diary, the following occurred in the Polish villages of Ottorowo and Samter:

In Ottorowo—"A carbine had been stolen, the room in which the burglary was committed had been damaged, a swastika flag had been torn down and the Polish Eagle put up. Sentence was passed by a court martial of the chief of civil administration and after a specified period of time had expired, 5 hostages each were shot in Ottorowo and Samter. The execution took place in the presence of the entire population. There were no tears, and the fine of 10,000 zlotys imposed on the village of Ottorowo was paid, probably with the help of the church."

In Samter—"Catholic services may be conducted only once a week * * *. The county governor intends to remove gradually

from his county the Polish intellectuals, the owners of large estates and the clergy.

“A lieutenant, who is a district speaker for the Nazi Party in civilian life, attends to the moral welfare of the troops.”

Under this beneficent moral tutelage rapidly emerged, in fearful shape, the German inferiority complex. The Poles were inferior peoples, but the Germans could not be quite sure that this was really true until all the educated Poles had been removed.

The following year the same pattern was repeated in France and the Low Countries. It is June 1940, and the defendant List, with his 12th Army, is attacking across the Aisne River in France. The commander of the rear area of his army gives the order that—

“As soon as acts of sabotage—fires also belong in this category—are found, hostages are to be taken. The arrest is to be announced publicly. If the acts of sabotage are repeated, the hostages are to be shot, according to the regulations previously issued, after sentence by a court martial. Executions by shooting are to be reported to the 12th Army and announced publicly.

“Belgian citizens, however, may be shot only with the consent of the High Command of the Army.”

As the scourge of war spread from country to country, the ways of the army grew even more savage. In 1941, as the Wehrmacht threw itself into the Slavic countries of eastern Europe, the Germans encountered peoples whom they held in contempt born of fear. In the Balkans and Russia, they spread such death and terror that the conscience of the world was made to reel and on 25 October 1941, Franklin D. Roosevelt, who was the President of a country still at restless peace, declared prophetically:*

“The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples long ago adopted the basic principle that no man should be punished for the deed of another.

“Unable to apprehend the persons involved in these attacks, the Nazis characteristically slaughter fifty or a hundred innocent persons. Those who would ‘collaborate’ with Hitler or try to appease him cannot ignore this ghastly warning.

“The Nazis might have learned from the last war the impossibility of breaking men’s spirit by terrorism. Instead, they develop their ‘Lebensraum’ and ‘new order’ by depths of fright-

* The New York Times, 26 October 1941, p. 1.

fulness which even they have never approached before. These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution."

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THE INVASION OF GREECE AND YUGOSLAVIA

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a. The Plan of Attack

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b. The Invasion

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c. Von Weichs and The 100 to 1 "Hostage" Ratio

MR. DENNEY: As appears from the foregoing account, the three principal military figures of the German campaign in southeastern Europe were von Kleist and the defendants List and von Weichs. After the capitulation of Yugoslavia, Kleist departed almost immediately to head an armored group in the attack on Russia. List remained as supreme commander of the armed forces in the Southeast [Armed Forces Commander Southeast], and his actions in this capacity will shortly be described.

The defendant von Weichs and his 2d Army were scheduled for ultimate employment on the Russian front, but did not take part in the initial attack. Von Weichs remained in Croatia until the latter part of May, while List completed the conquest of Greece and Crete. In the meantime, the puppet government of Croatia, headed by Pavelic, was being established, and von Weichs participated in the recruitment and organization of Croatian militia units, known as "Ustasha" who were strongly anti-Serbian and whom the Germans were counting on to maintain security in Croatia.

Thereafter, von Weichs and his 2d Army headquarters departed, and von Weichs did not return to the Balkans until August 1943. Short as his stay was in the southeast in 1941, he left an indelible imprint as the result of his methods of "pacification."

Just after the German attack on the Soviet Union, the Russian radio broadcast a report that, as a result of the alleged murder of two German soldiers in Belgrade, 100 Serbs had been shot to death. The defendant List, upon making inquiry, learned that no such episode had in fact occurred in Belgrade at that time, but that the Russian report was undoubtedly based on an episode which had occurred in April 1941, in the course of von Weichs'

southward march. As a result of the incident, von Weichs had issued, on 28 April 1941, the following order, distributed throughout the 2d Army down to battalion level (*NOKW-1198, Pros. Ex. 5*):

"The increase in malicious attacks on German soldiers necessitates most stringent countermeasures. Only immediate and ruthless measures guarantee the maintenance of peace and order and prevent the forming of bands.

"1. A division sent out a detachment to carry out the disarmament of a Serbian village. The leader rode on ahead with another officer and a Wachtmeister [sergeant], whereupon he was overtaken by a Komitatchi band (in Serbian uniform) and was shot to death. His companions were seriously wounded. This occurrence gives us cause to make the following statements:

"a. After conclusion of the armistice there is no Serbian soldier in the whole area who is authorized to carry arms.

"b. Whoever is found in Serbian uniform with weapon in hand transgresses the bounds of international law and is to be shot to death immediately.

"c. If in any area an armed band appears, then even those men capable of bearing arms who are seized because they were in proximity of the band are to be shot to death, if it cannot immediately be ascertained with certainty that they were not connected with the band.

"d. The bodies of all persons shot to death are to be hanged and left hanging.

"e. Arresting hostages after a surprise attack is wrong and is by no means to be taken into consideration. On the contrary, action is to be taken only according to letters a-d.

"2. As preventative protection of the troops against such malicious surprise attacks, I give the following orders:

* * * * *

"d. In the endangered villages, placards are to be posted wherein the population is notified of the serious consequences to be expected from surprise attacks (the posters will be sent separately).

"e. In all localities of the endangered area which are occupied by troops, hostages are to be taken immediately (from all classes of the population!) who are to be shot to death and hanged after a surprise attack. This measure is to be made public in the villages immediately.

"3. In cases of surprise attacks on the troops, the division commanders should examine in detail whether the troop leader

in question is to be blamed. In the reports of the division, regarding encountered surprise attacks, there should always and immediately be a statement to the effect that the attacks were atoned by ruthless measures and account be given as to the manner employed."

The placards which were posted in Serbian villages as a result of this order read as follows (*NOKW-1151, Pros. Ex. 7*):

"By a mean and malicious surprise attack, German soldiers have lost their lives. German patience is at an end. As atonement, 100 Serbs of all classes of the population have been shot to death. In the future, 100 Serbs are to be shot, without consideration, for every German soldier who comes to harm as a result of a surprise attack conducted by Serbs."

Irrelevant as any such circumstance might be, there is nothing to indicate that von Weichs received any directive or suggestion from above calling for the issuance of any such order. It appears that he conceived the order in his own mind and issued it on his own initiative. It epitomizes the German terror which raged in the Balkans for the next 3½ years. It embodies the two fundamental policies which List and his successors applied: that the enemy should be denied even the bare right of continued resistance and his troops no longer be recognized as belligerents entitled to the protection of the laws of war, and that attacks against German soldiers should be suppressed by executing civilian "hostages" at the astonishing ratio of 100:1. The only important respect in which subsequent practice departed from von Weichs' precedent was that his injunction that "hostages" should not be arrested *after* an attack, but should always be taken *in advance* and executed after the attack, was found to present serious inconveniences. With a required ratio of 100:1, it was impossible to keep enough hostages on hand to meet all contingencies, and in subsequent months the Germans repeatedly transgressed this rather formal and academic restriction which von Weichs had laid down.

THE OCCUPATION—LIST AND KUNTZE

(April 1941–August 1942)

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a. The Partition of Yugoslavia and Greece

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b. Structure of The German Occupational Administration

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May it please Your Honors. We now take up the discussion of the activities of the defendants List, Foertsch, and the deceased Boehme during the period April–October 1941.

The defendant List was an able protagonist in fields ideological as well as military. This is indicated in a letter of 23 April 1941, written by Alfred Rosenberg, who was later appointed Reich Minister for Incorporated Eastern Territories, to Martin Bormann. Part of this letter stated* (071-PS, *Pros. Ex. 4B*) :

“Art objects generally do not come into the question as far as the Balkans are concerned, although there are Free Masonry archives and Jewish libraries and other relevant research bodies. In my opinion, only the same attitude as that prevailing in occupied French territory can be taken, and what I requested was really only an expansion of an already existing regulation. For with Field Marshal List, and likewise with the Generalquartiermeister [chief of supplies] of the army, the work has already been begun and my men are already at work with these circles in Belgrade. And by command of Field Marshal List, as well as of his deputy general, these men will also be employed in closest relationship with the Security Service (SD) in Salonika. As you know, Salonika is one of the largest Jewish centers.”

The capitulation was barely finished; yet List, the soldier, was making himself a party to the “cultural” work of the Third Reich.

Early in September 1941, List determined that matters in Serbia required a more forceful executive authority in that territory. With this in mind, List teletyped to the OKW and the High Command of the Army requesting that Boehme, at that time Commanding General of the XVII Mountain Corps, 12th Army, be assigned with his staff as Plenipotentiary Commanding General in Serbia with supreme authority in that sector, directly responsible to List. List regarded Boehme as being “especially suited” for the position because he had “excellent knowledge of conditions in the Balkans.” This request was answered by a Hitler order of 16 September 1941 in which List was charged with the task of suppressing the insurgent movement in the southeast area, and Boehme was designated as Plenipotentiary Commanding General in Serbia with executive power, directly subordinate to List. All military and civilian offices in Serbia were instructed to comply with Boehme’s orders.

Upon receipt of the Hitler order, List, on 19 September 1941, advised the Military Commander in Serbia, the LXV Corps Com-

* Rosenberg and Bormann were tried and convicted in the case before the International Military Tribunal. The reference in the letter concerns the activities of the “Einsatzstab Rosenberg.” In its judgment, the IMT stated the following concerning Rosenberg and the “Einsatzstab Rosenberg”: “He organized and directed the ‘Einsatzstab Rosenberg,’ which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses.” Trial of the Major War Criminals, *op. cit. supra*, vol. I, p. 295.

mand, and the German general in Zagreb [Agram], who was the liaison between the Croatian government and the Armed Forces Commander Southeast, that Boehme had received entire executive power in Serbia and that "all command authorities and forces of the army existing there or to be transferred there are subordinated to him." He stated further, "instructions for the carrying out of operations for the necessary protective measures will be given by me only to General Boehme, who is responsible for their being carried out."

One of the first acts of Boehme in his new post, for which List had stated he was "especially suited," was the publishing of an order which he directed that the recipients destroy after dissemination, and which reads as follows (*NOKW-1048, Pros. Ex. 63*):

"In March of this year Serbia shamefully broke her friendship treaty with Germany, in order to strike in the back the German units marching against Greece.

"German revenge stormed across the country.

"We must turn to new, greater goals with all our forces at hand. For Serbia, this was the sign for a new uprising to which hundreds of German soldiers have already fallen in sacrifice. If we do not proceed here with all means and the greatest ruthlessness, our losses will climb to immeasurable heights.

"Your mission lies in carrying out reconnaissance of the country in which German blood flowed in 1914, through the treachery of the Serbs, men and women.

"You are the avengers of these dead. An intimidating example must be created for the whole of Serbia which must hit the whole population most savagely.

"Everyone who wishes to live charitably sins against the lives of his comrades. He will be called to account without regard for his person and placed before a court martial."

So it was that List's corps commander, now Plenipotentiary Commanding General in Serbia, set the same keynote as had von Weichs for the program of subjugation through terror which was to pervade in the Balkans for the ensuing years of the war.

Now that the chain of command has been clearly established, let us return momentarily to List's request of 14 September directed to OKW. His communication starts with the words "threatening development of the over-all situation in Serbia demands energetic measures." Later on, he states, "the present command regulations are based on peaceful conditions and are unbearable under the present turbulent combat conditions." This request having been received at OKW, another order was issued,

in addition to the Hitler order appointing Boehme mentioned above. After reciting that it had been established that the opposition to the occupying power was the result of a centrally directed mass movement and that each incident of insurgence against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of Communist origin, the order directed (*NOKW-258, Pros. Ex. 53*)¹:

“In order to stop these intrigues at their inception, severest measures are to be applied immediately at their first appearance, in order to demonstrate the authority of the occupying power and in order to prevent further progress. One must keep in mind that a human life practically counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case, the death penalty for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure, to proceed at first with relatively easy punishment and to be satisfied with the threat of measures of increased severity as a deterrent, does not correspond with these principles and is not to be applied.”

This was the answer of the OKW to List's plea for help in “turbulent combat conditions.” The order was passed on by List to his subordinate units.

Not satisfied with the initial directive with reference to the killing of innocent people in the southeast, an additional OKW order, signed by Keitel, came down on 28 September 1941. In this order it was directed that military commanders have hostages available at all times in order that they might be executed when German soldiers were attacked. The complete ruthlessness of the second Keitel order may be seen from the following provisions (*NOKW-458, Pros. Ex. 69*):²

“Because of attacks on members of the Wehrmacht which have taken place lately in the occupied territories, it is pointed out that it is opportune for the military commanders to have always at their disposal a number of hostages of different political persuasions, i.e.,

“1. Nationalists.

“2. Democratic middle class.

“3. Communists.

“It is of importance that among these are leading personalities or members of their families. Their names are to be

¹ Parts of this document are reproduced in section VB.

² This document is reproduced in Section VB.

published. In case of an attack, hostages of the group corresponding to that to which the culprit belongs are to be shot."

Nowhere in this order did Keitel attempt to enlighten his commanders as to the means to be employed in identifying the "culprit." It was a matter of little concern to him, and the evidence will show that it concerned his field commanders even less. The manner in which this order was complied with will be detailed at greater length in the evidence which is presented to the Tribunal.

The 100:1 ratio having been proclaimed, Boehme, on 4 October 1941, ordered the execution of 2,100 persons, to be taken from the concentration camps at Sabac and Belgrade. Those to be executed were primarily Jews and Communists. These killings were reprisals for the deaths of 21 German soldiers. On 9 October 1941, the Chief of the Security Police in Belgrade reported that 2,100 Jews and gypsies were being executed by the Wehrmacht in reprisal for 21 German soldiers shot to death. The Security Police in this operation were to make available to the Wehrmacht the required number of victims. The report continues that 805 Jews and gypsies were taken from the camp in Sabac and the balance, 1,295, were taken from the Jewish transit camp in Belgrade.

On 9 October 1941, Boehme informed List of "an execution by shooting of about 2,000 Communists and Jews in reprisal for 22 murdered men of the 2d Battalion of the 521st Army Signal Communication Regiment." A partial report of this action was made to List and Boehme by a major who commanded the 2d Battalion of the 521st Army Signal Regiment. The major's report enclosed a report of the lieutenant who commanded the company which carried out a portion of this action. The lieutenant's report is dated 13 October 1941. The report is sordid in its detail; the shooting of 2,200 Jews in the camp at Belgrade had been ordered on 8 October 1941. The action took place on 9 October in a forest seven miles from Kovin, and on 11 October near the Belgrade shooting range on the road to Nis. No detail was overlooked, films and pictures were to be taken by an army propaganda company. By issuing spades and other tools to the inmates who were to be executed, the atmosphere of a working party was simulated. Only three guards were placed on each truck to further allay the suspicions of the wretched victims. The prisoners were happy to be leaving the camp, if only for a day of work in the fields. The soldiers were able to execute only 180 on 9 October, and 269 on 11 October. The executions were accomplished by rifle fire at a distance of 12 meters. Five shots were ordered for the shooting of each prisoner. Articles of value were removed

under supervision. They were later sent to the Nazi People's Welfare or the Security Police in Belgrade. The lieutenant reported that the attitude of the prisoners at the shooting was calm and that following the killings the troops "returned to their quarters satisfied."

It was while List was Armed Forces Commander Southeast that concentration camps were introduced in that area. The military commander in Serbia, in a letter of 22 June 1941, spoke of a "concentration camp which I had been ordered to erect." He spoke of the future inmates as "Communists and other criminal types."

List himself recommended concentration camps in an order of 5 September 1941. He stated that the relatives of those people resisting the army should be transported to concentration camps.

Often has it been urged that the German Army had no knowledge of concentration camps, or at best that they had nothing to do with them. It has been the repeated refrain of the German military men that such matters were beyond the scope and beneath the concern of a soldier, and that such affairs were handled by Himmler and his subordinates. In the Southeast, the army not only had knowledge of the camps; they were in charge of some of them. An order of 11 September 1941 (*NOKW-1141, Pros. Ex. 46*) will show that the concentration camp Serbia, in Belgrade, was made subordinate to the military commander of Serbia on that date.

Again, in an order of 18 September 1941 (*NOKW-1222, Pros. Ex. 58*) issued by Bader of the LXV Corps, it was stated in connection with mopping-up operations that "the entire male population above 14 years of age is to be arrested, to be sent to a concentration camp which the division will install, and to be detained there."

Boehme, in an order of 23 September 1941 to the 342d Division (*NOKW-194, Pros. Ex. 61*), directed that unit to " * * * evacuate Sabac by surprise attack on the entire male population between the ages of 14 and 70 and take them to a concentration camp * * *."

Boehme further concerned himself with the transfer of the Jarak concentration camp from the 342d Division to the 64th Police Reserve Battalion in an order of 27 September 1941 (*NOKW-193, Pros. Ex. 66*), which specified in addition that inmates would receive half rations—only 200 grams of bread daily and 200 grams of meat weekly.

Early in October, Boehme ordered that a concentration camp be located in the Zasaviza area, capable of holding 30,000 inmates. This camp was to be "guarded by restricted forces and closed

from the outer world." In the same order, he directed that inmates from another concentration camp be brought to work on this new construction project.

The evidence will show how the army used the concentration camps as collection points for innocent people who were to be channeled into German industry or to be used for such other purposes as might be directed.

Two final references to List concern his later acts prior to his post being handed over to the defendant Kuntze. On 4 October 1941 (*NOKW-203, Pros. Ex. 70*)¹ he issued an order in which it was directed that men in insurgent territory who were not encountered in battle were to be examined, and "if they are only suspected of having taken part in combat, of having offered bandits support of any sort, or of having acted against the Wehrmacht in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the Wehrmacht is undertaken in the territory mopped up, or in their home localities, and in such cases they are to be shot." This was in keeping with the spirit of an earlier order which he had issued on 5 September 1941, which provided in part for (*NOKW-084, Pros. Ex. 42*)²—

"Immediate ruthless measures against the insurgents, their assistants, and their relatives (hangings, burning down of localities participating, increased arresting of hostages, deportation of family members into concentration camps)."

We are now turning to the period from October 1941 until August 1942 where we are primarily concerned with the defendants Kuntze, Foertsch, the deceased Boehme, and the believed to be deceased Bader.

The defendant Kuntze succeeded to the command of the 12th Army late in October 1941. The measures which had been started under his predecessor, List, were continued with increased severity. Kuntze received periodic reports of the activities of the troops under his command. These reports recited the seizing and killing of "hostages" and the wanton destruction of villages.

On 2 November 1941, a situation report was signed, on behalf of Kuntze, by the defendant Foertsch. This report gives as one of the reasons for the unrest in the southeast the fact that (*NOKW-1152, Pros. Ex. 139*)—

"* * * the refugees expelled from the separated territories"³

¹ Ibid.

² Ibid.

³ The reference is to the territories which, after the German occupation of Yugoslavia, were "separated" from Yugoslavia.

(from Croatia—110,000 ; from Hungary—37,000 ; from Bulgaria—20,000) were transported across the frontier without means and without sufficient care.”

The report then set forth the methods to be followed by Kuntze's subordinates in combating opposition. It was stated that he had charged Boehme with the suppression of Serbia and Croatia. He ordered that “all prisoners taken during combat or mopping-up operations will be hanged or shot to death” and that “for the time being, arrests are to be made only for purposes of interrogation or to supplement reconnaissance.” In addition, he directed that all male civilians be temporarily collected in camps.

Late in November or early in December 1941, Kuntze went to Belgrade. Some notes were made on this trip. One of the items which concerned Kuntze was the question of resettlement. This memorandum provided (*NOKW-1150, Pros. Ex. 156*) :

“The question of the resettlement of women and children of the insurgents, as well as other unreliable elements, is still being examined. The retention of these people in Serbia, south of the Danube, does not appear to be practical. There are still difficulties with respect to shelter, rations, and guard which oppose the transfer into the Banat.

“All Jews and gypsies are to be transferred into a concentration camp at Semlin (at present there are about 16,000 people there). They were proved to be the bearers of the communication service of the insurgents.”

On 20 December 1941, Kuntze's subordinate, the Plenipotentiary Commanding General in Serbia, Bader, who had succeeded Boehme earlier in the month, issued an order to his troops. After reciting that there had been proper compliance with the prior orders concerning reprisals, he stated (*NOKW-840, Pros. Ex. 161*) :

“The reprisal measures will be continued further. In order to exclude any existing doubts concerning them, I am referring to the fact that these groups of prisoners are to be differentiated.

“Reprisal prisoners are persons who, for reason of their attitude, are destined for reprisals for German human lives, for example, Communists not encountered with weapons, gypsies, Jews, criminals, and the like.

“Hostages are persons who play a role in public life and on the basis of their personalities exercise a certain influence on the population in their realm of activity. They comprise the most varied strata of the population. They guarantee with

their lives the public peace, order, and security in their part of the country.

"Prisoners of the unit are persons who are taken in the course of an operation, as suspicious. They require a further examination by the administrative subarea headquarters authorities. They will either be released or transferred to the reprisal prisons."

It is clear that there was to be no change, save for the worse, under Kuntze as Armed Forces Commander Southeast, in the matter of "hostage" takings and retaliatory killings.

The policy as set forth was implemented by further orders of the German division commanders. Hoffmann, the Commanding General of the 342d Division, on 6 January 1942 issued an order to his troops which provided that "Communists, in any event, will be shot immediately after a short interrogation; only in special cases will they be brought back to the division".

A particularly harsh policy was established by Kuntze, made effective on 6 February 1942 (*NOKW-945, Pros. Ex. 174*).^{*} He called for detailed reports on countermeasures taken by subordinate units. He further directed that persons who loitered around the battlefield should be considered as having taken part in the battle and therefore should be shot.

With the advent of spring, Kuntze anticipated increased activity from the people of the occupied area. With this in mind, he issued an order on 19 March 1942 (*NOKW-835, Pros. Ex. 184*). He emphasized the degree of importance which he attached to the regimental commanders and stated that Himmler's security units and the Serbian police should cooperate closely with the German troops. He directed that "captured insurgents are to be hanged or shot as a matter of principle. If they are used for information purposes, this only postpones their execution." In an appendix to the same order he advised, "It is better to liquidate 50 suspects than lose one German soldier." He dictated that in areas which had been mined, the Serbian population, among others, should be used to clear the terrain. And there appeared again the 100:1 ratio in the event that death came to any German.

Later in March, on the 23d, Kuntze sent a teletype to Bader (*NOKW-943, Pros. Ex. 187*) in which he agreed that insurrectionists not captured in battle should be deported for work in Norway. He failed to explain how the identity of those to be deported could be established.

Kuntze had more to say about forced labor on another occasion. Bader, in an order of 25 March 1942 (*NOKW-930, Pros.*

^{*} This document is reproduced in section VB.

Ex. 188), mentioned an earlier order of Kuntze, dated 18 March, which directed that "Persons who are arrested because of being suspected of supporting or collaborating with the insurgents are to be handed over to concentration camps, where they are to be interrogated (by the SS) who will make further disposition, for example, handing over as forced laborers in the German interest sphere."

From this same order, it is evident that three concentration camps were presently available in this area at Sabac, Belgrade-Delinjo, and Nisch, with a fourth to be opened shortly at Semlin.

Kuntze advised OKW from time to time of the success of the measures he was directing in the southeast. On 7 April 1942, he informed them that since 1 September 1941, 11,522 of the enemy had been shot in battle and 21,809 persons had been killed in retaliation measures. On 23 June 1942 Kuntze advised OKW that a total of 37,477 had been shot in battle or in way of reprisals as of that date in Serbia and Croatia. He mentioned that the mayor of Crete had been slain and, in retaliation, persons sharing in the guilt and a number of hostages were shot.

Kuntze left his post as Armed Forces Commander Southeast on 8 August 1942, but before leaving he knew that there had been more than 45,000 people killed by the Germans in Serbia and Croatia during the period September 1941 through July 1942. He knew that people were being deported to labor in the German war economy, both in the Reich and in Norway. He knew that he had done his work well and faithfully in the service of Hitler.

Mr. Fenstermacher will take up the opening statement at this time, Your Honors.

MR. FENSTERMACHER: May it please the Tribunal, we take up now the occupational period, August 1942 until August 1943.

By 8 August 1942, when General Alexander Loehr replaced Kuntze as Commander in Chief of the 12th Army and Armed Forces Commander Southeast, the German reprisal machinery was completely set up and functioning. It remained only to keep the existing machinery running and, if possible, to increase the efficiency with which the retaliation measures were carried out.

The defendant Foertsch, who had served as chief of staff under both List and Kuntze, remained in the same capacity throughout the 12-month period of Loehr's supreme command in the Southeast. General Bader, the commanding general in Serbia under Kuntze, also stayed on. A few weeks before Loehr arrived in the Southeast, the defendant Geitner arrived in Serbia as chief of staff to Bader.

To pacify the civilian inhabitants, Bader and Geitner divided Serbia into various field [administrative] headquarters areas

which correspond in the main to the larger cities and important strategical points throughout the country. The field headquarters areas were in turn subdivided into smaller territorial units known as district commands [headquarters]. This was the organizational machinery which General Bader utilized for the security of Serbia.

When a telephone line was cut, or railroad tracks torn up, or a mine blow up, or shipping on the Danube mined—whether by partisan units in the course of legitimately planned actions or by unknown persons—the reprisal machinery swung into action. The district command notified field headquarters of the incident and field headquarters in turn notified Geitner, Bader's chief of staff in Belgrade, suggesting that certain stated reprisal measures be taken in retaliation. Geitner and Bader would either approve the proposals of field headquarters or issue new orders to cover the case. In either event, the district command was notified, orders were issued and carried out, and reports were sent back up through the established channels. The reprisal orders were almost invariably the same. To insure the consistent execution of the German program and to prevent delay, as well as to avoid the confusion that might ensue from the exercise of individual decision by the German mind, a retaliation code was established for the guidance of all concerned. An arithmetical table was so easy to follow—even the slowest and dullest battalion or company commander could comprehend its ready meaning. What did it matter that the ratio of Serbs to Germans seemed high or that innocent people would necessarily suffer for the deeds of persons whom the Germans were unable, or did not even try, to apprehend? Weren't the Germans a superior race, and wasn't it better that 99 innocent men—either hostages or so-called reprisal prisoners—should die than that one guilty person go free?

With the precedents that Weichs, List, Boehme, Kuntze, and Foertsch had established before them, Bader and Geitner on 28 February 1943 devised a more detailed table of retaliation quotas to take care of an increased number of factual possibilities which new conditions had brought to the fore (*NOKW-382, Pros. Ex. 263*)*—

For one German, or one Bulgarian occupational corps member, killed, 50 hostages are to be executed.

For one German or one Bulgarian occupational corps member wounded, 25 hostages are to be executed.

For the killing of a person in the service of the occupying power, regardless of his nationality, or a member of the Serbian

* Document reproduced in section VB.

Government, high Serbian official (district supervisor or mayor), official of the Serbian State Guard, or member of the Serbian Volunteer Corps, 10 hostages are to be executed.

For the wounding of any person in the previous categories, five hostages are to be executed. For an attack against important war installations, up to 100 hostages are to be shot to death, according to the seriousness of the case.

That these retaliation quotas were no idle German boast or mere paper threat is made quite clear by the literally dozens and dozens of both orders and reports that poured into, and went out from, Geitner's own hands.

15 December 1942—"Five Draja Mihailovic* followers shot in retaliation for the German sergeant shot to death near Zlotov."

25 January 1943—"Since the Organization Todt driver Braun had not returned as of 1 January 1943, a total of 50 followers of Draja Mihailovic and Communists were shot to death."

10 February 1943, near Gr. Milanovac—"25 Communists arrested, 10 shot to death in reprisal for murder of mayor."

On 14 May 1943, the war diary of the 104th Jaeger [Light] Division contained this entry:

"The division applies to the commanding general and commander in Serbia for the shooting to death of 125 Communist hostages and the evacuation of the villages of Kamendo and Dubona in reprisal for the attack on the railroad patrol Drazanj.

"7 August 1943—As retaliation for the surprise attacks in the Runjkovao-Leskovac district, on 16 and 28 July 1943, in which two members of the German customs border guard were killed and two were wounded, 150 Communist reprisal prisoners were shot.

"15 August 1943—15 Communist reprisal prisoners shot in retaliation for murder of a mayor and the burning of threshing machines.

"16 August 1943—In retaliation for the killing of the leader of a mixed harvesting crew on 7 August 1943, 50 Communist reprisal prisoners were shot."

On occasion they even returned to the earlier and higher quota of 100:1 for each German soldier killed. A proclamation by Bader of 19 February 1943 stated (*NOKW-1027, Pros. Ex. 258*):

"In the forenoon of 15 February 1943, a passenger car of the German Wehrmacht was attacked by partisans on the road

* Serbian Nationalist partisans under the command of Draja Mihailovic; generally referred to in the contemporaneous documents as "D.M. Followers."

Petrovac-Pozarevac near Topanica. The four passengers, two officers, one noncommissioned officer, and one enlisted man were murdered and robbed. The vehicle was set on fire.

"As a reprisal measure 400 Communists were shot to death today in Belgrade. The village of Topanica was partly burned down. Several hundred persons arrested, who were seized in the district Pozarevac, will not return to their villages but will be given worthwhile employment elsewhere."

The perpetrators of the attacks for which reprisal measures were instituted were frequently unknown to the Germans. Sometimes, however, the attacker was caught in the act or his identity became known. But even knowledge or apprehension of the guilty offender did not rule out or prevent the application of the retaliation table—the hostages had to be shot anyway in order to set an example. The following entry for 24 December 1942 in the war diary of the 704th Infantry Division, a unit subordinate to Bader, makes this last fact very clear:

"Lieutenant Koenig, executive officer, 2d Battalion, 724th Grenadier Regiment, and 2d Lieutenant Dr. Engelhardt, battalion physician of the 2d Battalion, 724th Grenadier Regiment, were fired on in Mladenovac at 1413 hours by a 20-year-old woman who was assumed to be a Communist. They were severely wounded (shot through lung and stomach) and immediately transferred to the military hospital in Belgrade. A former Chetnik leader was also shot to death by the woman while trying to arrest her. Later she shot herself. The 724th Grenadier Regiment ordered the encirclement and search of Mladenovac. Seventy-two men and 52 women were arrested. A part of the population fled immediately after the attack on the officers. Local police and Serbian state guards participated in the military measures without causing trouble. Three pistols were found.

"The division applies for authorization to shoot in reprisal 50 hostages and/or people detained as retaliation prisoners."

The reply of Bader and Geitner to the division's incredible application is apparent from the entry in the division's war diary on the following day:

"Forty-nine men and one woman shot to death in Mladenovac for the attack on two officers of the 2d Battalion, 724th Grenadier Regiment. 2d Lieutenant Dr. Engelhardt died in the military hospital in Belgrade. The division applies for authorization to shoot an additional 25 hostages and/or all people detained as retaliation prisoners from the district of Mladenovac.

The execution will be carried out by the SD in Belgrade.”

At least 75 innocent persons, perhaps more if the division's request to shoot all retaliation prisoners held in the Mladenovac district was honored, were killed in spite of the fact that the guilty party was known. This was German justice in Serbia on Christmas Day, 1942. Can any doubt remain that German policy in the southeast, as in Poland and the East, was designed and calculated to decimate the native populations for generations and generations?

But if the saboteur or attacker was really unknown—that is, if even the easily convinced Germans were too baffled to hazard a guess as to the “culprit's” political affiliation—then an equal number of both Draja Mihailovic followers (D.M.'s, as they were called) and partisans would be shot. The German reports are full of examples of such arbitrary and indiscriminate executions. On 27 June 1943, Bader ordered (*NOKW-374, Pros. Ex. 282*):

“Fifteen Communist and 15 D.M. hostages are to be shot to death in reprisal for the attack and destruction of mines near Aleksinac on 8 June 1943.”

Another order of the commanding general and commander in Serbia, this time of 13 August 1943, stated (*NOKW-148, Pros. Ex. 305*):

“In retaliation for the murder of two and the wounding of two German soldiers by insurgents on the highway at Pozarevac, 9 August 1943, 150 reprisal prisoners are to be shot.

“Since the political origin of the perpetrators cannot be definitely established, 75 D.M. and 75 Communist reprisal prisoners are to be executed.”

To cope with the gigantic problem of hostage supply posed by this wholesale reprisal program, the district commands turned for assistance to their well-trained and widely-experienced co-workers in mass crime, the SD. With the help of native collaborators the SD had prepared lists of “suspects”—relatives of men who were absent from a village or immigrants without valid reason from another village, “persons of a hostile attitude,” and the like—the definition was uncertain and ambiguous, and no one quite knew how his name got on or remained off the lists. One thing, however, was sure—there was no investigation, and no trial and no appeal from the German judgment of inclusion. From time to time, as the available supply of hostages dwindled in the face of an astounding number of mass executions, troops of the district commands and SD detachments would stage “special actions” to round up additional victims. Large hostage camps were con-

structed at various strategic places—their locations were changed from time to time to make for more efficient administration and quicker executions—and when the orders came, the hostages would be shot, either at the hostage camp itself or on the site of the attack. In general, retaliation victims were supposed to be residents of the village in or near which the attack allegedly occurred. But if a sufficient supply of hostages or retaliation prisoners was not on hand in a particular district camp, then the balance of persons necessary to satisfy the hostage quotas would be shot from the central camp in Belgrade. With a macabre fascination for mathematics and a consuming passion for everything smacking of rote, the Germans enforced the code firmly, precisely, exactly—no matter where the hostages were from.

Two examples will suffice. On 28 May 1943, Bader issued the following order to 610th Field Area Headquarters (*NOKW-341, Pros. Ex. 275*):

“A total of 100 D.M. hostages is to be shot to death in retaliation for the murder of three members of the Russian Protective Corps near Konarevo, wounding of a member of the Russian Protective Corps near Ivanjica on 11 May, and for the murder of two members of the Serbian Volunteer Corps near Vezania.

“Since D.M. hostages are not available at the present time in the camp of 610th Field Area Headquarters, they are to be made available from other camps by the commander of the Security Police.”

On the same day, 28 May 1943, Bader signed and Geitner distributed a similar order to 809th Field Area Headquarters (*NOKW-341, Pros. Ex. 275*):

“One hundred and fifty Communist hostages are to be shot to death in retaliation for the murder of three members of the German customs border guard near Vucje on 15 May 1943.

“Since there are no Communist hostages available at present in the camp of Field Area Headquarters Nis, they are to be made available from other camps by the Commander of the Security Police.”

Nor was there ever any jurisdictional conflict between the district commands and the SD over the sheer physical task of executing these thousands of retaliation victims. Generally, losses of the military were avenged by the military themselves. Police units usually furnished the execution squads in reprisal actions for their own losses, as well as for attacks on other soldiers and installations under German protection. Both groups were ready and willing to participate in the mass massacres. If a particular

hostage camp was administered by the SD rather than by a temporarily under-manned district command, then its personnel would supply the trigger men. There was no set rule; both organizations cooperated to do the job at hand. The orders for the actual executions, however, invariably came down through the military Bader-Geitner chain of command. The SD did not exercise a concurrent jurisdiction. In those matters it was subordinate to, and took orders from, the Wehrmacht commander in whose field area headquarters or district area it was stationed and operating. An entry in the war diary of the 104th Jaeger [Light] Division for 4 April 1943 states (*NOKW-1013, Pros. Ex. 286*):

“By order of the Commanding General and Commander in Serbia, in reprisal for the murder of the Organization Todt man shot to death by Communists 8 km. south of Pozarevac, 78 hostages were shot to death in Pozarevac by the SD.”

While Geitner was having conferences with SD leaders and the subordinate troop commanders on such diverse subjects as conditions at the Semlin concentration camp where “up to 100 persons were dying daily,” on “the execution of invalids, sick or pregnant women, or people over 60, male or female,” if they took part in combat, “with or without weapons,” against the Germans, on the deportation of the male population of whole areas for labor in Germany, and kindred subjects, Foertsch at supreme headquarters also kept occupied with current business. To him and to Loehr came the daily, weekly, and monthly reports from their vast southeastern empire—from Bader and Geitner in Serbia, from General Lueters, the German commander in Croatia, from General Brauer* on the Island of Crete, and from various other commanders on the Peloponnesus Peninsula.

Croatia by this time was in an uproar. Tito's partisans were growing stronger by the minute. By the end of 1942, they could boast of having called a Congress, of a government of their own which exercised control in an area 250 km. by 100 km. of a regular civil and military administration within that area, and of an armed force numbering almost 100,000 men skillfully organized into brigades, battalions, and companies. Lueters was completely unable to cope with the problem. He gave the usual orders for the execution of hostages, the burning of villages, and the arrest of “suspects” and relatives of “bandits,” but to no avail. As the practical minded Lueters himself pointed out, the existing techniques and methods were wrong since “in any case of cleaning-up

* Former Governor of Crete. Tried and sentenced to death by a Greek military court at Athens, 9 December 1946. *History of the United Nations War Crimes Commission*. (His Majesty's Stationery Office, London 1948), p. 575.

or retaliatory action against the civilian population the innocent are seized, the guilty having earlier taken to the woods." "Nor should captured partisans be shot as a matter of course," pleaded Lueters. "Perhaps if they were given fair treatment many of them would desert—at least that new approach ought to be tried."

But Lueters' complaints fell on deaf ears at headquarters. Orders continued to come through Foertsch from Loehr that they would assume responsibility for what their subordinate commanders did, that no one would be held responsible for having employed harsh methods, that "individual soldiers should not be prosecuted for being too severe with the native inhabitants," and that commanders who failed to take retaliatory measures for reasons of negligence or softness would be held responsible. In spite of the fact that the German intelligence service reported the presence of partisan troop units, with the names of their leaders, the various insignia of rank worn, the size of their battalions and companies, their weapons, and other details, captured partisans continued to be executed after a brief interrogation. The reports are full of references to "temporary prisoners," as the partisans captured-but-not-yet-executed were called—

3 August 1942—"In mopping-up, 39 temporarily arrested persons shot."

5 August 1942—"In west Bosnia another temporarily arrested eight persons shot."

17 August 1942—"In Syrmia, 90 persons shot in reprisal, 65 temporarily arrested."

29 August 1942—"In Samarica, 262 persons temporarily arrested, of this number 20 shot immediately."

There was no trial, hearing, or court martial for these men who fought as honorable and patriotic soldiers for their nation. The orders distributed to the lowest of units were unmistakably clear. Lueter's directive to his troops of 7 January 1943 is representative—"Execute and hang partisans, suspects, and civilians found with weapons. No formal proceedings are necessary." No wonder that Foertsch could report to the High Command of the Army in Berlin that up to 24 August 1942, 49,724 and up to 8 September, 52,362 "insurrectionists" had been shot in battle or by way of reprisals.

Just as it was in Serbia, the German directives in Croatia were by now the old familiar ones—comb whole areas, seize the entire male population capable of bearing arms for deportation to Germany for labor, choose "unreliables" as hostages to be executed in case of attacks on convoys or communication lines,

do not enter into negotiations with the enemy for the exchange of wounded, the better treatment of prisoners, nor recognition of their belligerent status. Instead, treat captured partisans as criminals to be hanged after all possible information had been drained from them, with or without torture. In Croatia, just as in Serbia, the revolt continued to gain momentum. By the middle of 1943, with the Allies advancing in the Mediterranean theater, the German commanders realized that what was going on in the Balkans was really a war.

During the period of General Loehr's supreme command, on 1 January 1943, the 12th Army went out of existence, or more accurately from a practical standpoint, it changed its name. Loehr's headquarters was redesignated Army Group E, and until August 1943, it remained the supreme headquarters for the southeast theater. The change, however, was of little practical significance; Loehr continued to command and Foertsch continued as his chief of staff. In Serbia, Bader and Geitner were still subordinated to Loehr.

The structure of Army Group E is shown on chart "C" of the prosecution's pamphlet.* To almost every rule there is an exception, and the Court will note that here we have an army group to which no army was subordinated; instead, this army group commanded a heterogeneous collection of corps, military commanders, "fortress" commanders, and others. The tide of war was soon to bring about still another departure from orthodox German military structure. The German terror had not brought peace and order in southeastern Europe; Serbia was as restless as ever, and the partisan forces in Croatia and Greece were growing stronger all the time. On 10 July 1943, the Allies landed in Sicily, and it became apparent that soon they would be on the Italian mainland, and in a much better position to bring material assistance to the national armies of liberation in Greece and Yugoslavia. Faced with these new and unfavorable developments, in August 1943 the Germans reorganized the entire command structure in southeastern Europe. New faces appeared and a familiar face reappeared. We will now turn to the story of this last and most important occupational period.

THE OCCUPATION, VON WEICHS AND RENDULIC (after August 1943)

The year 1943 was known to the American public as the "end of the beginning." To the German Army, reeling under the heavy blows of Allied military might, it was indeed the "beginning of

* Chart "C" is reproduced on p. 819.

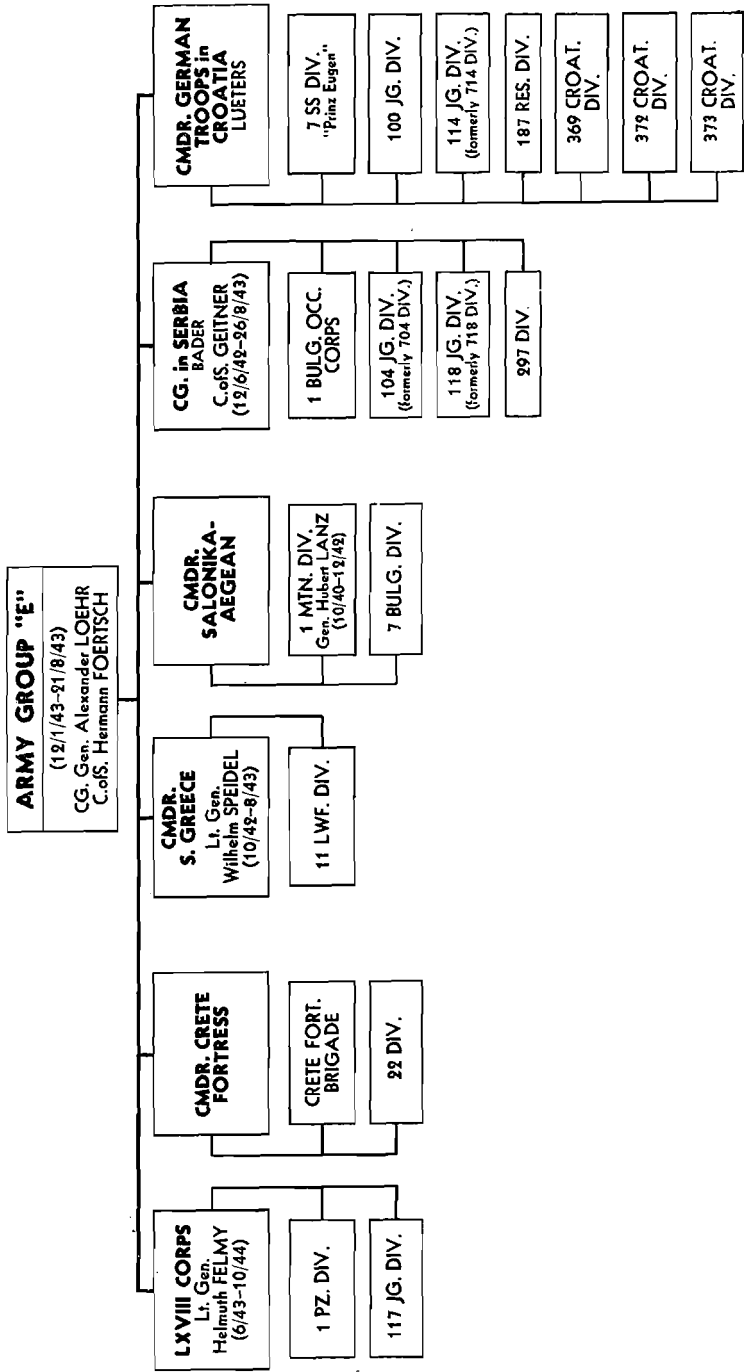


Chart C—ORDER OF BATTLE OF ARMY GROUP E
(ARMED FORCES COMMANDER SOUTHEAST)
(January—August 1943)

the end." The invasion of North Africa and Montgomery's advance from Egypt in November 1942 were followed by the crushing surrender of von Paulus' crack 6th Army before Stalingrad. Rommel's retreat and defeat in Libya and Tunisia was followed by the invasion and rapid conquest of Sicily. Finally it was Italy's turn. With the invasion of the Italian mainland, the long despised and very tired Italian accomplice collapsed in thankful relief.

a. Reorganization of the Southeast Command

Reorganization of the command structure was the first step taken towards meeting the new challenge in southeastern Europe. From the Russian front where, as commander of an army group he had won promotion to the rank of field marshal, Hitler called Maximilian von Weichs. A new army group headquarters, Army Group F, was established in Belgrade, as the vehicle for von Weichs' supreme command over southeastern Europe. The defendant Foertsch, the veteran of service as chief of staff under List, Kuntze and Loehr, now came to Serbia as chief of staff to von Weichs.

The new command structure which von Weichs headed is shown in the chart on the wall.* Loehr remained in Greece, and his headquarters continued to be called Army Group E, thus creating the double anomaly of an army group with no "army" beneath it, and which was itself subordinated to another army group. From this time on, Loehr's headquarters concerned itself exclusively with Greece and the Aegean Islands, and Loehr reported to von Weichs. The two corps commanders under Loehr were the defendant Felmy, who had returned to Greece in July, and the defendant Lanz, who had been a divisional commander during the original invasion of southern Yugoslavia and who arrived in Greece in August.

Although von Weichs maintained his headquarters in Belgrade, so far as military operations against the partisans were concerned, the center of gravity was shifting toward Croatia. To cope with Tito's partisans and to protect the long Dalmatian coastline, exposed as it was to an Allied invasion or raids from nearby Italy, the headquarters of the 2d Panzer Army, which had been engaged on the Russian front, was moved to Croatia. To command this army, and to carry out the difficult mission of reestablishing order in Croatia and safeguarding it against enemy attacks, the German High Command selected the defendant Lothar Rendulic. An Austrian, whose mother was Croatian, Rendulic had learned much about the Balkans by the sheer process of growing up under the Hapsburgs and living in the center of

* See chart "E" in section IVB.

their sprawling empire. He had joined the Austrian Nazi Party in the early thirties at a time when it had been declared illegal, and was regarded on all sides as a "Nazi General." In 1938, he was the Austrian Military Attache at Paris, and after the annexation of Austria he transferred into the German Army in which his rise was phenomenally rapid. At the outbreak of the war in 1939, he held the rank of colonel. He participated in the Polish campaign as chief of staff of an infantry corps, and thereafter was given command of a division during the campaign against the Low Countries and France. He commanded another infantry division in Russia, and in 1942, he was given command of a corps; in the same year, he reached the rank of General der Infanterie (equivalent to a lieutenant general in the American Army). His outstanding combat record, which had won him the highest German decorations, brought him to Hitler's attention and undoubtedly led to his appointment as commander of the 2d Panzer Army. In the spring of 1944, he was promoted to Generaloberst (full general). Two more of the defendants, Leyser and Dehner, now appear for the first time in this case as corps commanders under Rendulic.

In Serbia another new face was introduced. General Hans Felber had led troops in battle and seen occupation duty in France. Von Weichs and Rendulic thought Bader too old and routine minded for the requirements of the new situation; he was relieved as military commander of Serbia and replaced by Felber. The defendant Geitner, however, carried on as Felber's chief of staff.

Felber's jurisdiction, however, was broader than that which had been exercised by Bader. Just as von Weichs, as commander of all the armed forces in the Southeast was the superior of Loehr in Greece and Rendulic in Croatia, so Felber, with the title of Military Commander Southeast, was now made the superior of the German military commanders in Greece and Montenegro and of the "Plenipotentiary Generals" in Croatia and Albania. The military commander in Greece, beginning in August 1943, was the defendant Speidel. Accordingly, in this final phase of the case, all of the defendants except two (List and Kuntze) are involved.

Von Weichs, of course, had supreme authority over the entire organization—over Rendulic and Loehr as tactical commanders, and over Felber and his subordinate "military commanders." Geographically speaking, his responsibilities were far greater than those which had been borne by List, Kuntze, and Loehr before him. He had barely arrived in the Balkans when the Italian capitulation occurred, and he was immediately confronted with the task of disarming and rendering harmless the Italian forces

in Croatia, Montenegro, Albania, and Greece. At the same time, he had to take over occupational responsibility for the areas which the Italians had theretofore controlled.

b. The Italian Surrender

The new leadership was on the defensive from the start. Sicily had been invaded by the combined British and American forces in July. A fortnight later Mussolini was deposed and the King appointed Marshal Badoglio to conduct the war as new head of the Italian Government. But in 6 more weeks, on 8 September 1943, the Italian armed forces surrendered unconditionally. Under the terms of the armistice all of the Italian armed forces were to cease hostilities of any kind against the forces of the United Nations and to withdraw to Italy immediately from all areas in which they were currently engaged.

The German High Command was not caught unaware by this development. Italy's defection had been anticipated, and when it actually occurred, the Germans proceeded with synchronized swiftness to attack and disarm their one-time colleague. The orders from Berlin were clear and precise. Italian soldiers who wished to continue fighting on the German side were to retain their arms, to be accorded treatment "completely consistent with their honor," and to receive rations "based on those of the Germans." Indeed, they even were to receive 50 percent of the German pay corresponding to their ranks. German gratitude and generosity to the "faithful" was boundless. Those Italians who did not wish to continue fighting for the Germans were to be disarmed and made prisoners of war. They, however, would not have to endure the long, boring days of waiting in the barbed-wire enclosures, which is the legal fate of prisoners of war. Instead they were to be turned over to the Plenipotentiary for Labor Allocation and the Reich Minister for War Production and Armament, so that their strength and skill might be fully utilized in the German war production.

For those Italian soldiers who dared to obey the orders of their own supreme commander and resisted German forces either actively or passively, a more select fate was in store. The officers of all Italian troop units who let their arms fall into the hands of insurgents or in any way made common cause with insurgents were to be shot to death after summary court martial; the noncommissioned officers and men of such units were to be taken away for labor employment.

The Fuehrer's order was put into savage execution. In a matter of hours, von Weichs had ordered its distribution to all tactical commanders in the theater. In some cases the order was

passed on in expanded form. Rendulic, for example, gave more detailed instructions to his troops: Should an incorrigible Italian division destroy its arms and supplies, besides the individual "culprits," one officer of the divisional staff and 50 men of the division should be shot to death; any individual Italian soldier selling or giving away his arms to civilians or destroying them without explicit orders would be shot to death; any Italian soldier arriving at his embarkation station without his weapon was to be shot to death together with his responsible unit leader; for every motorized vehicle made useless, one officer and 10 men would be executed. In a matter of days, 51 hesitant Italian divisions had been totally disarmed by but 17 German divisions. However, at least two whole Italian divisions resisted, while thousands of individual Italian soldiers, noting the treatment meted out by the Germans to resisters and surrendered alike, took to the hills to join the partisans.

The reports poured in—from the division to the corps, the corps to the army, the army to the army group, and the army group to OKW in Berlin:

"On 27 September 1943, from Split on the Dalmation coast—City and port occupied, 3 generals, 300 officers, 9,000 men of the Italian 'Bergamo' Division taken prisoners; officers to be shot to death according to the Fuehrer order.

"30 September and 1 October 1943—3 generals shot in Split after summary court martial; 45 more guilty Italian officers shot in Split.

"From the 7th SS Division on 29 September 1943—The Italian General Fulgosi has been convicted for delivering arms to the partisans and sentenced to death.

"From the XXI Mountain Corps on 9 October 1943—Operations against the Italian 'Taurinense' Division concluded in the main, reprisal measures carried out against 18 officers.

"From the XXII Mountain Corps on 23 September 1943—General Gandin and all his staff captured, special treatment according to Fuehrer order. The following day—General Gandin and all officers have been shot.

"From the 100th Light Division on 15 November 1943—Reprisal measures are being taken against the two Italian colonels (the Ia and IIa of the 9th Italian Army) captured near '505'.

"On 13 September 1943, from von Weichs, the Supreme Commander Southeast—Execution of General Roncaglia, Commander of the Italian XIV Army Corps, ordered in case of further opposition."

This calculated slaughter of captured or surrendered Italian officers is one of the most lawless and dishonorable actions in the long history of armed combat. For these men were fully uniformed. They bore their arms openly and followed the rules and customs of war. They were led by responsible leaders who, in repelling attack, were obeying the orders of Marshal Badoglio, their military commander in chief and the duly authorized political head of their nation. They were regular soldiers entitled to respect, humane consideration, and chivalrous treatment.

c. Croatia

With the disarming and liquidation of the Italians complete, the Southeast Command returned to the continued prosecution of its principal mission of pacification. In Croatia the task of defeating the guerrillas was alone a big order. To do that and quiet the civilian population in addition was far more difficult.

To begin with, the puppet Croatian Government of Ante Pavelic was of no help whatever. Its inefficient and poorly organized national militia, led by Kvaternik, was unable to maintain order within the country, let alone protect the vital German supply lines running from the Reich through Croatia to Serbia and Greece. Even for the German troops of the 2d Panzer Army, it was a full time job to keep the supply and communication routes open. In an earlier period, the enemy had waged guerrilla warfare; it was the only way he could fight, and the way which suited him, his resources, and the topography of the country best. He staged surprise raids on lonely German outposts or under-manned garrisons, he mined bridges, derailed trains, cut telegraph wires, fired supply depots, and exploded ammunition dumps. That sufficed in an earlier time. Now after 2 years in the hills he was experienced and well trained; the Allies were on the offensive and had supplied him with weapons, ammunition, food, and clothing; he was expertly led and efficiently organized. Now he was a real enemy, a belligerent of major proportions, and a foe to be reckoned with in terms of large-scale operations and over-all strategy.

To meet the challenge of the big and the new, the Germans had only the small and the old. From the day in 1941 when the campaigns against Greece and Yugoslavia had been declared ended and the front line troops redeployed to the east, the southeastern commanders had begged for replacements and reinforcements. The southeast theater was continuously under strength throughout the war. Yet always the same answer came—additional troops cannot be spared from the decisive Russian front. But not only were the troops in the Southeast too few; they were

also of inferior quality. They included many reserve troops who were over age and jaded. Insufficient and inferior troops had been the German problem from the beginning. In 1941 and 1942, they had met it the only way the heavy handed Germans knew how to meet any resistance—by terror. In 1943 and 1944, as unimaginative and blindly cruel as ever, they would meet it in the same way.

The practice of seizing scores of hostages in each village in which German troops were stationed or in the vicinity of which German troops were operating was continued. In 1941, the Germans had taken democrats, nationalists, and Jews as their hostage victims. Now that most of those had been liquidated they were choosing “Communists,” “bandit suspects,” “bandit helpers,” or relatives of “bandits” as security pawns against attacks. How did one distinguish a “Communist” from the rest of the population? Only the SD, the Croatian police, or the village quislings could answer that. If men thereby were victimized by spiteful and gossiping neighbors, it was just unfortunate.

The pattern of terror and intimidation was simple. After the Germans had entered a village, all of the inhabitants—old men, women, and young children alike—were summoned to the central square or market place. From a sound truck a German officer would announce to the assemblage that there were partisan bands operating in the vicinity. The Germans wanted information concerning the size, location, and leadership of those bands, the number of men missing from the village, and the names of strangers presently living in the village. Unless the inhabitants came forward voluntarily with the desired information, other and more drastic steps would be taken to procure it. When there were no volunteers, priests, school teachers, small shopkeepers, or farmers—sometimes just every third, fifth, or tenth man—were called out of ranks and loaded in lorries for shipment to the division’s hostage camp at some distant central collecting point. Whether to save one’s husband, father, or son by revealing that a neighbor’s brother had joined the bands or was absent from the village was a difficult choice for those who remained. Sometimes men or women weakened. More often they just stood there—some passive, others weeping, all hating.

The basic pattern of burning homes and villages was also continued. Partisan bands moved from village to village, changing their bases of supply and operations as the Germans advanced or retreated. As the Germans advanced on a village there might be an exchange of fire, perhaps a few shots by retreating guerillas. That the villagers had not asked the partisans to come, had given them food and supplies only under protest, or were

powerless to resist their intrusion was of no moment to the Germans. The inhabitants would be evacuated on foot to the rear. Some of the aged would die en route; of the others some would be executed as "bandit suspects" or "bandit helpers" after screening by the SD; the remainder would be sent to the Reich for labor; the village would be reduced to rubble and ashes.

* * * * *

Not until late December 1943, four months after the inauguration of the new Southeast command, did a major reorientation in theater policy take place. Minister Plenipotentiary Neubacher, Ribbentrop's top political advisor for southeastern Europe, had long worried over the boomerang effect of the German occupational terror. After conferences with Weichs and his army commanders, it was agreed that "the reprisal, penal, and revenge measures practiced up to now must in the future, take into account the new political objectives." In cases of attacks or acts of sabotage, the new principle was "to seize the perpetrator himself and to take reprisal measures only as a second course, if through reprisal measures the prevention of future attacks is to be expected." Up until now the hangings and burning admittedly had occurred first, and the search for the guilty only later. A reversal in technique was a tribute, not to justice, but to military expediency.

This order of the Supreme Command Southeast, 22 December 1943, is a remarkable document in many ways. It rescinded all previous orders concerning hostage quotas. But though reprisal quotas were no longer to be fixed, they were not at all prohibited. Rather, the extent of the reprisal measures was to be "established in advance in each individual case." The order is also unique because of its twisted and inconsistent language. It reads in part as follows (*NOKW-172, Pros. Ex. 379*):

"The procedure of carrying out reprisal measures, after a surprise attack or an act of sabotage, at random on persons and dwellings in the vicinity, close to the scene of the deed, shakes the confidence in the justice of the occupying power and also drives the loyal part of the population into the woods. This form of execution of reprisal measures is accordingly forbidden. If, however, the investigation on the spot reveals open or concealed collaboration or a conscientiously passive attitude of certain persons concerning the perpetrators, then these persons above all are to be shot as bandit helpers and their dwellings destroyed * * *.

"If such people as are guilty cannot be found, those persons

must be resorted to who, without being connected with the actual deed, nevertheless are to be regarded as coresponsible."

Why should persons not connected with the actual deed "nevertheless be regarded as coresponsible"? When superior orders are so incomprehensible and so in need of lower-level clarification, it is not surprising to find one of Rendulic's division commanders, writing to his troops in the following simple, straightforward, understandable language:

"All is right which leads to success. After 3 full years of war in the Balkans each commander knows what is best."

Not because of the new policy directive, but rather because of tactical considerations arising out of the regular military nature of the current war in the southeast, there was a noticeable change in the Croatian picture in the early months of 1944. The change was not so much a decline in the quantum of crime committed by the German troops there, as it was a shift in emphasis from one type of crime to another. The number of hostage hangings may have decreased, but in their place were the many raids on partisan concentrations, followed, after all military operations were ended, by the deliberate burning of partisan hospitals and medical supplies and, on occasion, by the merciless execution of their sick and wounded patients. With periodical "purge actions" and "punitive expeditions" throughout 1944, for example, units of the "Prinz Eugen" and "Devil's" Divisions, both subordinate to Rendulic, went on a rampage of blood and cruelty that can only be duplicated in history by the orgies of Genghis Khan. A dozen or more inoffensive Dalmatian villages were burned and plundered. Three villages were destroyed and more than 800 of their inhabitants massacred on a single day. The troops machine-gunned crowds which they, themselves, had assembled; they looted the dead, and then half burned the bodies on giant funeral pyres; they poured gasoline on live victims and then set them on fire; they raped; they pillaged; and they slaughtered. What else could be expected of men brutalized and incited to crime by the ruthless orders of ruthless commanders?

* * * * *

For reasons of convenience and clarity in the statement of this case, we have postponed our description of the German occupation of Greece in order to treat it all together. Greece had been stunned almost into quiescence during the first half of the joint German-Italian occupation. Always a heavy food importing country, Greece, with her outside sources of supply cut off and her food stocks plundered by the Italian and German occupiers,

faced national starvation. Hundreds died in the streets of Athens daily, children with the bloated bellies of undernourishment could be seen everywhere, and between August 1943 and October 1944, the drachma declined from one-three hundredth to one trillionth of its prewar value. With a population of slightly over seven million people, Greece lost an estimated 300,000 of its inhabitants because of the food shortage.

To a people accustomed to horses and carts, German mechanized might was overwhelming. The military end had come with such speed that it took some time before the Greeks could even entertain the thought of rebelling against half-tracks, tanks, and airplanes. "But", as Lord Dunsany says, "in three thousand years, freedom grows so hard that it is like a piece of rock at the core of a mountain, that cannot be broken or ground away, and cannot disappear ever." In the latter part of 1942, at the time of Stalingrad and the Allied victories in North Africa, the Greek resistance movement began to gather strength. In Crete, an all too familiar note was heard as early as November 1942, when the German commander General Braeuer, instructed his commanders to educate the troops "to show no mercy whatsoever to the civilian population."

As has been observed, up to August 1943, the greater part of Greece was occupied by the Italians. But in November and December 1942 and January 1943, Loehr's reports to the High Command of the Army began to contain an increasing number of references to retaliation measures against sabotage and guerrilla attacks in the German-occupied portions of Greece.

By June and July 1943, the situation in Greece had become increasingly similar to that in Yugoslavia. Loehr's reports to the High Command of the Army are an accurate barometer of the terroristic pattern—

"3 June 1943—10 Communists from a concentration camp shot in Larisa as a retaliation measure.

"2 July 1943—4 villages burned down and 50 Communists shot near Litochoron for attack on German sergeant and blasting of railroad tracks.

"4 July 1943—87 suspects shot while trying to escape.

"5 July 1943—50 Greeks shot in Melaxa for sabotage of cable lines."

Just as in Yugoslavia, literally dozens of separate resistance groups at first arose in Greece. But after a period of merger and consolidation, two organizations of major importance were discernible—General Zervas and his approximately 10,000 "Edes" troops in the Epirus section of western Greece, and the "Elas"

units, 15,000 strong in eastern Greece, the Peloponnesus Peninsula, Crete, and the islands.

To put down the Greek resistance the Germans tried the same old methods. Terror and intimidation, hostages and reprisal measures, hangings and burnings had failed to pacify Serbia and Croatia. But the Germans, never humane and seldom smart, knew no other course.

Greece during 1943 and 1944 was, like Yugoslavia, divided theoretically into both operational areas and so-called administrative areas, each with its own separate jurisdiction, organization, and personnel. For the efficient execution of their respective missions of pacification and security, it was, of course, quite necessary that the regular tactical troops of Felmy and Lanz should cooperate closely with the district and subarea [administrative area] police troops under Speidel's jurisdiction. This was achieved both by personal contact of the major personalities involved and by the regular interchange of information, daily and weekly situation reports, and the like. Generally speaking, the tactical troops confined their activities to regular military engagements against the organized partisan bands. Speidel's police troops, on the other hand, were concerned for the most part with the civilian population—seizing workers for forced labor in the Reich; deporting Jews from Crete, Corfu, Rhodes, and the other islands; putting down strikes; executing hostages in retaliation for acts of sabotage; and the clandestine killings of German police and Quisling Greek mayors.

The orders of Felmy, Lanz, and Speidel in Greece were similar to those issued by Rendulic, Dehner, and Leyser in Croatia and by Felber and Geitner in Serbia. When attacks on troops, installations, and supply lines continued, notwithstanding a previous 10:1 "hostage" quota, the Germans, with their customarily inflated notions of their own worth, promptly raised the quota to 50:1. But even the execution of 50 civilians in retribution for attacks by unknown persons did not completely satisfy General Lanz. On 25 October 1943, his 1st Mountain Division ordered that the 50:1 arithmetical key be applied even to German losses suffered in regular military combat with the legitimately organized and uniformed guerrillas. After October 1943, the outmoded 10:1 ratio was to be effective, only for the less serious deaths of such racial inferiors as a "pro-German Greek or a Greek working for the Germans."

By mid-1943, the "Andartes," as the Greek partisans were called, were an enemy to be seriously reckoned with. The Germans, however, refused to grant full belligerent status to the Greek resistance forces. Instead they waged war against the

Greeks in 1941 and 1942, by pressing the native population into service on the side of the terror that was oppressing them. They intimidated the inhabitants of peaceful villages into giving information concerning the size and location of partisan troops. They executed civilians in reprisal for the bombing of bridges and tunnels, and for sabotage of communication lines. They labeled men "bandits," "Communists," "bandit suspects," and "bandit helpers," and killed them without benefit of investigation, trial, or even summary court martial. In short, they resorted to every trick and device that a tyrant, blinded by the fury of his own insanity, might resort to. The reports to von Weichs and Foertsch tell the story of the harvest of the German policy in Greece—

"29 November 1943—In reprisal for band attack on the road Tripolis-Sparta, 100 hostages shot at the scene of the attack.

"1 December 1943—In reprisal for the killing of one German soldier in Tripolis, 30 'Communists' were shot.

"2 December 1943—For attack on railroad bridge southeast of Tripolis, 50 hostages hanged.

"3 December 1943—19 Communist reprisal prisoners shot in revenge for the murder and wounding of Greek police.

"6 December 1943—As reprisal for band attack southeast of Gythion, 25 hostages shot.

"21 December 1943—In the area of Volos 25 bandits shot to death in reprisal for an attack on motor vehicles.

"25 February 1944—50 hostages from the hostage camp at Tripolis shot to death on 23 February in reprisal for the murder of an interpreter.

"9 March 1944—In reprisal for strike agitation by Communists, 50 Communists shot to death.

"25 March 1944—45 hostages shot in Corinth, 52 in Tripolis, 44 in Sparta.

"1 April 1944—Special train Athens-Salonika hit mines. One dead, 14 wounded. Tracks blocked only short while. The execution of 70 Greeks at the site of the incident ordered."

Lidice, the small Czech village which the Germans leveled to the ground in 1942, stands today as a symbol of German savagery. In Greece there are a thousand Lidices—their names unknown and their inhabitants forgotten by a world too busy and too cynical to remember. Greece has many small primitive villages with 500 to 1,000 inhabitants who live in mud houses with thatched roofs that have been lived in for centuries. There are, for example, the villages of the Peloponnesus peninsula, which were leveled to the ground in December 1943 during the notorious "Operation Kalavrittha." Touched off by a report that "bandits"

in the vicinity had killed 78 German prisoners, troops subordinate to General Felmy embarked upon a reprisal expedition that lasted for 8 days before their senseless bestiality had been satiated. Fourteen villages were completely destroyed and their male inhabitants shot. Five hundred and eleven persons from Kalavriitha alone were executed. Whether the partisans had killed captured German soldiers or not, there was no legal excuse, and there can be no moral mitigation, for seeking wholesale and indiscriminate revenge on the innocent.

Then there were the parallel tragedies of Klissura and Distomon. On an April morning in 1944, partisan troops appeared on the outskirts of Klissura and forbade the inhabitants to leave the village. On the afternoon of the same day, about two miles away, one German motorcycle was attacked and two German soldiers killed. German reprisal methods being well known by now, all the male population of the village fled in fear to hide in the hills. Only old men, women, and young children remained behind. About 4 o'clock that afternoon the 7th SS Panzer Grenadier Regiment and Bulgarian Occupational Militia subordinate to its command, both under Felmy's tactical jurisdiction, threw a cordon around the village, searched the houses unsuccessfully for weapons and ammunition, and called all the people together in the public square. Then the killing and burning began. When it stopped, there were 223 victims lying in the square—50 of them children under 10 years, 128 women, and the rest old men—Klissura was a mass of smouldering rubble.

The "blood bath of Klissura," as the Germans so appropriately entitled their own report on the affair, was too much for Minister Neubacher to stomach. Not because it was inhumane but because it would have serious political repercussions. Neubacher immediately protested to Weichs. He said (*NOKW-469, Pros. Ex. 482*)*:

"It is sheer insanity to shoot babies, children, women, and old people because heavily armed Reds had been quartered for one night in their houses and had shot two German soldiers in the neighborhood. The political consequences of such deeds may be very serious. It is obviously easier to kill quite harmless women, children, and old men than to hunt down an armed band. I demand a thorough investigation of the matter."

The investigation was ordered. The military whitewash of an SS unit by a Wehrmacht field marshal came 2 months later when Weichs wrote to Neubacher:

* Parts of this document are reproduced in section VB.

"The Greek witnesses cannot be believed. The village was taken by storm, the inhabitants killed by artillery fire. There was no retaliation action."

Just 2 months after Klissura, in June 1944, troops of the same 7th SS Panzer Grenadier Regiment were involved in a similar massacre at Distomon. From the Germans' own lengthy report of the incident the following facts appear. As a German company approached the village, 18 Greek civilians were seen. Although they did not fire on the Germans, 6 of the 18 "were shot while trying to escape." The remaining 12 civilians were arrested and taken along with the company, which continued on to Distomon, remained there for several hours undisturbed, and then set out on the road from Distomon to Stiri. About 2 kilometers from Distomon, 30 to 35 partisans, well entrenched in ridges overlooking the road and armed with 8 cm. trench mortars that covered the entire area, lay in ambush. Before the surprised company could disperse and reorganize to return the sudden partisan fire, the enemy had gone.

In defiance of orders restricting the initiation of reprisal measures to commanders of at least division commander level, the company commander returned his troops to Distomon to carry out retaliation against the villagers because they had not previously disclosed the presence and position of the "bandits." A report of a German Secret Field Police member, who was in Distomon at the time, relates what happened after the troops returned (*NOKW-467, Pros. Ex. 484*)—

"After the troops returned to Distomon, the 12 prisoners who were taken back were shot dead in the market place as a reprisal measure.

"Subsequent to that, all people present in Distomon were shot dead wherever they happened to be. At that time, I was at the market place and was looking after our wounded interpreter. As far as I observed events, 60 to 70 persons—men, women, and children—were killed in the vicinity of the market place. As far as I could see it, all were shot dead. I did not see inhabitants being killed in any other way, i.e., beaten to death by rifle butt or by pouring gasoline over them and setting them on fire."

Why were the 12 arrested Greek civilians killed? What had they to do with the subsequent action by the "Andartes"? Why were 270 inhabitants of Distomon killed? What was their crime? Why did the Secret Field Police member feel obliged to say that he had not seen any inhabitants "killed in any other way, i.e.,

beaten to death by rifle butt, or by pouring gasoline over them and setting them on fire"? Was that the usual method of executing retaliation victims?

Again Neubacher was dismayed by the political, not the moral, insanity of such actions. And again he protested—not to Himmler, although SS troops were once more involved, but to Weichs, the omnipotent master of the southeast, the commander of Wehrmacht and SS troops alike. This time the investigation was more lively, for it revealed that the regiment to which the company involved was subordinate had knowingly issued a false official combat report of its action against Distomon. According to the regimental report the 18 Greek civilians opened fire upon the company as it was approaching Distomon and were "shot while trying to escape," while Distomon itself was taken only after a hard battle followed by a mopping-up operation.

From a sheer internal military standpoint, the SS company commander had not only violated orders regarding the initiation of reprisal measures. He had also deliberately issued a false official report. But convinced that the "competent authorities would also subsequently have ordered reprisal measures against Distomon which would have necessitated sending at a later time a strong mission with corresponding high fuel consumption" and believing that the company commander's procedure was "merely a transgression against formality and corresponded to a natural soldierly feeling," the regiment requested permission to handle the matter "by disciplinary proceedings only." General Felmy, the corps commander involved, consented to the regimental request, and Field Marshal Weichs agreed. Neubacher was informed. The case was closed.

The events of Distomon merit this somewhat detailed account because in this single tragedy there is presented in microcosm the evil of the Germany Army in Greece and in the whole southeast during 4 years of ruthless occupation. It gives good insight, for example, into the mental processes of a young German officer of company grade, completely devoid of any notions of decency and honor, thoroughly corrupted by the regulations, directives, and orders handed down by his superiors. It reveals precisely how war in the Southeast was fought, how the peaceful population was drawn into the struggle, what a reprisal action specifically entailed. It indicates how little the top military authorities did to humanize the already existing techniques and methods of anti-partisan warfare, how lax they were in disciplining their own troops, how they shielded the guilty. Finally, it gives the lie to one of the most important single myths that the Wehrmacht seeks desperately to perpetuate—that the terrible crimes of troops

in the field were committed by SS units over whom the Wehrmacht had no power or control, and that Wehrmacht commanders constantly and vigorously protested to higher authorities against the undisciplined excesses of the SS troops. Weichs knew the inhabitants of Klissura had been killed in a reprisal, not a combat action by the same SS unit which was later involved at Distomon. He not only failed to remove the commanders responsible for that atrocity before they could repeat the same criminal performance at Distomon, but he lied to Neubacher in order to shield the incident from criticism.

* * * * *

GENERAL TAYLOR: Your Honor, I desire to turn next to the charges concerning devastation and deportation in northern Norway. These are the charges embodied in the first specification of count two of the indictment, and to examine them we must turn our attention from the Balkans to the northern-most part of the European mainland—the province of Finmark in northern Norway. These charges concern only the defendant Rendulic.

Ever since the initial attack against Russia, the German 20th Mountain Army had been situated in the northern part of Finland, holding Petsamo and threatening Murmansk and the railroad line from Murmansk south to Leningrad, one of the two main avenues for the weapons and supplies which America and Britain were sending to the Soviet Union. This army had been commanded, since January 1942, by General Eduard Dietl, who met his death in an airplane crash in June 1944. Rendulic was chosen to succeed him, and arrived in Finland in August. The order of battle of the 20th Mountain Army, predominantly composed of mountain troops, is shown in chart "G" of the prosecution's pamphlet.*

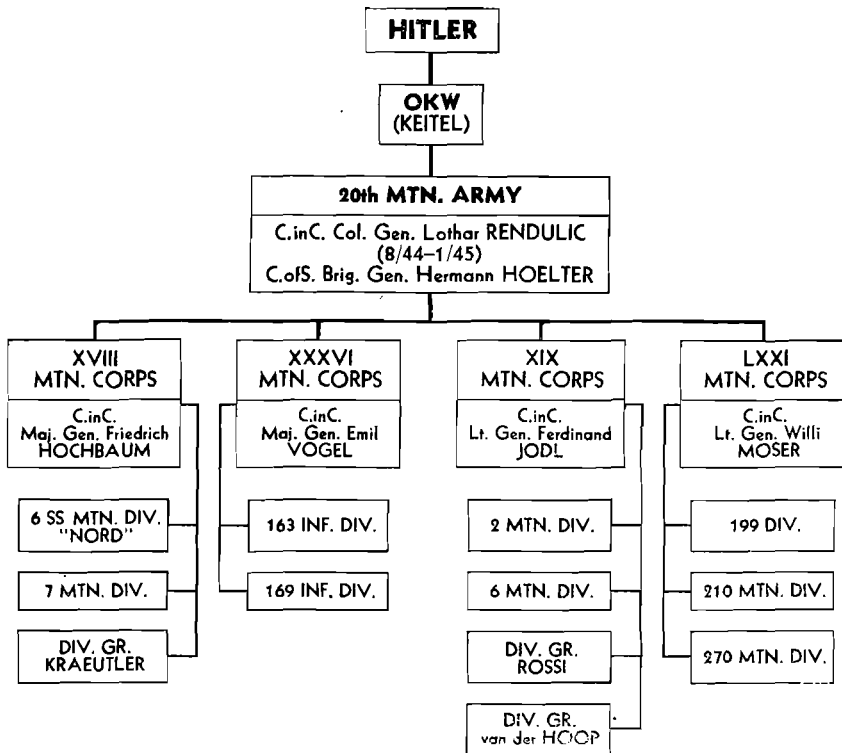
Rendulic's arrival in Croatia in August 1943 had been followed almost immediately by the collapse of Germany's Italian ally; now he was to encounter a parallel situation in Finland. On 4 September 1944, the Finns capitulated to the Soviet forces, and demanded that the Germans promptly withdraw their troops from Finland. Rendulic decided to fall back across the northwestern Finnish frontier into northern Norway.

The region in which this retreat took place involved the northern-most province of Norway, which is known as Finmark; the province just to the south is known as Troms. Including a nomad population of Laplanders, the population of this area numbers approximately 62,000, most of whom live in small ports and villages along the heavily indented coastline, and make their

* Chart "G" is reproduced on p. 835.

**Chart G—ORDER OF BATTLE OF THE 20TH MOUNTAIN ARMY
DURING THE EVACUATION OF FINMARK**

(Fall 1944)



living as fishermen. It is a very wintry and isolated region; there are no railroads, and the only communication with southern Norway is by sea or by the single road along the coast known as Route 50.

Rendulic began his retreat in September 1944. The two northern-most corps of his army were the XIX Mountain Corps under General Ferdinand Jodl (brother of Alfred Jodl who was a defendant in the trial before the International Military Tribunal) and this corps was in the extreme north near Petsamo; the other was the XXXVI Mountain Corps, about 100 kilometers to the south of Jodl's unit. It was the troops of these two corps that were chiefly concerned in the activities which form the basis of the charges in the indictment. By the latter part of October, part of these troops had been withdrawn westward from Petsamo through Kirkenes and were resting around the village of Tana, and others to the south were making their way out of Finland by the more southerly route which joins Route 50 near Porsanger-

Halvoya. The darkness of the northern winter was rapidly setting in, it was very cold, and there was more than enough snow. The advancing Soviet troops had kept contact with the Germans as far as Tana. In order to make the Russian advance as difficult as possible, the German troops had been systematically destroying barracks and buildings and port facilities, and endeavoring to persuade the Norwegian population to evacuate, in the area between Kirkenes and Tana.

Late in October 1944, the German High Command decided that this program of devastation and deportation should be much more extensive and rigorous. As a result, on 28 October 1944, the OKW, over Alfred Jodl's signature, issued the following order to Rendulic as commander of the 20th Mountain Army (754-PS, *Pros. Ex. 503*)—

“Because of the unwillingness of the northern Norwegian population to voluntarily evacuate, the Fuehrer has agreed to the proposals of the commissioner for the occupied Norwegian territories and has ordered that the entire Norwegian population east of the fiord of Lyngen be evacuated by force in the interest of their own security and that all homes are to be burned down or destroyed.

“The Supreme Commander Northern Finland is responsible that the Fuehrer's order is carried out without consideration. Only by this method can it be prevented that the Russians with strong forces, and aided by these homes and the people familiar with the terrain, follow our withdrawal operations during this winter and shortly appear in front of our position in Lyngen. This is not the place for sympathy for the civilian population.

* * * * *

“It must be made clear to the troops engaged in this action that the Norwegians will be thankful in a few months that they were saved from bolshevism, and that the barbarian methods of the air war against our German country and her cultural shrines have brought a thousand times more misery to our people if compared with the humane evacuation and destruction of homes in northern Norway, which is necessary for our war effort, and which, if it is not done, must be paid with the blood of German soldiers.

“The population, whose livelihood is fishing, in northern Norway, furthermore has enough shipping space at its disposal to be able to get out of the way en masse across the water. A large part of the small Norwegian ships which are kept hidden at present can be used for this, and can later also be used for our own transportation needs.

“The danger of the formation of guerrilla bands on the part of the Norwegians appears to be negligible since they can no longer use the houses during the winter.”

It was claimed, in defense of Alfred Jodl, during the trial before the International Military Tribunal that this order was unnecessarily far reaching, and that Alfred Jodl, by various subtle means endeavored to convey to Rendulic that it should not be complied with to the fullest degree.¹ If this be true, there is little evidence that Rendulic undertook to soften its effect in any material respect. The order which Rendulic issued to his subordinate commands the following day follows very closely the language of the OKW order and includes the following (*NOKW-086, Pros. Ex. 504*)²:

“1. Because of the lack of willingness of the northern Norwegian population to evacuate the country voluntarily, the Fuehrer has ordered the compulsory evacuation of the population east of the Lyngenfjord in the interest of the security of the population, which is to be preserved from bolshevism, and that all houses be burned down or be destroyed. It is the responsibility of the commander in chief of northern Finland that this order be carried out ruthlessly so that the Soviets supported by dwelling places and a population which knows the country will be prevented from following our withdrawal with strong forces. Pity for the civilian population is out of place.”

* * * * *

The following directions were given for the—

“5. Execution of the evacuation—

“a. The entire evacuation area is to be emptied of people.

“b. Evacuated settlements are to be destroyed unless they are to be used thereafter by troops marching through (that is, at the latest by the rear guards).

“c. The operation must be a sudden one and the officers of the Reich Commissioner of Norway must participate, and Norwegian authorities must be harnessed for it; the latter, however, only from the beginning of the operation.

“d. The seized population is to be led to the nearest ports under military guard (also small ports with docks suitable for cutters).

“e. Local and district commanders are to erect reception camps in or near these ports.

¹ Alfred Jodl's contention in this regard is referred to in the judgment of the IMT, Trial of the Major War Criminals, *op. cit. supra*, vol. I, p. 324.

² This document is reproduced in section VIII.B.

"f. Men capable of working and marching, and in the western districts women capable of marching also, are to be coupled to the marching units furthest in front and to be taken along.

"g. Insofar as the population still has small ships available, they are to be used for the deportation of the evacuees under military cover.

"h. All ships used by the Wehrmacht (freighters and army transports) are to be loaded additionally with as many evacuees as possible.

"i. Columns on Route 50 to be formed only to an unavoidable degree; invalids, women, and children to be assisted by loading them on trucks. Only men really capable of marching to join the march columns!

* * * * *

"7. I request all officers concerned to carry out this evacuation in the sense of a relief action for the Norwegian population. Though it will be necessary here and there to be severe, all of us must attempt to save the Norwegians from bolshevism and to keep them alive."

On 1 November, the Germans made known to the population what was in store for them. Rendulic's proclamation stated (*NORWAY-10, Pros. Ex. 519*)*—

"To the Population

"The evacuation of a part of northern Norway has been rendered a military necessity as a result of the treachery of a Finnish Government clique.

"The evacuation necessitates the removal of the civilian population as the enemy has proved that in those territories occupied by him, he ruthlessly and brutally forces the civilian population to give him active assistance in achieving his aims.

"This means that no shelter or means of existence of any kind can be left to the Bolshevik enemy in the fighting zone. All such installations as housing accommodation, transport facilities, and food stocks must be destroyed or removed.

"The population in these districts will therefore be deprived of the basis for their existence, so that in order to be able to survive, they must evacuate to those Norwegian territories which are still protected by the German Wehrmacht.

* Document reproduced in section VIIB.

“He who does not comply with these unequivocal instructions exposes himself and his family to possible death in the Arctic winter without house or food.

[Signed] “TERBOVEN
“Reich Commissioner for the
“Occupied Norwegian Territories

[Signed] “RENDULIC
“General
“Commander in Chief, 20th Army.”

This ruthless and in large part unnecessary decision was carried out by Rendulic's forces according to plan. Northern Norway, from Kirkenes nearly to Tromso, was turned into an Arctic desert. Over 43,000 men, women, and children—over two thirds of the entire population of an area about the size of Scotland—were herded down Route 50 or crowded into small boats. We may be sure that the official German report to Rendulic of the manner in which the evacuation was carried out is not overstated (*NOKW-090, Pros. Ex. 506*),* I quote:

“Some untoward events, such as * * * the separation of men from their families to be deported * * *, the burning down of houses in the presence of inhabitants even where an immediate destruction was not necessary, and shelling of the locality Kjoellefjord by units of the navy, hindered the readiness of the population to follow the officially prescribed way.”

The prosecution will submit evidence to show that the devastation and evacuation, at least in large part, were wholly unjustified from a military standpoint, and that, under the spur of Rendulic's admonition that his order was to be “carried out ruthlessly”, and that “pity for the civilian population is out of place,” the destruction and evacuation were carried out with unnecessary brutality, resulting in the impoverishment of the entire population, in the death of some, and the suffering of many thousands.

* * * * *

Before concluding, the prosecution wishes to outline its views on certain legal questions which are sure to be discussed in the course of this trial. No doubt the Tribunal may desire a fuller discussion of these matters at a later date, but we think that a few remarks at this time may be of assistance.

Certain points may be passed over briefly. The defendants may contend, for example, that the crimes charged against them were committed under the compulsion of orders from their military

* Ibid.

superiors. As has been stated, their own military law is to the contrary. Paragraph 7 of the German Military Penal Code is quite clear and states:

“If execution of an order given in line of duty violates a statute of the penal code, the superior giving that order alone is held responsible for it. The subordinate obeying that order, however is liable to punishment as an accessory in the event * * * that he was aware that the order involved an act the commission of which constituted a common or military crime or offense.”

In any event, the London Charter and Control Council Law No. 10 are governing. Paragraph 4(b) of Article II of Law No. 10 states:

“The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”

So far as the plea of mitigation is concerned, should any of the defendants succeed in bringing themselves within the scope of this provision, the prosecution will suggest that it has little, if any, application to persons holding the high military rank of these defendants. There may be room for application of this provision in the lower ranks of the military, but if it is to be applied to field marshals and generals, the whole doctrine of responsibility for the commission of war crimes would be absurdly limited and rendered totally ineffective. As the International Military Tribunal declared in finding Keitel and Jodl guilty,*

“Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.”

But there are a few legal matters which have a more substantial bearing on this case. These include the principles of international law and the qualifications of belligerents. We do not believe that these principles will have any decisive bearing on the outcome of this proceeding; no doubt there are many delicate and unsettled questions pertaining to hostages and belligerents, but the defendants so frequently, so deliberately, and so far transgressed the outer-most boundaries of what might be justified or defended as not unlawful, that in the final analysis no such difficult problems will confront us.

I shall deal first with hostages and reprisals.

* Trial of the Major War Criminals, Nuremberg, 1947, vol. 1, pp. 291 and 325.

The concepts of "hostage" and "reprisal" both derive from relations between nations, or between their opposing armed forces, and not from the relations between a nation or its armed forces on the one hand and the civilian population of an occupied territory on the other. This circumstance is not infrequently overlooked, and perhaps accounts for the lack of precision in much of the writing on these subjects. In war time, reprisals are actions taken by a nation or its agents in order to prevent an enemy from continuing to violate the laws of war. Thus, if on one side, hospital ships are constantly being attacked, or the protective symbol of the Red Cross ignored, the other side is entitled to take action by way of reprisal in order to dissuade the enemy from continuing his unlawful course of conduct. Retaliatory action so taken may include actions which would themselves be violations of the laws of war, but for the circumstance that the acts were done as legitimate reprisals. Reprisal actions need not be identical with the unlawful act which gave rise to the reprisals, but they should not in quantity or character be out of keeping with or disproportionate to the enemy actions which they seek to stop. Reprisals may, in some circumstances, be taken against a civilian population of an enemy country. For instance, if two belligerents are each occupying a portion of the other's territory, and one of them mistreats the inhabitants in a manner not permitted by international law, the other belligerent might take similar action in the territory under its occupational control. But in such a case, the penalties would be inflicted upon the civilians of the enemy country for the purpose of persuading the enemy government to discontinue an unlawful course of action, and not for the purpose of punishing the civilian inhabitants themselves. Indeed, it is basic to the law of reprisals that although they are in a sense retaliatory, their purpose is not revenge but correction of the enemy's behavior.*

The practice of taking or exchanging hostages is very ancient; its original purpose was to insure the performance on both sides of treaties or agreements mutually entered into. The hostages were in the nature of a pledge offered to guarantee a certain course of behavior. In more recent times, hostages have been taken not only to secure the performance of treaties, but also to enforce the payment of requisitions, to protect or secure the return of individuals held by the enemy, and for other like purposes. It will be observed that, at bottom, the purpose of taking hostages is to put one's self in a position where reprisals can be taken if the enemy (or, in time of peace, the other party to the agreement) does not follow a lawful or an agreed upon course of action. It is for this reason that a distinguished author in the

* Oppenheim, *International Law*, (Longmans, London, 1920), vol. 2, pp. 51-52.

field of international law has said, "The whole question of hostages is bound up with the question of reprisals."¹

Beginning with the Franco-Prussian War of 1870-1871, and probably before that, it has frequently occurred that hostages are taken from the civilian population of an occupied territory, not in order to affect the course of conduct of the government to which these civilians owe allegiance but in order to control the conduct of the civilian inhabitants themselves. This practice has been most frequently adopted by the Germans, for no other reason than that during the last 80 years they have been most frequently in the situation of occupying the territory of a belligerent adversary. However, other nations have from time to time taken hostages for this purpose, most noticeably the British during the Boer War.

The practice of taking hostages from the civilian population of an occupied territory in order to insure the peaceful behavior of the inhabitants has been much criticized,² but is acknowledged as lawful by the great majority of text writers, and in the light of actual practice, it certainly cannot be considered as a war crime. But the taking of hostages for such a purpose is not, strictly speaking, a reprisal at all, because it is not³ " * * * a measure which is especially aimed at the enemy's method of waging war and which aims to force the enemy to abandon measures which are contrary to the laws of war." Although frequently called a reprisal, such a taking of hostages is really a "police" or "security" measure. There is no opposing government or military commander with whom the occupying power can deal on belligerent terms. From both a military and legal standpoint, the taking of hostages or any other kind of oppressive action for the purpose of maintaining order in occupied territories must be considered from the standpoint of the right and responsibilities of the inhabitants under international law, and the probable effect of the measure upon their course of conduct. Steps which might be quite effective in order to persuade an enemy government to alter its course of conduct might be quite ineffective when addressed to the inhabitants of an occupied territory, and vice versa. As Professor Lauterpacht, Professor of International Law at Cambridge University and a scholar who is both distinguished and modern, has pointed out—⁴

¹ J. M. Spaight, *War Rights on Land* (MacMillan, London, 1911), p. 469.

² Hyde, Charles C., *International Law* (Little, Brown and Co., Boston, 1945), 2d revised edition, vol. III, pp. 1902-1903. While the taking of hostages by the occupant may, under certain circumstances, operate as a reasonable mode of securing compliance by a restive population with a just demand designed to promote the maintenance of order, occurrences in the course of World War I encourage the conclusion that it is also a weapon likely to be employed by a despot to check interference of any sort with ruthless and cruel acts inspired by caprice.

³ Luttevöth, Ascan "Der Geisel im Rechtsleben" [*The Hostage in Legal Practice*] (Verlag von M. und H. Marcus, Breslau, 1922), p. 248.

⁴ H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes," *The British Yearbook of International Law* (Oxford, 1944), p. 77.

“* * * the impact of the operation of reprisals is not as considerable as would appear at first sight. In particular, it does not seriously affect that most potent source of war crimes which originates in the lawlessness and the brutality of the occupying state.”

This brings us to the question whether, if hostages are taken to insure peaceful and orderly behavior on the part of the civilian population of an occupied territory, the hostages may lawfully be executed if violent conduct by members of the population continues to endanger the security of the occupying forces. The Hague Regulations of 1907 do not contain any express provisions concerning either the taking or the execution of hostages in occupied territory. They do provide, however, in Articles 43 and 46, respectively, of the Annex to the Convention, that—

“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.

“Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”

And, if these quoted provisions are not governing, we must take full account of the declaration in the Preamble to the Hague Convention—

“It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice.

“On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

The majority of the text writers in the field of international law, ancient and modern, have determined, either from the

unwritten usages of war or by clear implication from the language of the Hague Convention, that the killing of hostages, under the circumstances and for the purpose with which we are here concerned, is unlawful, and that the continued confinement of hostages is as far as the occupying power is permitted to go. For example, Oppenheim sanctions the taking of hostages by the occupying power only "provided that he does not kill them."¹ The classical statement by Grotius that "hostages should not be put to death unless they have themselves done wrong"² is in accordance with the views of other old authorities and has been echoed in more recent times not only by Oppenheim but by Garner³, and others.⁴ As might be expected, in view of the German propensity for occupying the territory of neighboring countries, and the sustained practice of the German Army in recent decades, German scholars take the contrary view, and defend the execution of hostages as a necessary measure in the event of continued civil disturbances, dangerous to the security of the occupying forces.⁵ A few English and American writers have expressed agreement with this view and argue, theoretically rather than practically, that there is a fundamental absurdity in taking hostages if they cannot be executed.⁶

The military field manuals of the United States and England do not throw much light upon this problem. The American manual states that "hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people, may be punished or put to death if the unlawful acts are nevertheless committed," but in practically the same breath states that "when a hostage is accepted, he is treated as a prisoner of war," and that "reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929."⁷ The British manual is not entirely clear either, but it contains the declaration that hostages are to suffer captivity, not death, if an agreement is violated.⁸

Despite these conflicting views in years gone by, the results of

¹ Oppenheim, *op. cit. supra*, pp. 241-242.

² Grotius, "De Jure Belli Ac Pacis" (Carnegie Institution, Washington, 1913), ch. XI, art. XVIII, sec. 1.

³ Garner, J. W., *International Law and the World War* (Longmans, New York, 1920) vol. 1, pp. 306-311.

⁴ Kuhn, Arthur K., *The Execution of Hostages*, *The American Journal of International Law* (April 1942), pp. 271-274.

⁵ Waltzog, "Recht der Landkriegsfuehrung" [Rules of Land Warfare] (1942), art. 46, par. III.

Lutteroth, *op. cit. supra*, pp. 264-267, where, however, the author acknowledges that the majority view is to the contrary.

⁶ Hammer and Salvin, *The Taking of Hostages in Theory and Practice*, *The American Journal of International Law* (January 1944), pp. 20-33.

⁷ *Rules of Land Warfare*, U. S. Army, Field Manual 27-10 (U. S. Government Printing Office, Washington, 1940), pp. 89-90.

⁸ *British Manual of Military Law*, par. 461.

German practices with respect to hostages during the last two wars has led to more definitive declarations in accordance with the opinion which most authorities have always upheld. In January 1942, the representatives of nine European governments in exile, in the famous St. James Declaration, branded the execution of hostages as "part of a regime of terror" and categorically described such executions as punishable war crimes.¹ The London Charter, in Article 6(b), and Control Council Law No. 10 in paragraph 1(b) of Article II, both recognize the "killing of hostages" as a war crime. The opinion of the International Military Tribunal makes repeated reference to the killing of hostages as a war crime.²

The prosecution suggests to the Tribunal that the execution of hostages, under the circumstances pertinent to this case, is quite definitely and clearly a crime under international law. The provisions of Law No. 10 are not only binding upon the Tribunal, but are in accordance with the views which most authorities in the field have held for decades past. But in urging the rightness of this conclusion, the prosecution does not rely principally upon the weight of authority, however impressive. On the contrary, our position is based squarely upon practical considerations of military necessity. The fundamental tenet of the laws of war, as we said at the outset, is that human life should not be taken unnecessarily. Over the past decades, only the Germans have adopted a general practice of executing civilian hostages in order to maintain security in occupied territories. Occasional examples in the military history of the other western nations may perhaps be found, but there is absolutely no footing, either in the authorities or in practical experience, for the conclusion that the execution of hostages is ever really necessary. And, if not, such executions are in flat contradiction of Article 46 of the Annex to the Hague Convention.

The short and conclusive answer to this much-mooted question is that the execution of hostages practically never achieves its intended effect. If the practice is once adopted on a systematic scale, it deteriorates rapidly into a barbaric blood bath. The officers and men of an occupying force will always find it easier to take vengeance on innocent civilians who can be readily rounded up than to track down the actual perpetrators and bring them to justice; it is only human nature, though scarcely a credit to it, that once the taking and killing of hostages is sanctioned, efforts to apprehend the real offenders will be slackened, and repeated

¹ See Kuhn, *op. cit. supra.*, p. 274.

² Trial of the Major War Criminals, *op. cit. supra.*, judgment of the IMT, vol. I, pp. 227-228, 234, and 290.

breaches of security will be countered only by ever greater slaughter of hostages. Furthermore, the execution of hostages, far from frightening a rebellious people into submission, tends rather to deepen their hatred for the invaders and provoke them to renewed outbursts.

Even the timid and quiescent will be driven to resist, not so much out of patriotism, as because they are no longer sure that good behavior will safeguard their own security. When hostages are being executed at the rate of 100:1, there is no security for anyone. If women and children and old men of the most pacific disposition are liable to be put away in concentration camps and eventually executed because of violence in the surrounding countryside, they will soon feel much safer in the ranks of the insurgents than anywhere else.

And that is just what happened in the countries with which we have been chiefly concerned today. The truth of what I have just said should have become apparent to the Germans within a matter of weeks after large scale military operations in Yugoslavia had been concluded. It did become apparent to some of them, but they were not listened to. As early as 31 July 1941, a German lieutenant colonel in Belgrade wrote a report to the defendant List in which he said (*NOKW-1114, Pros. Ex. 30*) :

“Though nothing is said publicly about the shooting of Jews and Communists as reprisal for acts of sabotage, these shootings have, however, made a deep impression in Belgrade. It is doubtful whether the shooting will prevent a repetition of acts of sabotage. The saboteurs are to be looked for in the camp of the former Serbian officers, of the Chetniks as well as of the Communists, who have the common interest of creating unrest in the country and stirring up the population to boiling point against the occupation authorities. For their purpose the shooting of people who did not directly participate in the acts of sabotage is actually welcome.”

One week later, another report from Belgrade stated (*NOKW-1114, Pros. Ex. 30*) :

“Reprisal measures, as for instance the severity of the shooting of 81 persons collected haphazardly, did not bring out pacification nor did it serve as an intimidation. On the contrary, the feeling of being plundered, chased away, or slaughtered with wife and child, either by criminal Ustasha people in Bosnia or Hercegovina, or by robber elements, or to lose life and property as the casual object of reprisal at the hands of the Germans, has embittered and made desperate the otherwise quiet

and politically indifferent and loyal parts of the Serbian population, who are automatically driven into the ranks of some kind of insurgent groups."

The German civil authorities in Belgrade were of the same opinion. A report dated 20 August 1941, by an official of the Ministry of Interior to the Military Commander in Serbia, disclosed the following (*NOKW-1487, Pros. Ex. 34*):

"A German officer, a captain, was killed from ambush on the road Arandjelovac-Topola, 4 kilometers from Arandjelovac near the village of Banja on the morning of 16 August. The officer was going on duty by car to Belgrade. The offense was committed by a Communist who has remained unknown. This Communist had been lying in ambush in the cornfield and fled through the corn to the woods after committing the deed.

"Eleven young farmers working in the fields were captured and shot for this murder by the Germans at the place of the incident, a state of siege was declared for the entire district.

"In order to combat Communist operations which had got out of hand during the last few days, the German headquarters sent a motorized assault troop which is at present going through all the villages making arrests and, due to ignorance of the situation, is killing innocent men, women, and children. All this is done on their own initiative, without inquiries and without any kind of close cooperation with the administrative authorities at the Gendarmerie, although such cooperation is an absolute necessity for the combating of the Communist action and for exterminating the Communists in the woods. The district office has available reports from which the movements of the Communists could be established, and it also has at its disposal all personal data of the individual Communists. However, the German headquarters does not request anything, nor does it ask the district administration for any information, and is opposed to taking any suggestion.

"The consequence of the procedure of the German assault troops will be that a large number of innocent people will be slaughtered and that the Communists in the woods not only will not be exterminated but will increase in numbers. Because many farmers, even entire villages—even though up to now they had no connection with the Communists—will flee into the woods only out of fear and will be received there by the Communists. They will be provided with arms and used for combat and for open revolt against the German armed forces. This insurrection will develop on a large scale and will have

incalculable and terrible consequences for the entire population."

There was no lack of these warnings. With respect to reprisal shootings carried out in the town of Kragujevac, the local German commandant, a captain, reported to the Military Commander in Serbia:*

"According to my standpoint, shooting partly or completely innocent persons from this city can have directly harmful effects. It is to be expected that embittered relatives of those shot will now practice acts of revenge on members of the German Wehrmacht.

"Sabotage acts on drinking water and on the current temporary light supply, as well as a large attack of the bandits against the city, in which the units could suffer more losses than before, are not out of the realm of possibility. Above all, the psychological effect will be catastrophic. The residents of Kragujevac had hoped that the German Wehrmacht would rid them of the Communist danger and that they would be aligned into the new framework of Europe. With the methods applied here we shall most certainly fail to win back the favorably inclined elements of the population."

Two years later, the same Cassandra-like prophesies are found in the documents. No one can ever say that these defendants were not warned. In July 1943 (*NOKW-893, Pros. Ex. 293*), Glaise-Horstenau, the German Plenipotentiary General in Croatia, strongly admonished the German Air Force for reprisal actions by way of bombing villages, because, I quote, "This only forces additional adversaries 'into the woods,' and it does not help to pacify the country, but is detrimental, and shakes the confidence in the German soldier of those parts of the population which are of good will." But not until December 1943 did the German military leaders in the Balkans even pay lip service to these truths. Finally, Loehr's order of that month recognized that, and I quote:

"The procedure of carrying out reprisal measures after a surprise attack or an act of sabotage at random on persons and dwellings, in the vicinity, close to the scene of the deed, shakes the confidence in the justice of the occupying power and also drives the loyal part of the population into the woods." But even this order was, in other aspects, so ambiguous that it

* Even those commentators who have defended the principle of executing hostages on the ground of military necessity make no defense of the German Army's practice of this principle. See Hammer and Salvin, *op. cit. supra.*, pp. 26-28, 32; see also, Stewell, "Military Reprisals and the Sanctions of the Laws of War," *The American Journal of International Law* (1942).

did little to change these stupid and cruel policies. The slaughter of the innocent continued and the Germans reaped only a harvest of dragons' teeth.

The second set of principles of international law which are worthy of preliminary discussion at this time are those pertaining to the qualifications of belligerents. Under what circumstances are combatants entitled to belligerent status? Under what circumstances must they, if captured, be treated as prisoners of war, and under what circumstances may they be treated as a mere armed band and disposed of by summary execution? These questions are especially relevant to count three of the indictment.

The Hague Regulations do deal with this question in Article 1 of the Annex which provides:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

“1. To be commanded by a person responsible for his subordinates.

“2. To have a fixed distinctive emblem recognizable at a distance.

“3. To carry arms openly.

“4. To conduct their operations in accordance with the laws and customs of war.”

These requirements are traditional and generally accepted, to the extent that captured partisans in Greece and the Balkans did not observe them. We may concede that the Germans would have been within their rights in denying them the status of prisoners of war and executing them.* But this does not mean that all of us here in the courtroom could here and now form ourselves into a military company, choose a commander, wear a distinctive emblem, carry arms openly, and obey the laws and customs of war, and on that basis alone claim the right here and now to wage warfare and the status of prisoners of war if captured.

Obviously, the members of an armed group cannot claim the status and rights of belligerents until a war has started. The determination of the starting point of a war may sometimes present problems, but ordinarily the far more difficult question is to ascertain when a war has stopped. In accordance with “the laws of humanity and the dictates of the public conscience,” it

* Except insofar as the provisions of Article 2 of the Annex, relating to the so-called “levy en masse” may have applied, and except insofar as the Germans themselves, by committing the crime of waging aggressive war and, in their own operations, departing from the laws and customs of war, may have deprived themselves of the right to demand compliance with Article 1 on the part of the partisans.

is desirable that wars be stopped as soon as possible, and under some circumstances it may be wise to adopt a fairly rigorous attitude when major military operations have come to an end, and declare that, after the signing of a treaty or armistice, the inhabitants of the defeated and occupied country, civilians and former soldiers alike, no longer have the right to carry on warfare and can not claim the status of belligerents.

On the other hand it can be, and is, often argued cogently and with the benefit of many examples from history, that nations can rise from apparent total defeat, long after the capitulation of their own former government, expel the invader, and ultimately achieve victory. As long as there is hope and particularly if there are strong allied nations as yet undefeated, true patriots of the conquered country will continue to offer desperate resistance to the invader no matter what armistice or treaties may have been concluded with him.

The argument between the proponents of these two divergent approaches to the problem has been waged briskly ever since the representatives of the European powers met at Brussels in 1874 to formulate a code of war. In general, the powerful countries with large armies have tended to favor strict qualifications for belligerent status, and the smaller powers a very much more liberal set of rules.¹ It goes without saying that the Germans have been in the vanguard of the former group of powers.

The International Red Cross has consistently sought to extend the protection of the laws of war to the members of all substantial armed groups who meet the requirements of Article 1 of the Annex to the Hague Conventions.² We cannot, in this proceeding, settle this thorny and complicated problem. And we do not need to.

To begin with, it will be quite clear that the war did not end in Yugoslavia in April or May 1941. Article 42 of the Annex to the Hague Convention no. IV, 1907, states very clearly that—

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

The second sentence quoted above is of special importance. No doubt the Germans, had they so chosen, could have left suffi-

¹ An excellent discussion of these questions is contained in Nurick and Barrett, “Legality of Guerrilla Forces in the Laws of War,” *The American Journal of International Law* (July 1946), pp. 563-588.

See also, I. P. Training, “Questions of Guerrilla Warfare in the Law of War,” same publication, pp. 584-562.

² Rapport sur l'activité du Comité International de la Croix-Rouge en Faveur des “Partisans” Tombes, Aux Mains de l'ennemi (Geneva, October 1946).

cient troops in Yugoslavia to establish their authority throughout the country. But they chose not to do this. They were preoccupied with the forthcoming campaign in Russia, and pulled out their troops before hostilities had been fully concluded in practical effect and while large portions of the country, particularly in the mountains, were controlled by substantial enemy forces who announced openly that they would continue to resist. Whatever might be the rule in other circumstances, it was not open to the Germans to sweep through Yugoslavia, evacuate the bulk of their troops before their authority had been fully established, and then declare that all future resistance would be considered a violation of the laws of war.

Furthermore, the cause of the Yugoslav and Greek resistance forces was at no time hopeless, as events have abundantly proved. Governments in exile were promptly established, under whose authority these forces continued their operations; indeed, long before the end of the war, there was an enemy government within Yugoslavia. Powerful allies of the Yugoslavs and Greeks continued to maintain armies in the field¹ and to assist the resistance groups.

Furthermore, if we look at the question as presented in this case from a practical standpoint, we again discover that the case is not nearly so difficult as it seemed at first sight. If resistance forces consist only of a few small bands, whose activities are limited to sniping and minor sabotage and who enjoy no support from other powers, there may indeed be reason for denying them the status of belligerents.² But there can be no reason for such a policy when the enemy remains in large numbers, and fights in large units and with modern weapons. To deny his troops the status of belligerents under such circumstances will merely invite counterreprisals against troops of the occupying power, and a senseless war of extermination may ensue. Even more important, such a policy will inevitably rally more and more inhabitants of the occupied country to the standard of the resistance forces. These very arguments were presented to Loehr and Lueters by Colonel Heinz, Commander of the 4th Brandenburg Regiment, in July 1943. Discussing the impossibility of capturing Tito and his staff by orthodox military action, Heinz declared (*NOKW-949, Pros. Ex. 290*):

“Such an elimination can only be achieved by former partisans in cooperation with the Brandenburg regiments.

¹ See Trial of the Major War Criminals, *op. cit. supra.*, vol. I, p. 254, concerning the doctrine of subjugation when “there was an army in the field attempting to restore the occupied countries to their true owners.”

² The distinguished jurist, Oppenheim, would not agree with this statement. See Oppenheim, *op. cit. supra.*, par. 60, pp. 76-78.

"The method followed up to now, of shooting to death all partisans without distinction, could never be successful. Many became partisans by the combined influence of several circumstances such as Ustasha, Moslem, or Chetnik atrocities, want and starvation, terror and duress by other partisans.

"They stay partisans because the way back is blocked by the German orders. They have lost their country and their family, and so they fight to their death.

"Since the political conditions in Croatia are not improving, new partisans replace those who are killed.

"According to observations of my unit, it would have been possible to win over a certain percentage of the captured partisans for fighting on the German side, if they had been guaranteed that their lives would be spared, that they would receive food and that they could return to their homesteads at a later time."

But the final and compelling answer to the question as it is presented in this case is that the Yugoslavs and Greeks alike, even assuming that they were completely conquered and their country wholly occupied and under German authority, had every right to rise and defend themselves by armed force because the Germans themselves so flagrantly violated the laws of war. It is true that the inhabitants of an occupied territory have responsibilities and duties as well as rights under the Hague Conventions. If the occupying forces comport themselves lawfully, the population is under a duty to remain peaceful and to refrain from endangering the security of the occupation troops. If the inhabitants do not fulfill these responsibilities, the occupying forces may take proper security measures, including retaliatory action, to reestablish order. But this works both ways. If the occupying forces inaugurate a systematic program of criminal terror, they cannot thereafter call the inhabitants to account for taking measures in self defense. This is no technical doctrine of "unclean hands," this is elementary justice and common sense. What I have said nowhere appears in so many words in the Hague Convention, but it is in entire harmony with the purpose of the articles, and I think no one will be heard to deny that this is the only conclusion which is possible in accordance with "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

In this case, ten thousand times ten thousand murders are charged, and for murder there is usually a motive. What moved these men to murder? Some of them were religious, most of them

well educated. Some of them may now realize that what they did was wrong, but, had the war ended otherwise than it did, I doubt that these things would have caused them many restless nights. Their policy of terror was a military failure, and an important cause of the defeat which has brought them to their present plight. Yet these men are certainly not without ability and some measure of understanding. Why did they not see what others saw so clearly?

I think that we can find the answer in two deep seated characteristics of the German military mind. Whether the characteristics prove the inheritance of acquired characteristics, whether they spring from undiscernible geophysical factors, or whether they are the result of the curious and narrow training and indoctrination to which German officer candidates are subjected, one may leave to the educators, historians, psychologists, and anthropologists. Today is the day of the jurists, and today it is sufficient to observe that the characteristics of which I speak led these men, and others of their cast, into crime.

One of these qualities is that their every thought and impulse is geared to a world in which Germany is at war, in which Germany is attacking and invading, in which Germany is conquering and occupying. Lacking such conditions, their world is in a state of suspended animation. Their martial fantasies have permeated German scholarship and, by the latter part of the nineteenth century, had thoroughly poisoned the most distinguished German minds. It was the great German historian and philosopher Treitschke who declared:¹

“It is not for Germans to repeat the commonplaces of the apostles of peace or of the priests of Mammon, nor should they close their eyes before the cruel necessities of the age. Yes, ours is an epoch of war, our age is an age of iron. If the strong get the better of the weak, it is an inexorable law of life.”

For the German militarist, other nations exist only to be conquered by Germany. They persist in the illusion that the other nations will benefit thereby, and are often sincerely puzzled when their occupying armies are treated coldly. This, too, we find in Treitschke²:

“We Germans, who know Germany and France, know better what is good for Alsace than the unhappy people themselves, who through their French associations have lived in ignorance

¹ Morgan, J. H., *German War Book* (John Murray, London, 1915), p. 42.

² *Ibid.*, p. 46.

of the new Germany. We will give them back their own identity against their will. We have in the enormous changes of these times too often seen in glad astonishment the immortal working of the moral forces of history * * * to be able to believe in the unconditional value of a plebiscite on this matter. We invoke the men of the past against the present.”

With such a point of view towards war and the rights of German conquerors, it is no wonder that German military leaders have little or no respect for the laws of war or the dignity of peoples who may come under their way. This is because they do not value, and in fact are contemptuous of, the reasons which underlie those rules. “If the strong get the better of the weak, it is an inexorable law of life.” This attitude shows only too clearly in the “German War Book,” the manual of the usages of warfare on land, issued by the Great General Staff [Grosser Generalstab] of the German Army. In the introduction to this manual, we read:*

“Nowadays it is not only the army which influences the spirit of the customs of war and assures recognition of its unwritten laws. Since the almost universal introduction of conscription, the people themselves exercise a profound influence upon this spirit. In the modern usages of war, one can no longer regard merely the traditional inheritance of the ancient etiquette of the profession of arms, and the professional outlook accompanying it, but there is also the deposit of the currents of thought which agitate our time. But since the tendency of thought of the last century [i.e., the 19th century] was dominated essentially by humanitarian considerations which not infrequently degenerated into sentimentality and flabby emotion, * * * there have not been wanting attempts to influence the development of the usages of war in a way which was in fundamental contradiction with the nature of war and its object. Attempts of this kind will also not be wanting in the future, the more so as these agitations have found a kind of moral recognition in provisions of the Geneva Convention and the Brussels and Hague Conferences.”

In this case, the second marked characteristic of the German officer caste comes into sharp focus—their profound contempt mingled with fear of the peoples of eastern Europe. Again and again this emerges in the orders to their troops and the reports to their superiors. We hear this note in Keitel’s order of September 1941, declaring that “a human life in unsettled countries frequently counts for nothing.” Von Weichs, when he inaugurated

* Ibid., p. 54.

the 100:1 ratio a few months earlier, responded to the same inner feeling. These orders, too, are echoes of Treitschke, whose voice, spanning over half a century, is heard to say:¹

“Each dragoon who knocks a Croat on the head does far more for the German cause than the finest political brain that ever wielded a trenchant pen.”

What these men have never realized is that no caste, and no nation, however mighty, can hold the world in contempt and set its laws at naught. Their military downfall was due, in no small part, to crimes such as those with which they are charged.

What we have said may explain but it does not condone. We may try to understand, but it is not ours to forgive. What these men did they meant to do.

There are only 11 men physically present in the dock, but they do not stand there alone. In a sense, they are hostages for the judgment which history will pass on many others like them. But they are more fortunate than the hostages we have heard so much about today. They will not be punished for the crimes of other men. Centuries ago, Grotius wrote that “hostages should not be put to death unless they have themselves done wrong.” That is the law of humanity, the law which they themselves are charged with transgressing. And that is the law under which they will be judged.

This concludes the statement, Your Honor.

B. Opening Statement for Defendant List²

DR. LATERNER: Your Honors, in his essay in the *British Yearbook for International Law* (*Oxford, 1944, pp. 58-95*), which has already been quoted by the prosecution in the opening statement, Professor Lauterpacht has made reference to a problem which is peculiar to the proceedings against alleged war criminals. It is the problem of the uncertainties of laws of war. These uncertainties of the laws of war make it imperative that the defense as well—already at the present stage of the trial—explain its conception regarding the problems of international law, which will be of importance for the judgment of the actions of the defendants especially since the prosecution has already presented its concept of the law to the Court. For the law is the framework within which the prosecution and the defense present their evidence before the Court and within which the Court assembles the

¹ *Ibid.*, p. 43.

² Opening statement is recorded in mimeographed transcript, 15 September 1947, pp. 2965-3026.

facts which are offered, not at the time of the determining of the judgment but also during the course of the evidence proceedings.

The problems on which the matter hinges have been mentioned in principal by the prosecutor in his opening statement and I intend to treat them in the same sequence as has the prosecution.

To begin with I wish to emphasize that I am purposely quoting in the main sources from the Anglo-American legal circles using such material as a guide in the interpretation of international law insofar as this is of importance in this trial, for it cannot be denied that in the field of science and practice of international law the *onus* now lies upon these minds.

The first problem which I wish to take up is that of acting upon orders. Logically enough, it is not the primary one, but by far the factual and psychological key for the conduct of the defendants which forms the subject of this trial. The prosecutor passed this point very quickly. I shall treat it more in detail not simply because, as I have already stated, it offers the explanation for many events which are being discussed here but because from the standpoint of international law it is much more complicated than one can infer from the opening statement of the prosecution.

The sole basis for the punishment of war crimes is international law, for war crimes are transgressions of international law, which is to be differentiated from the laws of the states against which the war crimes have been committed. Professor Lauterpacht particularly emphasized this point in his essay "The Law of Nations and the Punishment of War Crimes" in the *British Yearbook of International Law (Oxford, 1944, p. 59)* which essay has already been quoted. I quote:

"For the cause of international law demands not only the punishment of persons guilty of war crimes. It also requires that such punishment shall take place in accordance with international law."

And further on he states again:

"That law is, and must be, primarily international law. For, it must be repeated, it is only to the extent that the acts of these offenders are prohibited by international law, that they can at all be considered as crimes according to the laws of the individual states."

Professor Kelsen, the founder of the so-called Vienna School for State and International Law, now professor of international law in the United States, expresses himself similarly in his book "Peace Through Law" (*Chapel Hill, University of North Carolina Press, 1944*) he writes:

“These acts [war crimes] are forbidden directly by international law. The military court, by punishing the acts, executes international law even if it applies at the same time forms of its own military law.”

The sentence from the verdict of the International Military Tribunal must also be interpreted in this sense, since the London Statute is the expression of existing international law at the time of the creation of the statute.

From this it follows that the prosecution and punishment of war crimes is an exercise of law only insofar as this takes place within the framework of international law. What transpires beyond that point is the utilization of power and not law. That is the reason why in the proceedings before the International Military Tribunal the British chief prosecutor examined as the fundamental problem of his statements how the statute was in accord with valid international law. For general international law cannot be altered through unilateral action of the victorious powers or through special agreements amongst one another even when these may appear in the form of statutes or laws.

How is the plea of superior orders in the commission of war crimes to be evaluated according to international law?

Professor Oppenheim, who was for many years senior consultant of the British Admiralty and who must be regarded in the field of international law as the criterion during the past decades, stated the following in this respect in his book, “International Law”:*

“Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent government concerned. If members of the armed forces commit violations by order of their government they are not war criminals and cannot be punished by the enemy; the latter may, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible and the latter may, therefore, be punished as war criminals on their capture by the enemy.”

Professor Oppenheim maintained this opinion during his entire life, from the first to the fifth edition of his “International Law,” which is a standard text in international law literature throughout the world. Like many authors he does not differentiate between the plea of an act of the state, which comes into discussion when the act is based on an order of the government, and the plea of an order of some other military superior.

* Oppenheim, *op. cit. supra*, pp. 342-343.

George Manner, the American international law expert, who treats the subject of plea of superior orders and act of state in the article "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War" writes as follows:

"The maxim that members of the armed services of a country are not personally responsible and liable to penal punishment for acts perpetrated by them in contravention of the rules of warfare under the orders or sanction of their governmental or military superiors does not form part of the codified law of war. Nevertheless, it appears to be a recognized principle of this law. Since 1914, at least, the maxim has been incorporated in the war manuals of the powers as a rule of the customary laws of war."

Also in further passages he again characterizes the above pleas of superior orders, and act of state, as generally recognized maxims of positive law which limit the punishment of war crimes because they are components of the rules of warfare. I believe that the opinion expressed in the opening statement of the prosecution, with reference to the plea of military orders, to the effect that the recognition of this excuse is the result of a perverted view regarding military discipline, does not get at the root of the problem.

The question of military discipline in actions that are committed under orders is of importance only in the national penal laws of different states. Here in this trial, however, the matter under debate is the norm of positive international law independent of its cause, that acting upon military orders excludes the prosecution of war crimes by courts of the enemy states against whoever acted upon orders. This extremely important difference can easily be overlooked.

Paragraph 347 of the American "Rules of Land Warfare," which was edited under the direction of the Judge Advocate General and published by the War Department of the United States in 1940 and is still valid today, explains, following the enumeration of the possible war crimes, and I quote:

"Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

There can be no doubt that the official interpretation of the War Department of the United States is represented by this

decree with reference to the status of international law in the question of actions under military orders in cases of war crimes.

The same point of view was held until 1944 by the competent British offices in the British Manual of Military Law, paragraph 443, of which, after enumerating the possible war crimes, continued, and I quote:

“It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining regress which are dealt with in this chapter.”

In this respect Professor Lauterpacht writes in his essay in the British Yearbook of International Law (*Oxford, 1944, Foot-note, p. 66*).

“Although chapter XIV of the military manual has not been given statutory force it is, in general, an exposition of the conventional and customary rules of international law as understood by Great Britain.”

It is my opinion that the plea of superior orders is a generally recognized maxim of international law demonstrated by excellent authors on the subject of international law and by the military handbooks of the United States and Great Britain.

This principle was already generally recognized 100 years ago, as is shown by the famous case of MacLeod. During an insurrection against the British administration in Canada in 1837, members of the British colonial forces attacked an American ship, the *Caroline*, which was moored on the American side of Niagara Falls, because they suspected that the passengers were insurgents. They burned the ship and let it be carried over the falls. An American citizen lost his life in this incident. In 1840, MacLeod, a British subject, was arrested by the New York officials for participation in the act against the *Caroline* and brought before court. The British Ambassador in Washington demanded the immediate release of MacLeod on the basis that the destruction of the *Caroline* “was a public act by persons in the service of Her Majesty, who were obeying the orders of their superiors.”

The American Secretary of State, Webster, recognized the validity of the British argument and declared: “That an individual who is a member of a public armed force, and who acts under powers invested in him by his government, cannot be held

responsible as a transgressor of the law, is a principle of public law which is sanctioned by the customs of all civilized nations and which the government of the United States is not inclined to contest."

This was brought further into practice in the well known case of the sinking of the British Steamship *Lusitania* by a German submarine during the First World War. At that time the British Prime Minister, Asquith, declared himself against a prosecution of the perpetrators since they had acted under orders. (This attitude of Prime Minister Asquith is quoted in Lapradelle-Larnaude, *Examen de la responsabilité penale de l'empereur Guillaume II d'Allemagne*, in "Journal de Droit International".)

Attempts have been made to deviate from this maxim of international law. In Section 228 of the Versailles Treaty the German Government recognized the right of the Allied and associated powers "to bring those persons accused of having committed actions in violation of the laws and customs of war before military courts." The American expert in international law, Professor Fenwick, in his book "International Law" characterizes as one of the reasons why this decree of the Versailles Treaty was not executed.*

"* * * the obvious legal difficulty that many of the accused persons had acted in obedience to higher authority * * *."

These legal difficulties could have only been eliminated by a conventional rule on the problem. Therefore, and I quote Professor Fenwick again, "efforts were made to create a new conventional rule with regard to this subject."

At the Washington Conference in 1922, a provision was incorporated into the treaty in section 3, regarding the use of submarines, to the effect that a violation of the treaty provisions regarding the attack, seizure, or destruction of commercial ships should be punished as "piracy" regardless of whether the perpetrator acted under the orders of a superior. This treaty was never ratified.

This question was taken up again in 1930 at the London Naval Conference. In part IV of the Naval Treaty of 22 April 1930, it was decreed that submarines had to observe the same rules of international law in their actions against commercial ships as were observed by surface craft. The clause that the perpetrator be held responsible for actions which were committed under orders in violation of these rules is not to be found in the text of this treaty. From this, one must conclude that the appendix

* Fenwick, Charles G., *International Law*, Third Edition (Appleton-Century-Crofts, Inc., New York and London, 1934) p. 669.

contained in the Washington version is not in agreement with the opinion of the signatories of the London Submarine Protocol.

The jurists, commission which was assigned to the task of revising the rules of warfare by the powers participating in the Washington treaty expressly stated in a provision of their report that persons acting under orders are free from any responsibility for those crimes against the rules of warfare contained in their report.

The attempts to incorporate into international law in a manner effective under international law the principle of prosecution of war crimes committed under orders were thus unsuccessful. It is of importance that in spite of the efforts to initiate amendments, the American "Rules of Land Warfare" as well as the British Military Manual adhered to the earlier principle of nonpunishment.

The provision of the American "Rules of Land Warfare" that individuals may not be prosecuted for war crimes committed under orders is still valid today. In contrast, paragraph 443 of the British Military Manual was reedited in 1944, by which the interpretation of the problem according to the international law up to that time was supplanted by the maxims which were developed within national British law covering illegal actions committed under military orders.

If one examines the events to which this amendment can be traced, then one finds that the Moscow Declaration of October 1943 had set the precedent. In this punishment of war crimes without regard to the possible orders of military superiors was made certain. I do not believe it is necessary to make particular emphasis of the fact that this declaration was a political act and presented no effective source of new international law.

Officially, the circumstance that in the posthumous edition of the textbook of Professor Oppenheim (6th edition, 1940)—prepared during the war by Professor Lauterpacht—the attitude had shifted towards the question of prosecution of war crimes committed under orders was stated as the reason for amending paragraph 443 of the British Military Manual.

Professor Lauterpacht had further expressed an opinion against paragraph 443 of the Military Manual in his essay "Law of Nations and the Punishment of War Crimes."*

Professor Lauterpacht certainly is a very modern scholar and his essay is excellent, but I believe it cannot remain unnoticed in a critical analysis that his reasons for the above-mentioned opinion, from the point of view of international law, are very

* Lauterpacht, *op. cit. supra*, pp. 69-74.

weak. The view of Professor Lauterpacht, shared by a few others, is in any case also termed "more than questionable" by Professor Kelsen. Concerning the opinion set forth in the five previous editions of Oppenheim's textbook and of paragraph 443 of the British Military Manual, Professor Lauterpacht maintains that they represent no sound principle of military law, requiring for this reason a definite amendment of paragraph 443; I quote:*

"* * * unless the scope of prosecutions for war crimes is to be drastically and unduly curtailed * * *."

But this reminds us, the defense counsels, of a certain phase of the legal development within the state, which has in the meantime become a thing of the past, and in which prevalence is given to the idea of the justifying end and the so-called sound popular feeling as against the norms of positive law. And as regards the "sound legal principle" which is supposed to be provided by reason, the following view expressed by Professor Oppenheim about "reason" applies. I quote:

"I cannot agree to reason being a source of law. Reason is a means of interpreting law, but it cannot call law into existence."

It is just as much out of the question that reason alone can modify existing international law.

The fact that the Supreme Court of the United States, as pointed out by Professor Lauterpacht in one case concerning espionage and sabotage maintained emphatically the direct criminal responsibility of individuals for violation of military laws, can by no means be taken as a precedent applying to the problem under discussion. For as soon as espionage and wartime treason are involved, the prosecution of offenders acting by order has always been recognized as lawful in international law, contrary to the general law.

The prosecution maintains that if the defendants would plead that their acts were committed by order of higher authority, they would find a stumbling block already in Article 47 of their own Military Penal Code. Here, however, they fail to consider that the plea of acting by order is judged in different ways in international law, which has to be applied when alleged war criminals are prosecuted by an enemy state, and in the national law of the individual states. According to the principles of national law of civilized states the possibility of carrying through a criminal procedure will—with certain differences in each district of jurisdiction—be dependent upon whether and how far the offender

* *Ibid.*, footnote 2, p. 69.

perceived his actions to be unlawful, or whether and how far his guilt was neutralized or mitigated through duress. From the point of view of international law, on the other hand, acting by order—I adopt the view of the American “Rules of Land Warfare”—is a fact excluding as a matter of principle the prosecution for war crimes by a foreign state. This basic difference is also stressed by Professor Lauterpacht in his essay, “The Law of Nations and the Punishment of War Crimes,” being summarized in the following words:*

“It is an interesting gloss on the complexity of the problem that in Great Britain and in the United States the plea of superior orders is, on the whole, without decisive effect in internal, criminal, or constitutional law, although it is apparently treated as a full justification in relation to war crimes * * *.”

For this reason it is impossible to adduce the verdict of the German Supreme Court in the case of Llandovery Castle pronounced in the time following the First World War, in justification of the redrafting of paragraph 443, as is done in amendment 34 of the British Military Manual, in footnote 4 to paragraph 443. In the examination of the question whether and how far the accused German U-boat officers could plead action by order of superiors, the Supreme Court had to apply not international law, but only national German law.

Article 47 of the German Military Penal Code can moreover be used as foundation for the punishment of military subordinates only in case the order issued by the superior was in violation of German law. As orders issued by Hitler in Germany and for German authorities and law courts were law, a soldier acting by force of an order from Hitler could not be punished, not even in pursuance of Article 47 of the Military Penal Code, even when Hitler's order constituted violations of generally recognized ideas of law or of international law.

I conclude my statements concerning this problem with a reference to the words of Professor Oppenheim, the firm champion of the version to which I appeal, which are to be found in the foreword to the second volume of his work.

“I have tried to write this volume in a truly international spirit, neither taking any one nation's part nor denouncing any other. It is to be deplored that many writers on the law of war and neutrality should take every opportunity of displaying their political sympathies and antipathies and should con-

* *Ibid.*, pp. 72-73.

fuse their own ideas of justice, humanity, and morality with the universally recognized rules of warfare and neutrality.”

I have shown that the plea of superior orders is a long recognized basic maxim of international law, which limits the punishing of war crimes. But Control Council Law No. 10, which decrees something different, is binding for the Court, says the prosecution. I believe that the Court is only bound by international law. Control Council Law No. 10 is based upon the combined authority of four victor nations, and this authority goes no further than the powers with which the sovereignty of each individual state invests it in the community of international law. The general international law, which, as has been said, recognized the plea of superior orders as effective, may only be revised by general conventions or by an administration of law based upon general recognition, not, however, by unilateral acts of the victor nations which are directed against a conquered nation. To be sure, an occupying power has the power to issue laws for the occupied territory; but it is just as certain that these laws may not interfere in the sphere of international law. For the military occupation does not transfer the sovereignty of the conquered nation to the occupying power, by virtue of which a nation acts in the sphere of international law, but it bestows only that part of the governing power which is necessary to make it possible for the occupying force to have effective control over the occupied territory during the length of the occupation. The rights of the occupying power are established and limited as binding in the Hague Convention, and we find a detailed definition of the powers of an occupying force in chapter 10 of the American “Rules of Land Warfare.” Not only is every authority lacking for empowering an occupying force to create, suspend, or alter international law while acting for the conquered state. Rather, we establish the fact that it was never doubtful that an occupying force did not have this right and that this limitation of its powers proceeds quite clearly from the Hague Convention. Such powers of an occupying force could only arise through annexation which, however, was expressly disapproved of in the London Declaration of 8 August 1945.

I believe that here there is a special reason for referring to the basic difference between the ideas of justice and humanity and the recognized terms of international law, because from the opening speech of the prosecution, the attempt to bring the charges against the defendants to a simplified common denominator may be perceived, thereby effacing this difference. In the opening speech of the prosecution, which we have heard here, it was said that

these men are indicted because they have denied and undermined the fundamental basis of civilization, namely, the principle that human life shall not be unnecessarily destroyed.

Regarding this principle, I am of the opinion that it is a noble principle and is not only a result of humanity's instinct for self-preservation. It is, however, only a principle of ethics and a demand of humanity. I cannot agree with the concept that it is a recognized maxim of international law, now in the age of the atom bomb and the mass air attacks upon the civilian population, the frightfulness of which we experienced only a short time ago—air attacks, in which, within a single city in 24 hours more than 200,000 people, mostly women and children, were killed, as in Dresden, and that at a time at which the war was already certainly won by the other side. I do not mention this in order to raise counterreproaches, by which, as I know, the situation of the defendants cannot be bettered. I only want to investigate the basis of the difference which the public opinion of the world and the jurists of international law make obvious in these questions. For it is necessary that in such important matters as the accusations raised against the defendants, one sees quite clearly, if one wants to judge them correctly. Thus, for example, Professor Lauterpacht writes in his essay in the *British Yearbook for International Law*, 1944, page 75, already cited several times, that it is difficult to answer the question of the legality of the air attacks by means of penal prosecution of individual persons, while, as we must establish, these difficulties obviously do not exist in the case of the charges which have been raised against the defendants. The difference certainly does not lie in the fact that in reprisal measures in the occupied territories more people were killed than by air attacks upon the civilian population; or that men die more easily by aerial bombs, aerial mines, and phosphorous bombs than did the executed hostages; and also not in the fact that the women and children who were buried under the wreckage of the houses or in the cellars, or burned to death on the streets as living torches, were more guilty than the partisans and insurgents shot in reprisal. The diverse judgment and treatment is rather connected, it seems to me, simply with the fact that it is a matter of executions in the case of the actions indicted here, that is, of killing men whom a belligerent had in his power. There is no point in pursuing further reasons upon which the diverse judgment is possibly based. It is sufficient to establish the fact that this difference is present. I must therefore proceed from the facts as they are; that in contrast to all other procedures by which in war people, even civilian persons, are killed in great numbers, executions establish *prima facie*

the suspicion of war crimes, and that, as the practice of the war crimes trials shows, without consideration here of the number of the victims.

I believe that the principle maintained by the indictment, that people may not be killed unnecessarily, must be traced back to the extent which agrees with the current practice of international law. Later, when I come to speak of the actual situation in the Balkans, I will take up the further efforts of the prosecution to substitute the ordered investigation of which of the measures indicted here were necessary and which were not, by the general principle that all the measures of the German commanders were arbitrary crimes, while, on the other hand, the actions of the partisans and insurgents were patriotic acts and justifiably self-defense.

First, I return to the executions. I intentionally did not say more than that they usually establish the suspicion of war crimes *prima facie*. I do not say, of course, that this suspicion is in general justified. This suspicion obviously is connected with the fact that the conviction that executions may only be undertaken on the basis of a judicial judgment is wide-spread in the ideas and concepts of men, while with regard to the exceptions to this principle, which come under the concept "retaliatory measures," obscurities and differences of opinion predominate even among the authors of international law.

"A tribunal confronted with the plea of reprisals as a justification of the offense will be faced with a task of considerable difficulty. International law regulates, in a necessarily rough and indeterminate manner, the occasion for and the use of reprisals both in peace and in war."

Says Professor Lauterpacht in his essay in the *British Yearbook for International Law*, 1944, page 76, after he has established directly before:

"But, as a rule, an act committed in pursuance of reprisals, as limited by international law, cannot properly be treated as a war crime."

The concept of reprisals is defined in paragraph 358a of the American "Rules of Land Warfare" (*U.S. Army Field Manual 27-10, 1940*) and in paragraph 452 of the British "Manual of Military Law." I agree with the prosecution that reprisals are retaliatory measures which are committed by a nation or its agents in order to hinder the enemy in further violation of the rules of war. Reprisals are coercive measures. I cannot recognize that they may be applied only in the relationships between

nations or between their opposing armed forces, as the prosecution argued. The action according to plan of inciting the civilian population to acts of sabotage and attacks upon members of the German occupation forces and the fight of the partisans in violation of international law in the occupied territories had the result that during the Second World War reprisals had to be resorted to above all against illegal actions of the civilian population, in order to force the latter to desist from its illegal conduct. It would be absurd to assume that the commanders of the armed forces of a belligerent party had to endure acts of an enemy civilian population in violation of international law, without being able to protect their troops, when necessary, by retaliatory measures.

The admissibility of reprisals against illegal acts of enemy civilian population is, therefore, expressly recognized by the military handbooks of the United States and Great Britain. Paragraph 358*c* of the American "Rules of Land Warfare" answers the question "who may commit acts justifying reprisals" as follows:

"Illegal acts of warfare justifying reprisals may be committed by a government, by its military commanders, or by a community or individuals thereof, whom it is impossible to apprehend, try, and punish."

Paragraph 358*d* decrees:

"The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed."

The British military handbook contains the following decree concerning this, paragraph 386:

"If, contrary to the duty of the inhabitants to remain peaceful, hostile acts are committed by individual inhabitants, a belligerent is justified in acquiring the aid of the population to prevent their recurrence, and, in serious and urgent cases, in resorting to reprisals."

Paragraph 453—

"The illegitimate acts may be committed by a government, by its military commanders, or by some person or persons whom it is obviously impossible to apprehend, try, and punish."

Paragraph 458—

“Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community, for some act committed by its inhabitants, or members, who cannot be identified.”

These provisions of the American and British military handbooks are based, as it may well be assumed, just as much upon practical military experience as upon consideration of the laws and customs of war, just as these latter are conceived by the governments which published these handbooks. By these provisions, the claim is therefore refuted that such steps remain ineffective if they are directed against the inhabitants of an occupied territory and not against the enemy government or its armed forces. In the trial against Field Marshal Kesselring before a British military court in Venice, the defense proved that the shooting of 335 Italians, which was undertaken on 24 March 1944 in Rome as a retaliatory measure for an attempted bombing of a German police company, prevented any further attempt against the German Wehrmacht for the period following, until the surrender of Rome at the beginning of June 1944, whereas before these reprisals, attempts of that sort had occurred to a constantly rising degree and at shorter and shorter intervals.

I believe that the prosecution also cannot appeal to Professor Lauterpacht for its conception that reprisals against the civilian population are ineffective and for this reason, inadmissible. The passage cited by me from the essay of Professor Lauterpacht in my opinion does not refer to the actual effects of retaliatory measures, but to the effect of the protest of the reprisals upon the juridical judgment of a case according to international law. The first sentence of the passage cited reads completely:*

“On the other hand, as in the matter of the uncertainty of the law of warfare, the impact of the operation of reprisals is not as considerable as would appear at first sight.”

By referring to the preceding legal statements concerning the problem of the uncertainty of military law the meaning of the citation becomes clear. Deliberations which take into consideration the actual situation in the occupied territories and the military necessities resulting from it, and the concepts laid down in the American and British military handbooks of the governments in question concerning the condition of martial law show,

* *Ibid.*, p. 77.

therefore, that reprisals may also be applied against the civilian population, in order to force the latter's conduct to be commensurate with international law.

The main question then immediately follows, whether in the course of such reprisals people may also be killed, that is, also people who cannot be proved to have had any connection with the illegal acts for which the reprisals are a retribution. The English and American authors available to me are silent concerning this question. I disregard the citation of German authors, world-renowned scholars, who answer in the affirmative. But I cite again the British and American military handbooks. Paragraph 459 of the British "Manual of Military Law" provides:

"What kinds of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of reprisals must not, however, be excessive, and must not exceed the degree of violation committed by the enemy."

Reprisals are, as established, coercive measures by which the opponent is to be brought to desist from conduct contrary to international law. But how can an enemy population in an occupied territory, which, in opposition to its duty to maintain a peaceful attitude and in no way to take part in the hostilities, maliciously commits murder on members of the occupying military forces, be forced in any other way to conduct in accordance with international law than by answering their acts with equally heavy measures, when, as almost always in such cases, the guilty parties cannot be seized and punished? What can the commander of an occupation army do, when an enemy population systematically murders his soldiers and is prepared any moment for open insurrection? It is left to his deliberation which measures he wants to apply, says the British military handbook, and only adds that retaliatory measures may not be immoderate and may not overstep the degree of the violation committed by the opponent. That means that the party forced to take retaliatory measures may do everything but not more than the nature of the reprisals demand according to what they consider to be their duty. The British military handbook answers the question whether in such a case people may even be killed in reprisal indirectly by not forbidding such a killing, while it expressly excludes the killing of hostages in paragraph 461 who serve to guarantee a treaty.

I believe a British officer would be told he had violated his duty if, in a case where the security of his men demanded, he would not have understood the indirect instruction of his military manual in that way.

In this connection, I must again refer to the proceedings against Field Marshal Kesselring. The Associate Judge Advocate General at the British Military Tribunal in summarizing expressed his opinion on this question as follows: "It cannot be excluded entirely that innocent persons may be shot by way of reprisals; international law is very flexible."

In addition, it is of special importance that neither in the London Statutes nor in the Control Council Law No. 10 is the killing of persons by way of reprisal designated as a war crime although this problem had no lesser practical importance during World War II than the problem of killing hostages.

In paragraph 358*d* of the American "Rules of Land Warfare" a quite clear answer is given to the question whether innocent persons may also be killed by way of reprisals. I have already quoted this rule:

"Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed."

I now add this: The American "Rules of Land Warfare," according to the international law expert, Plueck—that is on page 41—are legally valid. He expresses it in the following words: "rules having the force of law."

This is the most important sentence that has ever been written in more recent times with regard to reprisals and hostages. It is not only the key to the entire problem of reprisals and hostages; it also denotes the point where these two institutions overlap.

The prosecution has already pointed out the close connection existing between the problem of reprisals and the question of hostages and with regard to the modern practice connected with hostages I agree with the prosecution in that respect that the purpose of taking hostages is to place oneself in the position of having the possibility of carrying out reprisals. Hostages have always been exchanged, given or taken, for quite varying purposes. The two main objects were always to guarantee treaties in war and peacetime and the protection against hostile acts by the population in an occupied territory. The two forms have developed independently of each other and are quite different in their character.

The classical form in which to guarantee a treaty, which was the original one, has been out of practice for a considerable time. It was abandoned after the opinion had been accepted in international law that such treaty hostages must not be killed and, in addition, the importance, extent, and complexity of the more

modern international agreements necessitated other guarantees in the form of material and territorial securities. It is not my intention to make extensive investigation into the historical development of the hostage problem. However, I do think it necessary to make it clear that the sentence of Grotius, “* * * hostages should not be killed if they have not themselves committed an injustice, * * *” quoted in the opening statement of the prosecution only refers to the classical form of hostageship, viz, to hostages serving as guarantees of treaties. In addition, Grotius only regarded it as a demand which in his opinion followed from natural right; whereas, as Grotius states himself, the execution of treaty hostages was regarded as admissible according to the external or positive international law based on the accordance of will of states which we call the practice of the states. The principle that treaty hostages must not be killed was not given universal formulation before de Vattel in the sentence, “*la liberté seule des hôtages est engagée.*”

From this time on we may regard the principle that hostages serving as a guarantee of a treaty must not be killed as a recognized standard of customary international law. As already mentioned, it referred, however, only to treaties, and in the beginning only to treaties concluded for the termination of a war or in peacetime. Hostages destined as guarantees for war conventions were still subject to the more rigorous martial law. To begin with, the statement we find of von Moser applied to them—

“If the promise is not kept the hostages may, according to more rigid laws, be treated with such severity as is appropriate in view of the circumstances of the case.”

However, also in their case killing was later generally rejected. Insofar as hostages still should be designated at all as guarantees for treaties, which is still conceivable only during the war, the statement contained in the British military manual, paragraph 461, therefore applies at present:

“* * * and if hostages nowadays are taken at all, they have to suffer in captivity, and not death, in case the enemy violates the agreements in question.”

This principle must surely also be applied to a form of taking hostages still exercised today as a guarantee for service claims based on international law, which is closely related to the institution of treaty hostages, viz, to hostages taken by an occupying power as security for requisitions and contributions. They do not serve as security for contractual services but for service claims based on a unilateral levy by an occupying force. Also in these

cases nonperformance does not grant the right to put the hostages to death.

As regards the second main form of taking hostages, we have the statement of the American "Rules of Land Warfare" of 1940, that hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy civilian population may be punished or put to death if the unlawful acts are nevertheless committed. With this sentence the competent American Government authorities have summed up the development which we can follow since this form of taking hostages has developed into an important institution of martial law in the course of the last 150 years. The taking of hostages as security for the troops in the occupied territory was already practiced in former times. It could, however, only become a legal institution after martial law in its development had arrived at the point of protecting in principle the civilian population. Since only from that time on reprisals against the civilian population became a problem of law. The above quoted sentence from the American "Rules of Land Warfare" is a clear acknowledgment of the facts which may confront an occupying force in modern warfare with partisan activity and underground movements.

Only at first sight is the fact peculiar that the modern form of taking hostages for the purpose of reprisals developed into its full severity only at a time when the classic form of insuring treaties had been abandoned after its practice had become even milder. It is the necessary consequence of the fact that in the modern wars, as we could observe, the civilian population in the occupied territory in an ever increasing degree participates, contrary to international law, in the fight against the occupying power—of its own accord as well as due to systematic inciting by exile governments or other enemy powers.

It is a peculiarity of the hostage problem that the separate forms of this institution have developed separately and have separate contents so that they cannot be treated analogously to which Lutteroth already has referred in his treaties on hostages. It makes a great difference for the actual contemplation of things whether hostages are to be put to death because a levy was not paid at all or not paid in time, or whether a commander in the occupied territory is faced by the fact that his soldiers are being murdered contrary to international law by a fanatical population in spite of its having been warned. The analyses of the problems of law show that a corresponding difference also exists from the viewpoint of law. It lies in the reason justifying the measures taken against the hostages. In the classical form of hostageship, the right of punishing the hostage in case of contravention of

the treaty or the duty to pay the levy originated from the ancient institution of the hostageship itself where the measures adopted against the hostage are a kind of punishment; with criminal punishment it has in common the purpose of general prevention less that of expiation. In the modern hostage form, however, the killing or other punishment of the hostages are at least preponderantly reprisals, that is, compulsory measures adopted against acts of the civilian population or the enemy forces committed contrary to international law in order to force them to abide by martial law. The prosecutor already said in his opening statement that "the purpose of taking hostages is to place oneself into a position of being able to adopt retaliatory measures." The nature of reprisals of the modern hostage practice has been recognized especially clearly in composing the American "Rules of Land Warfare" as follows from the incorporation of paragraph 358*d*, which deals with hostages, into the rules on *reprisals*.

Together with this designation of the modern hostages, of becoming possible subjects of reprisals, the conception of a hostage has changed its meaning. In the classical sense of the word hostages were persons who were formally exchanged or taken as such, which resulted in certain legal relations between the interested parties. Hostages in the sense of paragraph 358*d* of the "Rules of Land Warfare" are, however, all persons taken or held for the purpose of making them subjects of reprisals in case of necessity, whether they be formally recognized as hostages and actually be called hostages or, as in several orders of the defendants, are called "expiatory prisoners" or the like.

Hostages in the sense of the expression as used in paragraph 358*d* of the "Rules of Land Warfare" are not only persons taken by a belligerent for the sole purpose of placing himself in a position of being able to carry out reprisals in case of acts on the part of the enemy contrary to international law. Mostly, several purposes are interwoven with one another; persons are arrested because they are suspected of illegal activity, or of connection with partisans or rebels, or who seem dangerous to the occupying power for other reasons. It is especially natural that they, from the moment of their arrest, also serve the declared purpose of being subjects of reprisals in the future. In the order read here they were frequently called expiatory prisoners. Other persons were arrested because of the influence which they possessed due to their profession or their economic or political position, and by their arrest alone the paralyzation of the population's activities was frequently achieved, which is still increased by the threat of being put to death. For these persons generally only the expression of hostage is customary; likewise for those who from

the outset were taken solely for the declared purpose of serving as subjects for reprisals in the case of future violations of international law by the opposite side. All these various groups are covered by the stipulations of paragraph 358*d* of the American "Rules of Land Warfare," according to which they may be punished or put to death, if the unlawful acts are committed by the opposite side in spite of warnings.

The opinion has been expressed that in the American "Rules of Land Warfare"—due to the placing of hostages on an equal level with prisoners of war and due to the stipulation that prisoners of war must not be put to death—an "unfortunate contradiction" exists with regard to the fact that the killing of hostages is expressly permitted in paragraph 358*d*; this was held by authors who stress that it is permissible to put hostages to death in case of necessity.

The prosecution has also hinted at that. I do not share the opinion that such a contradiction exists. On the contrary, I am of the opinion that the regulations of the American "Rules of Land Warfare" permit an absolutely clear solution of most aspects of the modern problem of hostages; as a consequence of their being accorded treatment equal to that of prisoners of war, persons who formally have been taken as hostages shall, for the duration of their arrest, be kept and treated as prisoners of war. Another consequence is that such persons may, in as far as they were not, as mentioned in paragraph 358, taken for the purpose of being the objects of reprisals, be submitted to reprisals only under the same conditions as prisoners of war, if for example, hostages taken by the other side are killed in violation of international law. As for the rest, those hostages mentioned under paragraph 359 of the "Rules of Land Warfare" who were taken to insure a correct treatment of the wounded and sick and to protect the lives of prisoners of war who have fallen into the hands of irregular troops are also to be counted among those hostages who, in contrast to the prisoners of war, may generally be made objects of reprisals.

These hostages, too, were taken, as it says in paragraph 358*a* of the "Rules of Land Warfare," as a protection against unlawful acts of the enemy, and may, therefore, be punished or killed if those unlawful acts are nevertheless committed. I cannot see where, as Hammers and Salvin, and the prosecution claim, there exists an unsolved contradiction. All that is necessary is to observe the fundamental difference between hostages in the classical sense of the word and persons who are taken or kept in order to become objects of reprisals if the enemy violates international law, and who often are also called hostages.

I have already mentioned that neither the London Statute nor Control Council Law No. 10 consider the killing of people by way of reprisals as a war crime. They obviously refrain from doing so because reprisals might be a necessary means of forcing the opposing armed forces and the enemy population to observe the rules of warfare and to prevent them especially from committing crimes against members of the occupying power. Since the London Statute and Control Council Law No. 10 do not declare reprisals being forbidden, they do not apply to the killing of persons who were taken or kept for the purpose of becoming objects of reprisals, even if these persons are called hostages. This becomes evident through the fact that the army of occupation of the Soviet Union, that means, one of the three principal powers who on 8 August 1945 signed the London Agreement, shortly before that date decreed and publicly announced in Berlin the killing of hostages on a proportional basis of 50:1 as a reprisal for attacks against members of the army of occupation. This I shall prove.

It is obvious that the question of the status of the irregular combatants in Yugoslavia and Greece plays an important part in this trial. First of all it is important in connection with count three of the bill of indictment but it also touches the other points of the indictment as far as they deal with the problem of reprisals.

I agree with the prosecution that this is the question: Under which circumstances must combatants, if they are captured, be treated as prisoners of war, and under which circumstances can they be treated as armed bandits and be summarily executed?

The legal status of the resistance forces was also discussed during the trial of Field Marshal Kesselring before the British Military Tribunal in Venice.* That trial dealt not only with resistance activities equal or similar to those in Yugoslavia and Greece, but partly even with the same forces since, as is probably known to the Court, Tito's units expanded, since 1944, their operations in Venezia Giulia and in the eastern Alps far into Italian territory. In his opening statement the British prosecutor Colonel R.C. Halse also dealt with them. Let me read what he said about them:

“There are some war crimes which are only war crimes in respect to one side. The partisans, for instance (and I say it quite openly), by attacking the German forces in the rear, were guilty of a crime against the German law; I say advisedly

* See Law Reports of Trials of War Criminals, *op. cit. supra*, vol. VIII, Case No. 44, “Trial of Albert Kesselring.” The accused was found guilty and sentenced to death by shooting. The sentence was commuted by the Confirming Officer to life imprisonment.

against the German law. So far as the Italian and Allied law was concerned they were heroes. They did commit a war crime and if they were captured by the Germans, the Germans were undoubtedly entitled to try them for committing a war crime, and if found guilty of committing that war crime, the Germans were entitled to sentence them to death." [Record, 2d day, page 6.]

The records of the trial before the British Military Tribunal are, as far as I know, available here in Nuernberg, and can therefore be consulted. If not, I shall submit to the Court an extract of the trial transcript as an exhibit. Do we not find here a surprising difference of opinion between both prosecutors as far as the legality or illegality of the irregular combatants is concerned, if we remember what we heard in the prosecution's opening statement to this trial about the same problem and, as I said before, partly about the same resistance forces?

The problem of the status of the irregular combatants is very complex and needs a thorough analysis which must also examine whether, and to which extent, the reasons for the legality of the resistance forces, which the prosecution submitted in their opening statement, held true only for the evaluation of the latter from a patriotic and historical point of view, or whether they are also of consequence in connection with legal considerations.

The starting-point for legal considerations is provided by sections 1 and 2 of the Appendix to the Hague Convention which contain the conditions, agreed to by treaty, for the recognition of irregular combatants as belligerents.

The prosecution has characterized the conditions stated in section 1 as traditional and generally acceptable necessities, and has admitted that the Germans were justified in denying the status of belligerents to, and executing, captured partisans who had not observed these conditions. With this, such partisan activities as were not carried out in the form of larger military operations, have been taken out of the problem, because it is characteristic of all activities of the bands in Croatia, Serbia, and Greece, as far as they were carried out in the form of guerrilla warfare, that the requirements of Article 1 were not fulfilled. You will yet hear about origin, development, organization, and way of fighting of the irregular troops in the Balkans. Here I want to state in advance in condensed form only a few important points.

Guerrilla fighting developed some time after the cessation of hostilities in Yugoslavia and Greece and the occupation of these

countries. In the course of time it constantly increased in intensity.

First it was waged against the army of occupation by Nationalist groups, in Yugoslavia by the Chetniks under Draja Mihailovic and in Greece by the organizations of the Edes under Zervas. Soon there appeared Communist groups with the same aim—Tito in Yugoslavia, and the organizations of Eam and Elas in Greece.

First, all of them waged war against the army of occupation only in small irregular units and in the form of guerrilla fighting which consisted mainly of surprise attacks and sabotage. On account of growing numerical strength and thanks to the equipment he received from the Allies, Tito later on succeeded in organizing larger military units with which he tried to carry out regular military operations. At the same time, however, actual guerrilla fighting in the form of surprise attacks and sabotage in the rear of the front continued with undiminished ferocity. Even if part of the resistance movement organized themselves into military units, large parts of the movement in Yugoslavia and almost all parts in Greece continued to fight in a way which robbed the resistance forces of the protection of the Hague Convention and made them irregulars (Freischaerler).

It was characteristic that, regardless of whether they acted individually or in smaller or larger units, they did not carry their weapons openly, did not wear uniforms or insignia recognizable at a distance, and did not observe, during their operations, the laws and customs of war. During their actions they often wore German or Allied uniforms for the purpose of deception. After surprise attacks or acts of sabotage they assumed the appearance of peaceful peasants, their weapons were well hidden. All these groups of the resistance movement, those organized on a military basis as well as the irregulars, conducted the struggle in an unusually cruel way which contradicted all international law. Horrible murder and mutilation of German soldiers and torturing of prisoners were proved beyond doubt by affidavits and partly by photographs.

The general historical experience which the authors Nurick and Barrett formulated, with regard to the guerrilla bands which appeared during the Mexican War, in the article "Legality of Guerrilla Forces Under the Laws of War" in the words quoted below, applies also to them:*

"As has usually been the case in guerrilla warfare, many bands of guerrillas degenerated into little more than murderers and highway robbers. They mutilated wounded American

* Nurick and Barrett, *op. cit. supra*, p. 570.

soldiers, divided among themselves the goods taken from the enemy, and carried on 'war without pity in every manner imaginable'."

What does it matter in view of this, in connection with the legal evaluation that these partisans in the Balkans were patriots as the prosecution claims? The guerrillas to whom section 82 of the "American Instructions of 1863" for the leading armies in the field referred were patriots, too. And nevertheless they, too, at that time already lacked the status of lawful combatants and were, on the contrary, to be treated as highway robbers or pirates, as ordered by the American regulation.

As soon as we deal with the resistance forces, organized on a military basis, which attempted to carry out regular military operations, we find that they, too, could not claim the status of lawful combatants because they did not conduct their operations in accordance with the laws and customs of war. I already pointed this out when I mentioned the cruel manner of fighting, which violated international law, which all parts of the resistance movement carried on in the Balkans. For the moment, however, I shall disregard this fact, that is, paragraph 4, Article 1 of the Hague Convention.* The problem of the status of the above-mentioned military organizations and the question of the status of the remnants of regular troops after the capitulation of the government or, at least, the cessation of organized resistance, are very complicated if one presupposes, for the sake of the investigation, that they conformed to all four clauses of Article 1 of the Hague Convention on Land Warfare. In that case four facts are of importance in the evaluation of the legality of the resistance forces:

1. That a war can be waged between states or governments only.
2. That an actual state of war is terminated by capitulation or by the cessation of organized resistance after the destruction of the main forces.
3. The actual occupation.
4. The rights and duties of the population in the occupied territory.

An individual does not become a lawful belligerent by wearing a uniform, carrying weapons openly, and being under the command of a person responsible for his subordinates. On the contrary, before the members of a military force are entitled to be treated as lawful belligerents, it is also required that, in addition to the

* Annex to Hague Convention No. IV, 18 October 1907, Article 1, paragraph 4 (Treaties Governing Land Warfare, U. S. Army Technical Manual 27-251, Government Printing Office, Washington, 1944, p. 15).

requirements set forth in the Hague Convention, they serve a political entity which is a state *de jure* or *de facto*, or which at least exhibits certain evidence of such status. Westlake makes it absolutely clear that combatants can be treated as belligerents only if there is reason to identify them with their state or government.

He says:

“If they are treated as parties to a war, that can only be justly done when there is reason for their being identified with their state or government.”

If these points of view are applied to the resistance groups in Yugoslavia and Greece, one finds that all of them lacked the status of lawful combatants, if for nothing else but the fact that after the capitulation of the Yugoslav Government and the capitulation of the Greek armed forces a belligerent state and a belligerent government, the existence of which could have justified the claim of any person in those countries for the continuation of their being treated as lawful belligerents, existed no longer. The fact that later on governments in exile for both countries were formed in London does not affect the status of the irregular forces. It affects the status of the main agent of the struggle against the German army of occupation, that is the Tito units in Yugoslavia and the Eam and Elms units in Greece, which were also Communist, the less as they obviously cannot be identified with the above-mentioned governments in exile. Tito did not serve this government in exile but tried to replace it by the Communist regime, an attempt in which he succeeded on 8 May 1945 with the overthrow of the Yugoslav King. He and, like him, the Greek Communist resistance movements did not receive orders from the existing government but from a third power. It is correct that he also received material support from the Allies, but we can find nowhere that this can establish the status of a legal combatant.

During a war all kinds of methods are employed to damage the enemy. Thus, one has already often plotted popular uprisings in occupied territories and supported them materially. This, however, does not force the opponent to recognize the uprising supported this way as an action of a belligerent power. While arguing about the problem of the status of unlawful resistance, we may incidentally not lose sight of one quite simple and clear fact, which is more important than all arguments; it is the fact that the Yugoslav Government unconditionally surrendered on 15 April 1941. The capitulation was signed by the Yugoslav fighting forces and by the Minister Markovic as the representative of the Yugoslav Government. The entire army surrendered in Greece during the last weeks of April.

I believe that this important fact was not considered in several arguments of the prosecution, when the opening statement of the prosecution charges the Germans with the fact, that after overrunning Yugoslavia they withdrew the main body of their troops and then declared that any future resistance would be regarded as a violation of the laws of warfare. The Germans did not assume this right; this right was granted them by the unconditional surrender of the Yugoslav Government, independent of the effects which resulted from the condition of the occupation according to the Hague Convention.

When the former Prime Minister Winston Churchill announced Germany's surrender on 8 May 1945, he declared:*

“Hostilities will end officially at one minute after midnight tonight, Tuesday, the 8th of May.

* * * * *

“The Germans are still in places resisting the Russian troops, but should they continue to do so after midnight they will of course deprive themselves of the protection of laws of war and will be attacked from all quarters by the Allied troops.”

This is a clear and justified conclusion drawn from a clear fact.

Field Marshal von Weichs drew the same conclusion from the same fact in his order of 28 April 1941, when he declared (*NOKW-1151, Pros. Ex. 7*):

“After the armistice, no Serbian soldier in the entire Serbian territory has the right to carry arms.

“Whoever, in spite of this, is met in Serbian uniform with a weapon in hand, thus places himself outside of the law of warfare and is to be shot to death immediately.”

The prosecution states that the declaration made in this order of 28 April 1941 contains one of the two basic principles of German terrorism practiced in the Balkans, namely that not even the simple right to continued resistance was granted to the enemy, that his troops were no longer to be considered as combatants and thus should not enjoy the protection of the rules of warfare. When one hears this interpretation of the prosecution, I believe it is well to remember simultaneously the statement made by Prime Minister Churchill on 8 May 1945. The contrast is proof of the relativity to which law is subject in practice, especially international law, when it is applied unilaterally after a war by the victorious countries against the vanquished.

Both authors Nurick and Barrett have examined in the article

* The New York Times, 9 May 1945, p. 8.

which has already been quoted at various times, the status of unlawful combatants after the surrender of their government or after the complete defeat of the main fighting forces and the termination of organized resistance, on the basis of a series of historical events of the last hundred years, in order to derive from these cases of precedents the norms of international law according to the law of custom, which exist with regard to the status of such unlawful forces. They declare, and I quote—*

“If there is a formal surrender by the enemy government and capitulation of the main body of the armed forces, there is noteworthy precedent, particularly in the position taken by General Grant in the Civil War [after capitulation of the armies of Lee and Johnston in April 1865] for regarding as unlawful combatants those who continue to resist, even though they may be substantial in number * * *. Although there is little authority, the complete military defeat of the armed forces, the disintegration of the government and the occupation of its territory would seem to have the same consequence upon the status of those who continue to resist as does a formal surrender.”

Oppenheim also declares that if the dispersed remains of the defeated army continue to fight with guerrilla tactics after the defeat and capture of the main part of the enemy forces, after the occupation of the country and the disintegration of the enemy government, this guerrilla war is not a real war in the strictest sense of the word. And he notes that in strict law it is evident that the opposing force no longer has to treat these guerrilla bands as a combatant force and its members taken prisoner as soldiers. Spaight is of the same opinion.

Naturally it may be advisable for the opposing force to recognize the unlawful combatants as legal combatants, if they are under the leadership of a responsible commander and follow the laws and customs of warfare, as Oppenheim states, and especially if the unlawful forces are a large number and have formed a *de facto* government, as Nurick and Barrett state. Regardless if this fact, however, according to strict law it remains up to the opposing force to decide whether and when it wants to recognize the unlawful forces as legal combatants.

The above-mentioned laws applying to unlawful combatants are connected with the surrender of a government or the capitulation of the main fighting forces and the termination of organized resistance. They refer back to the traditional principle, that war is a fight between governments, which the fighting forces serve

* Nurick and Barrett, *op. cit. supra*, p. 582,

and with which they have to be identified, so that one can speak of war in the strictest sense of the word, and so that they can claim to be regarded as legal combatants. The legal conclusion, that war has stopped with the surrender of the government or of the main body of the fighting forces, agrees with the practical recognizance that, above all, it is in the interest of the population of the defeated country, if any further resistance is terminated as soon as possible.

Quite apart from these points of view, international law combines with other facts a similar effect, as is contained in the Hague Convention and in other laws and customs of warfare; namely with the actual occupation of enemy territory. Armed resistance within an occupied territory is rebellion; it deprives the resistant forces of the protection of the laws of warfare and grants the occupying force the right to execute them. This applies to popular uprising in an occupied territory, even if the arms are carried openly and the laws and customs of warfare are being observed. Only the inhabitants of a territory not yet occupied have any claim, according to section 2 of the Hague provisions, to be recognized as legal combatants if they take up arms at the approach of the enemy; but they naturally only have that right if they carry these arms openly and observe the laws and customs of war. The following statement of Professor Oppenheim applies to uprisings in a territory occupied by the enemy. But this case (Article 2) is, and I quote:* “totally different” from a “* * * levy *en masse* by the population of a territory already invaded by the enemy, for the purpose of freeing the country from the invader.” The quoted stipulation of the “Hague Regulations does not cover this case, in which, therefore, the old customary rule of international law is valid, that those taking part in such a levy *en masse*, if captured, are liable to be shot.”

We already find this rule of international law based on the law of custom in section 85 of the American Instructions of 1863, on how to conduct armies in the field, which provides:

“War rebels are persons within an occupied territory who rise in arms against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own but expelled government or not.”

We find this rule again in paragraph 12 of the American “Rules of Land Warfare” of 1940—

“* * * If the people of a country, or any portion thereof,

* Oppenheim, *op. cit. supra*, Vol. II, p. 107.

already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.”

It has always been difficult to determine when an invasion ends and an occupation begins. Article 42 of the Hague Convention is not very clear. We find a much more concrete, and on the whole more satisfying, definition of an actual occupation in paragraph 276 of the American “Rules of Land Warfare”, which states:

“Occupation must be effective. It follows from the definition that military occupation must be both actual and effective; that is, the organized resistance must have been overcome and the forces in possession must have taken measures to establish law and order. It is sufficient that the occupying army can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. It is immaterial by what methods the authority is exercised, whether by fixed garrisons or flying columns, small or large forces.”

These prerequisites agree factually with those which Professor Oppenheim considers necessary for an actual occupation:*

“In reason no other conditions ought to be laid down as necessary to constitute effective occupation in war than those under which in time of peace a sovereign is able to assert his authority over a territory * * *. When the legitimate sovereign is prevented from exercising his powers, the occupants being able to assert his authority, actually establishes an administration over a territory, it matters not with what means, and in what ways his authority is exercised. * * * really keep it under control.”

In the opening statement of the prosecution you have already heard several indications about the conditions which the Germans established with regard to an actual occupation in Yugoslavia and Greece. You have, for example, heard that for the pacification of the civilian population, Serbia was divided into several field commands, which essentially corresponded to the larger cities and to the main strategic points in the country, and that these field commands again were divided into smaller territorial units, which were called local commands. That was the organizational machinery used for the security of Serbia, the prosecution stated, and it became effective immediately if an act of sabotage had been committed. If you compare these facts with the demands made by Article 42 of the Hague Convention and

* Oppenheim, *op. cit. supra*, pp. 234-235.

by paragraph 276 of the American "Rules of Land Warfare" and in the above quoted sentences by Professor Oppenheim for an actual occupation, I believe from this alone the fact results that the German occupation was actually effective. And if one has heard in the opening statement of the prosecution how the partisans, for example, in Croatia acted during the first 2 years of the occupation, through surprise attacks on German guards or garrisons, and acts of sabotage against traffic installations, supply depots, and munitions depots of the German Wehrmacht, already such side-lights give the picture of an effective occupation. It will be the job of the defense to provide the Court with detailed material in this respect, in order to show that an actual occupation had been established in Yugoslavia and Greece after cessation of operations in April 1941.

In connection with the question of the combatants, I must also deal with the problem of the Italian fighting forces which went over to the partisans and fought against German troops after the surrender of the Italian Government to the Allied forces on 8 September 1943. The prosecution states that it was one of the most illegal and dishonorable acts in the history of warfare, that the Italian officers of such units were shot to death. However, we have heard that combatants who did not have the status of legal combatants could be executed according to the laws of warfare and up to now it has never been considered illegal or dishonorable to execute persons who had been sentenced to death for wartime treason. One may not only consider the fact that men who wore a uniform were executed, but one must also investigate what these men had done before they were sentenced to death.

By the surrender of the Italian Government, the Italian state ceased to be an ally of the German Reich. There existed, first of all, no state of war between Italy and Germany. Therefore, none of the Italian divisions had the right to fight German troops, and the Italian soldiers who did this could not claim the status of legal combatants. Disarming of the Italian armed forces was an absolute military necessity. Because three effective Italian armies in the Balkans were a very serious danger for the German armed forces, since they could have come to be an effective bridge-head for the Allies. It was known, for example, that Admiral Campioni in Rhodes had already initiated negotiations with the British.

In the case of war between Italy and Germany, which was considered a certainty, and if the Italian armed forces had not been disarmed, the Balkans could not have been held, because the Italian troops had occupied almost all the coasts. The right to disarm the Italian soldiers primarily resulted from the fact that

within the territory of operations of a combatant only legal combatants have the right to carry arms. I have shown that the Italian troops no longer possessed the status of legal combatants after their government surrendered. The authority to disarm the Italians also resulted from the negotiations, which the German command authorities carried out with the Italian High Command in Athens and Tirana and on the basis of these the Italian High Command ordered its troops to deliver their arms without resistance and to let the Germans take them captive. The order of the Fuehrer distributed to the subordinate troops by the army groups, for the forwarding of which Field Marshal von Weichs was held responsible, did not order that Italian officers were to be shot because they and their troops fought against the German armed forces without possessing the status of legal combatants, although this would have corresponded with international law.

What the order of the Fuehrer did decree, was, that officers of those Italian units who let arms fall into the hands of the insurgents or in any other way worked together with the insurgents are to be shot to death after they had been sentenced by court martial. Sentencing by a court presupposed a legal provision as a basis for the punishment. In view of such clear facts, such as the turning over of arms to insurgents or supporting them, one does not have to look very hard for such a legal provision. Just as the American provisions, which are applicable in wartime, the German provisions concerning warfare also cover the facts of wartime treason, which is punished by death. It was regulated in section 6 of the special Military Penal Code, and covered every kind of support to the enemy. It comprises the same facts as are enumerated in paragraphs 205 and 214 of the American "Rules of Land Warfare." Since here the unlawfulness of executing the Italian officers in spite of their wearing uniforms has been emphasized so much, I point out in particular paragraph 205b of the American "Rules of Land Warfare" which states that the American legal regulations on wartime treason within a territory under military control in general apply to persons of all classes without regard to nationality or military or civil status.

You have already heard from the prosecution that at least two Italian divisions joined the partisans. The defense will, within the framework of evidence which it will submit to the Tribunal, produce more material about the behavior of these Italian units whose officers were called to account.

Among the Italian divisions that went over to the partisans and thus committed wartime treason was, above all, the "Ber-

gamo" Division which from that time on called itself the "Garibaldi" Division. It has already been mentioned by the prosecution in connection with the asserted shooting of a large number of officers of this division. General Gandin, who has likewise been quoted by the prosecution, had fought against the Germans although he and his troops were no longer entitled to the status of legal combatants. He had thus violated the agreements reached between the German and Italian high commands. Beyond that, he had committed a particularly serious act of treason by violating a special agreement which he had reached with the German commanding staffs with regard to his division. He had declared himself willing to hand over arms. When the German troops wanted to receive the arms, he ordered that they be attacked. The Germans, not being prepared for that, suffered considerable losses. General Gandin and the officers who were responsible together with him were sentenced to death by a court martial formed by the competent German commander.

I must now say something with regard to counts two and four, charging the defendants with wanton destruction of enemy property, devastation of enemy territory, and encroachments upon the freedom of the civilian population, above all, with interning the population in concentration camps.

There is no doubt that only the willful destruction of towns, small towns, and villages, and only devastation not justified by military necessity can be war crimes. Thus, it was expressed in Article 6 of the London Statutes in agreement with the standards of the Hague Convention. As regards the internment of the civilian population in collective camps, it must be noticed that quite obviously the freedom of the individual has intentionally not been included in the fundamental rights of the civilian population to be respected by the occupying power in Article 46 of the Hague Convention. The reason for this is apparently that the security of the occupation power has always necessitated very extensive encroachments upon the personal freedom of the civilian population in the occupied territory. A corresponding right of the occupation power has, up to now, never been contested.

It is very easy to declare with regard to a conquered nation that its troops willfully destroyed enemy towns and villages and undertook devastations without military necessity. And it is very simple to designate the internment of parts of the civilian population in collective camps as a war crime if it was carried out by the conquered state. Here the relativity of law is seen, which I have already mentioned, and I think it would be good to regard the things with which the defendants are being charged in the

light of historical precedents and the opinion of important authors on international law.

The American Professor Fenwick writes in his "International Law" already quoted:¹

"General devastation of property as a means of covering the retreat of an army was, however, a common practice of belligerents. A more difficult problem was to determine how far the destruction of enemy property was justified, not in connection with direct hostilities, but as a means of cutting off the enemy's lines of communication, eliminating his subsequent sources of supply, or intimidating the civilian population and inducing it to bring pressure upon the government to sue for peace."

Professor Fenwick then states:²

"In 1864, General Sherman devastated a wide area from Atlanta to the sea in pursuance of an interpretation of military necessity which included the objects above-mentioned, and shortly afterwards the devastation of the Shenandoah Valley was carried out to the same end."

I insert here, when General Sheridan had finished the devastation of the Shenandoah Valley, he said himself then, "a crow flying across it would have had to carry its own rations." That is according to the general's own statement. This quotation is quoted by Spaight.³

I now go on quoting Fenwick:⁴

"In 1901, the British armies in South Africa interned the civilian population in 'concentration camps,' with the result of serious loss of life. At the same time the country was laid waste far and wide as a means of cutting off the supplies of the guerrilla forces."⁵

Professor Fenwick also stresses that Article 23g of the Hague Convention which prohibits the destruction of enemy property, unless it be imperatively demanded by the necessities of war, leaves to the determination of the belligerent army the circumstances under which military necessity demands such measures.

You have heard an unbiased American scientist and author on international law. I now quote Professor Oppenheim:⁶

¹ Fenwick, *op. cit. supra*, p. 567.

² *Ibid.*

³ Spaight, *op. cit. supra*, p. 135.

⁴ Fenwick, *op. cit. supra*, p. 567.

⁵ See Spaight, *op. cit. supra*, for further details, pp. 298-310.

⁶ Oppenheim, *op. cit. supra*, p. 215.

“But the fact that a general devastation can be lawful must be admitted.”

It continues¹—

“As regards captivity, the rule is that private enemy persons may not be made prisoners of war. But this rule has exceptions conditioned by the carrying out of certain military operations, the safety of the armed forces, the order and tranquillity of occupied enemy territory. * * * even the whole population of a province may be imprisoned in case a levy *en masse* is threatening. * * * that in case of general devastation the peaceful population may be interned in so-called concentration camps, there is no doubt.”

Oppenheim continues²:

“The purpose of war may even oblige a belligerent to confine a population forcibly in concentration camps.”

In the Court of the following weeks you will hear more details about the reasons why the establishment of concentration camps—

I have just heard the translation of “Sammellager” to the words “concentration camps,” I would like you to change this to “collection camps” and not concentration camps.

Your Honors, you will hear more details about the reasons why the establishment of collection camps and the internment of parts of the civilian population of the enemy in the Balkans was ordered, and likewise facts will be submitted to you which indicate the necessity for, and entitled the German troops to, carry out devastations.

As regards the collection camps, I wish to note that they must not be confused with the concentration camps in Germany, which were subordinated to the Gestapo and have become a by-word. They were collection camps, such as were also maintained by the occupation powers in Germany under the name of internment camp and in this connection I wish to point out that the conception of endangering the security of the occupation troops has been subject to an entirely new interpretation by the introduction of the so-called automatic arrest, an interpretation which up to the present was unknown in the practice of international law.

With regard to the destructions which were carried out by way of reprisals in order to force the civilian population of the enemy and the partisans to abstain from acts contrary to international law, I refer to paragraph 358e of the American “Rules of Land Warfare” which stipulates:

¹ *Ibid.*, pp. 174-175.

² *Ibid.*, pp. 216.

“Villages or houses, etc., may be burned for acts of hostility committed from them, where the guilty individuals cannot be identified, tried, and punished.”

I conclude my statements to this count with a statement by Professor Lauterpacht in his treatise in the *British Year Book of International Law*, 1944, page 74:

“Such acts as general devastation * * * may supply ample reason for condemnation and protest; * * * they may, at the end of the war, justify the imposition of collective sanctions by way of compensation or otherwise, as distinguished from individual penalties of a criminal nature. But criminal proceedings before the municipal courts of the victor may seem to many a questionable method of removing outstanding doubts and laying down authoritatively the existing law on subjects of controversy.

“Total war has altered the complexion of many a rule. At a time when the ‘scorched earth’ policy, with regard to the belligerent’s own territory, has become part of a widespread practice, general destruction of property ordered as an incident of broad military strategy will not properly form the subject matter of a criminal indictment.”

In the case of the measures with which the defendants here are being charged the principle of military necessity plays an important role. This principle, which formed the basis of all German military measures, was formulated in paragraph 4 of the American “Rules of Land Warfare” as the highest general principle of warfare and recognized to a very far-reaching degree.

This principle, however, must not be scrutinized in an abstract manner, but must be considered in connection with the conditions with which the accused were confronted and under which they had to discharge their task, i.e., to secure the Balkans militarily. Nothing at all of what forms the subject of this trial can be understood if considered apart from the fundamentals, as is done by the prosecution. The decisive fact was the geographic character of this country and the peculiarity of character of the Balkan population which favored a partisan and resistance activity—experienced nowhere else to such an extent. I believe this to be the proper time to give the high Court in brief a picture of the special conditions in which the defendants were placed in the Balkans.

Every appraisal of the military-political measures in the south-east area will remain incomplete and inadequate with regard to the actual conditions as long as it is not based on knowledge of

the completely abnormal circumstances in occupied territory. No historian would be able to name a political area that could measure up to the Balkan area as far as the entanglement of the problems, the multiplicity of the political currents, and the fanatic sullenness of the contracts are concerned.

This begins already with the split-up character of the country; nowhere else in Europe do we find in an area of about 1,600 kilometers so many heterogeneous, tiny self-contained life-cells laid out by the geographic nature of the country. Whereas, for instance, the United States in an equal stretch of 1,600 kilometers between Wisconsin and the Mississippi Delta uniformly cultivate gigantic plains. A conglomeration of highly contrasting landscapes is to be found here in the Balkans. Every one has its own individuality. They are littered around in a confused fashion, as though a child had emptied out a couple of big boxes of building blocks and the many-colored cubes now were mixed up in a completely disorderly way on the floor of the room.

The mountains have steep slopes. They often have remote dens and lonely mountain forests and thus offer welcome hiding places and secret corners. Shepherds and farmers in distress retreat there as do highway robbers, Komitatchis, and revolutionaries of many kinds. That has been going on for thousands of years and since the waves of the migration of peoples, since the great population upheaval that came about with the invasion of the Osmanians, and since the nationality struggles of the 19th and 20th centuries.

Partly in consequence of the geographical disruption appears also a far-reaching disruption of communications, commerce, and population.

Communications lack transcontinental lines laid out by nature, only the Morava-Vardar-furrow in the east might have provided such a connection. But even that trails through territories which despite their moderately favorable conditions, as far as lines of communication are concerned, developed rather centripetally than centrifugally. Not even the Adriatic-Ionian seashore in the west remains as a natural line of communication since the course of the mountains condemns the sea to inefficacy. The mountains mostly run parallel to the coastline and thus deprive the ocean of its influence on the interior. A very good map with a scale of 1:500,000 or even better of 1:200,000 is needed in order to comprehend the splitting up of the Southeast into Slovenia, Croatia, Serbia, Montenegro, Albania, and Greece.

Railroad construction has only underscored the geographic disruption splitting-up of the lines of communications of the western Balkans. It is not necessary to get lost in the many

details of the territorial, political, economic, historic, and ethno-cultural disruptions. It suffices to state that to date the Balkans are lacking an even halfway efficient railroad communications system. The only trunk line of European importance, the line Belgrade-Nis with the extensions to Sofia-Istanbul and Salonika-Athens is single track; several territories such as the Peloponnesus have only narrow gauge tracks. Well known mines have to content themselves with animals as a means of transportation and small cable cars.

Thus, in connection with all these facts only small communication systems developed in the western Balkan peninsula; therefore, also only small economies and small isolated settlements. People live only in villages, small or medium size towns, and the only large cities such as Athens, Salonika, and Belgrade are on the periphery. Hand in hand with nature the historical development, in particular the agrarian tendency at the beginning of Osmanian rule, has contributed its share; it has driven the Christian population into the mountains and has led to small dispersed settlements in the secret corners up there. This difficult territory had always made it possible to escape the authorities and combat them.

The Balkans show an amazing conglomeration of nationalities, an understandable variety if one considers how landscape and economic lines of communication are split up. This ethnic division comprises Pomakes and Muhatchirs, Kutzowlachs and Croats, Greeks and Slovenes, Serbs and Macedonians, Bulgars and Makedoslaves, Sarkatsaneans and Albanians, Turks and Armenians, gypsies and others. Until the redistributions of 1912-1913, and the great resettlement of 1923, all of these lived intermingled to an extent that the ethnological map of the Balkans looked like the tangled mess of threads of an over-colored carpet. And it partly looks that way even today!

One must realize how a military government is faced with unending difficulties on account of such an ethnic division, particularly since there is no perfectly correct diagram of the existing division. The few top scientists who can at all survey the conditions have come to the conclusion that all statistics, and that includes all old and new statistics of Balkan nationalities, show more or less great inaccuracies.

In the still undetermined state of development hard and cruel battles occur about the nationality of the individual under the motto, "if you don't choose to be my brother, I am going to smash your skull."

We must imagine, though, that this struggle follows the forms of fighting in the cultural ways of Central Europe or of the harm-

less skirmishes among the sects of the Anglo-Saxon area of culture. No, in the Balkans, from time immemorial all means are being used. Apart from pulpit addresses—be it in the Slav or Greek languages, apart from evening classes for adults and apart from all possibilities of fiscal policy, use is made of personal suspicions and, even in peace, of dagger and musket.

The results of such conditions are quite specific ways of life for the Balkans which are entirely different from those of the real European area of culture—different as far as their fervor, their impulsiveness are concerned, but also their sullenness and their cruelty. Always there have been all sorts of illegal fighters here and here especially; from the common highway robber^a to the feuding sons and grandsons, from the religious fanatic to the gang leader, and every kind of underground movement. Accordingly, it was quite normal that the Serbian kings died through assassinations. Europe, not to talk of the world, learned only little of what happened behind the mountain walls of the Balkans. In the seclusion of that part of the world revolts flared up again and again, and all efforts by the states were unable to subdue either the robberies or the cruel fight against and suppression of dissenters. What has not been said and written about the “Macedonian question”? Europe and the world shuddered when the scope of the Macedonian atrocities came to light and an International Commission published its report at the end of the Balkan Wars. Yet, we must take into consideration the fact that the commission could only visit the localities that could easily be reached from the outside world and that the ruins of the remote hamlets and villages in the mountains remained unknown; ruins whose population for the most part had been murdered.

Under such conditions the war added new political and ideological groups to those already in existence. A wild battle of every group against the next one set in with all furor and the age old cruelty.

In Greece, the revolting Nationalist groups (Edes) under Zervas were in opposition to the Communist movement of the Eam and Elas. The Nationalist Chetniks in Yugoslavia under Mihailovic were the enemies of the Croatian Ustasha detachments, and the adversary of both of them was Tito, the leader of the Communist bands.

Even the struggle against the outside enemy sometimes took second place in the efforts to finish off the political opponents in their own country.

With such conditions, however, the defendants had to cope; in the interest of the military tasks to be expected, they had to establish tranquility and pacification in occupied countries. This

military necessity alone required severest actions. It will be the task of the defense to show that the fight against the bands in the Balkans was dictated only by these military exigencies, but never—as is claimed by the prosecution—in execution of a plan for the weakening and decimation of the Balkan population.

When I now proceed to explain to the Court the line that I propose to follow in the defense of the Field Marshals List and von Weichs, whom I represent, I would like to state the following at the very outset with particular emphasis:

Both defendants were, during the time of their Balkan activity which will have to be illustrated in detail as far as scope, authority, and responsibility are concerned, the highest strategic leaders. Thus, it was they who before all others were responsible to the OKW for the execution and preparation of operational tasks.

This most important task within the scope of the entire conduct of the war had to [be] and was to commit to a secondary place all other tasks resulting from the occupation of a country. For field commanders, such as Field Marshals List and von Weichs, actual warfare is the main thing once a war has broken out in consequence of a decision by the politicians.

All other tasks resulting from the occupation of the Balkan countries appear, within the scope of the strategic task that was assigned to my clients, to be of minor importance. These occupational tasks were transferred to territorial commanders for independent action, and their chain of command did not go through the strategic leader but through the Military Commander Southeast to the OKW. It follows quite naturally from the cooperation that is necessary for military command posts at the front that they inform one another whenever they are outside of the chain of command. The fact that this principle was followed in itself explains the communication of the events that took place within the areas of the territorial commanders. On the whole they were bound to interest the strategical leader because they might be of importance in connection with the initiating or carrying out of operational tasks. But this reporting of territorial events could in no case constitute a reason for establishing the competency or even the responsibility of the strategic leader as the prosecution is trying to do.

Concerning the knowledge of all the happenings which make up the contents of the indictment, the prosecution seems to hold the opinion that the defendants represented by me had full knowledge of all happenings during their term of assignment. It is inferred that these happenings were in accordance with a plan designed to weaken and decimate the population of the Balkans.

May it please the Tribunal, Field Marshals List and von Weichs

learned about this plan for the first time through the prosecution, as I am going to prove subsequently.

As to the actual extent of the knowledge of the defendants, however, the prosecution in a way is charged with the *onus probandi*. It has to produce evidence to this effect through introducing certain reports issued by military offices in the Balkans. Apart from the fact that it still remains incumbent on the prosecution to prove the connection and the relevance of many of the submitted documents as far as the defendants are concerned, the following circumstances ought not to be overlooked, as easily happens in consequence of the documents being introduced according to purely chronological points of view and not to the proceedings of the case.

Generally, I maintain that the defendants represented by me could theoretically have knowledge of the reports and the accounts only when they were addressed to their office and had actually been received by the same.

I say deliberately—theoretically!

For in practice, Your Honors, you cannot presuppose even this amount of knowledge. A commander in chief, who does not receive incoming reports personally, will from these reports learn only the facts presented to him during the daily discussions with the officers of his staff. And this presentation is necessarily done with a view to the main tasks of a commander in chief, that means to the information that must be of interest to him in connection with his operational tasks. This makes the conclusion obvious that a commander in chief in a certain theater of operations must be much more interested in the fact that his own troops have been assaulted than in the retaliatory measures which might have been ordered, and which, moreover, were subject to the competency of another command. As to these measures he could assume that they had been carried out in accordance with existing regulations, as long as no special facts which had actually been reported to him gave him reason for a different conclusion. For, after all, the appropriate quarters issuing the orders directing retaliatory measures had the same authority as a commander in chief of an army or an army corps.

When these important points of view are considered, it becomes quite obvious how the situation at that time must have appeared to the defendants List and von Weichs, represented by me.

Field Marshal Wilhelm List, for whom I shall now present the defense in broad outline, was by no means a Nazi general as the prosecution is trying to make him appear in complete misrepresentation of the real facts of the case. He was an unpolitical, especially efficient officer and army commander with a strictly

Christian attitude. Toward national socialism, he had no sympathy at all; his premature separation from active service in the year 1942 is evidence of this.

His activity in the Balkans was only of brief duration. At that time he watched with anxiety the growth of the resistance movement which he in his capacity as chief of operations of the German forces in the Balkans was bound to prevent and combat.

That was his task and his duty and by no means a culpability.

a. As evidence justifying count one of the indictment the prosecution presents above all the directives issued by Field Marshal List dated 5 September 1941. (*NOKW-084, Pros. Ex. 42.*)¹

I am going to prove that these directives had their origin only in consideration of military exigencies.

In this document murder of the civilian population is ordered with no word or sentence, which circumstance solely could make it pertain to count one of the indictment.

Your Honors, I may ask you to read the document in full instead of only the passage underlined by the prosecution. You will then receive the impression that it is a question of directives serving the purpose of repressing insidious attacks by ambush. A "pacification through terror" is nowhere mentioned.

Further, I shall prove that the subsequent orders issued by subordinate quarters were based not on these directives of Field Marshal List, but on the order issued by the OKW, 16 September 1941. (*NOKW-1492, Pros. Ex. 49.*)²

b. In no case did Field Marshal List order or allow the wanton destruction of towns or villages, and only if this had happened could he be charged with count two of the indictment.

c. Concerning count three of the indictment the prosecution has not yet proved that the Commissar Order, (*NOKW-484, Pros. Ex. 13*), (par. 12*b* of the indictment) and the order issued by the OKW, 23 July 1941, (*C-52, Pros. Ex. 25*), (par. 12*c* of the indictment), were effective for the Balkan theater of operations. Murder of prisoners of war, as alleged in paragraphs 12*d*, *e*, and *f* of the indictment, has not been proved by the prosecution; it was here a question of reprisals in the course of which insurgents were killed.

d. Concerning count four of the indictment, I intended to prove that Field Marshal List only considered internment justified for such persons as had participated in or supported the resistance movement. And to do so was his right and his duty.

Field Marshal von Weichs, by nature perhaps more a scholar than a soldier, also repudiated national socialism and its methods.

¹ Document reproduced below in section V-B.

² *Ibid.*

He was a Catholic of profound devoutness, and for this reason he was never completely trusted by Hitler.

I have already brought to the attention of the Tribunal—and I still advocate the opinion—that Field Marshal von Weichs, because of his physical condition, is incapacitated for appearing in Court. I base this opinion of mine—

(1) on the expert opinion of Dr. Riffard who confirms the danger of a sudden perilous complication, as does also;

(2) the American prison physician, Dr. Martin, who, it is true, subsequently considers this danger no longer certain to the same extent as in his report made on his own initiative and dated 29 July 1947.

In a short time I shall submit a new petition for examination since in the meantime additional symptoms of a severe illness have appeared.

May it please the Tribunal, at the beginning of the campaign in the year 1941 Field Marshal von Weichs was only for a brief period in the Balkans as Commander in Chief of the 2d Army.

a. Within this period (April 1941) the shooting, alleged by the prosecution, of 100 Serbs in retaliation for the death of assaulted German soldiers took place.

I maintain that this shooting of 100 Serbs in a proclamation, still unproved, was only proclaimed as a threat but was never executed.

Neither did Field Marshal von Weichs within this period ever issue an order according to which 100 Serbs would be shot in retaliation for every German soldier killed. The prosecution has introduced no such order. The document submitted (*NOKW-1151, Pros. Ex. 7*) is only a proclamation to the Serbian population, only threatening with shootings in this ratio in order to warn against assaults on German soldiers. This is all that so far has been proved concerning this count.

When at the end of August 1943 Field Marshal von Weichs was again transferred to the Balkans—this time as strategic leader—the situation in this theater of operations had become much more critical. In spite of this he used his influence only for the purpose of mitigation, as I am going to prove. His order, 22 December 1943 (*NOKW-172, Pros. Ex. 379*), is evidence to this effect.

Against occurrences reported to him, and constituting misbehavior on the part of the troops, Field Marshal von Weichs took action in every way possible.

Besides, he in no case ordered or allowed civilians to be killed, as alleged by the prosecution.

That is what I have to say concerning count one of the indictment.

b. Concerning count two of the indictment, the prosecution has proved no case in which Field Marshal von Weichs ordered or knowingly tolerated wanton destruction of towns or villages.

c. In count three of the indictment, Field Marshal von Weichs is charged with having forwarded or complied with unlawful orders, but such orders were partly not issued, partly disregarded.

Under paragraph 12a of the indictment Field Marshal von Weichs is charged with having ordered that persons being caught in uniform and in possession of weapons after the conclusion of the armistice should be shot. This refers to a stipulation contained in the armistice conditions which had been laid down through agreement with the state of Yugoslavia. In this connection it will be sufficient to refer to previous explanations in my address.

The Commissar Order mentioned under paragraph 12b of the indictment did not apply to the Balkans, as I am going to prove.

The Executive Order, 18 October 1942 (par. 12h of the indictment) (*C-81, Pros. Ex. 225*), was forwarded to the Balkan theater of operations, and the army corps was unable to prevent this order from being received. As I am going to prove, Field Marshal von Weichs raised an objection to this order. In no case was the order carried out, as I likewise intend to prove.

The measures against the Italian officers and troops following the capitulation (pars. 12i through l of the indictment) were necessary from a military point of view. Executions of Italians took place only by virtue of sentences pronounced by military courts or courts martial for wartime treason committed through surrender of weapons to the partisans, support of the same in other ways, and of illegal resistance in connection therewith.

Concerning count four of the indictment, I intend to prove that also during the time in which Field Marshal von Weichs was the highest strategic leader in the Balkans only such persons were, and were supposed to be, interned as had connections with, or supported, the partisan movement.

I am at the end of my statement and hope to have clearly presented to the Tribunal in broad outlines the evidence which I will subsequently submit.

C. Opening Statement for Defendant Foertsch*

DR. RAUSCHENBACH: May it please the Tribunal. The prosecution charges the field marshals and generals who were active

* Opening statement is recorded in mimeographed transcript, 16 September 1947, pp. 3071-3079.

in the southeastern area with having carried out a well thought-out unlimited program of terror and destruction, by denying and undermining the most fundamental principles of civilization and by arrogant contempt of human beings in enemy territory. In that manner they madly let loose a senseless torrent of deaths in southeastern Europe. In the course of this they are supposed to have shown themselves henchmen and tools of Himmler, Sauckel, and of other Nazi worthies. The prosecution charges General Foertsch in particular with having played an important part in the realization of this so-called program of destruction and extermination, stressing that he was an experienced chief of staff. This is shown by the assertion that the physical presence of Foertsch is supposed to have given the terms of authority of List, Kuntze, Loehr, and von Weichs a steady and tragic uniformity. As against that, I am going to prove that—

1. The exposition of events in their entirety as given by the prosecution with regard to the southeast area does not correspond to the actual developments in any of the four counts, since the prosecution gives an incomplete and therefore incorrect picture of such events, which does not give sufficient consideration to conditions in the Balkans, to the actions perpetrated by the opponents, nor to the activities of those authorities which were not under the jurisdiction of military commanders, thus making no mention of the reasons for the measures of the German Army. With regard to the above, I agree to the argumentation of counsel for the defense, of the defendants List and von Weichs, and I shall add a few supplementary remarks thereto.

2. In order to refute the allegation that the defendant Foertsch disregarded and denied the most primitive principles of civilization, I shall prove that he always considered the laws of morality and of the Christian religion as binding, and that he also observed these laws in as far as he was free to do so during his term of office in the Southeast.

3. With regard to the further accusation that his attitude and behavior towards the people in enemy territory was distinguished by arrogant contemptuousness, I shall prove that he was in reality a man of varied interests and of comprehensive ideas whose aim it was by thorough research to acquire conception of land and soul of foreign nations in order to act to their advantage.

4. With regard to the accusation that the defendant permitted himself to be guided in his activities by a well thought-out program of terror and destruction, I shall refute that by proving that in order to pacify the country it was all important to him to make the occupation bearable and as little oppressive as pos-

sible, to take into account all desires in any manner reasonable and all needs of the population, and further to do all in his power in order to exclude or limit the influence and activities of men and authorities who in ignorance of the problems prevalent in the Balkans aggravated conditions by their faulty measures.

5. To refute the allegation that the defendant proved himself a henchman and tool of Himmler, Sauckel, and of other Nazi worthies, I shall give a true and complete picture of his personality, and thereby make clear his attitude to the dictatorship.

6. As to the accusation that the defendant Foertsch had proved himself the evil spirit who was responsible for the tragic uniformity of the terms of service of List, Loehr, and von Weichs, I shall refute that, by giving an explicit picture of his activities as they really were. Therefore, I shall first prove what tasks and authorities were not those of a chief of staff of an army or of an army group according to the service regulation then in force. The following limits were set to the activities of the chief of staff:

a. He had no authority to give orders or commands to the troops.

b. He had no authority to supervise the troops nor did he have a disciplinary or judicial authority with regard to the troops.

c. He had no right to decide in fundamental questions.

d. Thus, he had no responsibility with regard to the troops.

I shall prove that the defendant Foertsch observed the limits which according to the existing regulations were set to his activities and that thus he never—(*a*) gave any orders himself, or (*b*) made any decisions himself exceeding his authority.

I shall prove that according to the existing regulations his task was merely that of a first adviser to the commander in chief.

He actually understood his responsibility in such a manner—(*a*) that he never tried to provoke stringent measures, (*b*) that it was rather his aim to help reasonableness to prevail, and (*c*) that in consequence he was not a bad but a good spirit.

7. But in order to point out the difficulties with which he had to cope, I shall describe the obstacles with which he had to deal. These were—

a. The dictatorship which could be felt on all sides.

b. He was bound by his oaths.

c. The orders which were issued to the commander in chief by his superior authority and were considered by him himself as binding.

d. The orders which had to be issued directly to subordinate troops by these superior authorities which made their activities

independent of the orders of the jurisdiction of the commander in chief.

e. The threat of punishment existing according to the laws then in force.

f. The small understanding which the High Command of the Army showed to his submissions and suggestions.

8. That General Foertsch in his capacity as chief of staff did not help to bring about the tragic uniformity of the reprisal measures, which has been stressed by the prosecution, I shall refute by proving that—

a. He was absent just during such times when incisive and fundamental orders were issued.

b. He did not consider the part which he had to play as in any manner satisfactory but he tried to be released from these tasks which he felt to be unpleasant and oppressive.

Count one of the indictment charges the defendants with having madly unleashed a senseless torrent of death. This formulation implies two things, namely:

a. That the defendants had instituted measures of hostage taking and shooting of hostages arbitrarily, that is, without cause and without any necessity in blind madness.

b. Disregarding the assertion that every reasonable cause for these measures is supposed to be lacking, they are supposed to have been senseless also with regard to their alleged or asserted reasons which is obviously to be expressed in the words "senseless torrent of deaths."

With regard to these allegations and at the same time with regard to count two of the indictment, I shall prove the following:

a. From the very beginning it was the aim of the military leaders in the southeast area to achieve a real pacification of the country which was to be also in the clearly conceived interests of the population of the occupied territory.

b. These reasonable endeavors of the military leaders were defeated for reasons for which not they but in the first place the opposition were responsible.

c. The success which was to be achieved by these measures could in part not be realized because conditions occurred which could not have been foreseen when the above measures were ordered.

Count three of the indictment—shooting of prisoners of war. Here we have to differentiate between the following:

1. Shooting of members of Yugoslav and Greek forces.

2. Shooting of members of other Allied forces—

a. By reason of the Commando Order.

b. By reason of the Commissar Order.

3. Shooting of members of the Italian forces.

To 1—As far as the Yugoslav and Greeks, who had been shot, were concerned they were not members of the armed forces of a nation at war but insurgents who by fighting placed themselves outside of the realm of law, which is shown by the following:

a. Capitulation of Yugoslav and Greek armies carried out by the commanders in charge.

b. The actual power in these countries had been transferred to Germany as the occupying power.

c. The fight was resumed in violation of international law.

d. The internationally accepted land and war regulations were not adhered to.

e. Furthermore, the recognition of a power, as a power at war, is a political decision which was not the task of the military leaders in the Southeast.

f. The military leaders in the Southeast endeavored to achieve political recognition of a state of war without being able to raise any legal claims with regard to that.

g. In spite of the fact that this recognition which they were trying to achieve was refused, the captured partisans were treated as prisoners of war.

To 2—

a. Shootings by reason of the Commando Order were not carried out.

b. The Commissar Order did not apply to the Southeast.

To 3—Shooting of members of the Italian forces. I shall prove that the individuals shot were to be regarded as partisans according to international law because of the following facts:

a. By breaking her alliance with Germany and by virtue of her capitulation, Italy lost her authorities which she had enjoyed in her capacity as occupying power.

b. The territories in the Balkans which had so far been occupied by Italy now became exclusively German operational territory.

c. The organized armed forces of a power which had suddenly become hostile and which were in this territory constituted an extraordinary danger to the operational projects within the German operational sphere. Thus, the German request to surrender all arms was justified.

d. This request was consequently acceded to in the form of appropriate orders of the Italian commanders in charge.

e. The Italian soldiers or units which in spite of that continued to carry arms against the German troops were acting contrary to international law.

To count four of the indictment—It is alleged that the defend-

ant had, without any reason connected with military operations, helped to free southeastern Europe from so-called inferior persons, as for example: Jews, politically unreliable individuals, e.g., democrats and Nationalists. And that they helped to enslave and deport millions for forced labor. As to that I am going to prove—

a. That the internment of certain groups of individuals in collection camps and the evacuation have been approved by the military leaders in the Southeast only insofar as this was necessary in order to pacify the country and to secure operational objects.

b. That the military leaders in as far as they cooperated in the procurement of indigenous labor did that only because they considered this a way to pacify the country.

c. In as far as such measures could not be justified by military necessity the military leaders had no influence on these matters. The above mentioned points I shall prove—

(a) By examining the defendant as a witness on his own behalf.

(b) By presentation of documents.

(c) By examination of witnesses.

At this point I should like to mention that at the time when the defendant Foertsch will appear in the witness stand this evidentiary material will still be very incomplete. Besides the difficulties, which are well known and which have been described in the motion for adjournment brought by my colleague, Dr. Laternser, as well as by me with regard to the procuring of affidavits, as well as the translation of the document books must in this particular case be added that the defense has so far not had any opportunity to examine those documents which had been presented to the prosecution in the form of excerpts to the full extent. This alone would give counsels for the defense the opportunity to prove the reasons for the shootings about which the prosecution has brought numerous examples from the same documents. So far it is not possible to say whether or not counsels for the defense will get the opportunity to do that at all. For that reason I must reserve the right even at this stage, to make this extraordinary limitation of the defense which in the case of the defendant Foertsch may possibly lead to grave incompleteness of his evidentiary material the subject of an appeal which may possibly have to be lodged in this case.

I refrain from legally arguing against the charges which have been brought in the case of Foertsch at this stage. I shall do that in the course of my plea, but I should at least like to point out that I shall base his defense in the first place on the problem

of participation according to criminal law. This comprises the following legal problems:

1. Is a mere "knowledge" of and "being connected with" the retaliation measures which have been designated by the prosecution as criminal actions sufficient to condemn the defendant Foertsch. I should like to correct here that instead of retaliation measures it should simply be measures.

2. If that is not sufficient, with which positive actions or omissions contrary to his duties is he charged which prove that he aided in any criminal actions. Did he, as chief of the general staff, have any responsibility according to criminal law for retaliation measures which were ordered by others and in turn were carried out by others.

This last word "retaliation" again I would like to have corrected to "measures."

IV. THE THEATER OF WAR IN SOUTHEASTERN EUROPE

A. Introduction

Substantial argument and evidence on the organization of the German armed forces was offered in both the High Command and the Hostage Cases. In the first volume on the High Command Case, substantial evidence on the over-all nature of the German military organization has already been reproduced. See Volume X, section IV, "The Organization of the German Armed Forces—Selections From the Evidence." (*United States vs. Wilhelm von Leeb, et al., Case No. 12.*) The instant section is intended to supplement the materials previously reproduced by the addition of representative materials concerning the military organization in southeastern Europe.

The "Basic Information" submitted to the Tribunal as a brief and not as evidence contains charts which the prosecution offered to assist the Tribunal in understanding the evidence itself (section B). The position and activities of satellite governments and satellite troops in the Balkans came into the proof by means of numerous contemporaneous documents, a few of which are reproduced in section C. The relation of the German Army in the Balkans to special SS and police agencies, particularly the Security Police and the Einsatzgruppen, likewise played a role in the case (section D). Testimony of the defendant Rendulic (section E) concerning the authority of various German agencies in the Balkans concludes this section.

Evidence in the later sections further deals in greater detail with such matters as the chain of command, the distribution and execution of orders, and the position of particular defendants in relation to the matters mentioned in numerous contemporaneous documents.

B. Organization of the German Army

EXTRACTS FROM THE "BASIC INFORMATION" SUBMITTED BY THE PROSECUTION*

* * * * *

C. Types of army field units

* * * * *

8. The standard German division was known as an "infantry" division and comprised two or three infantry regiments, an artillery regiment, and various specialized battalions and smaller units. However, the German Army included a variety of other types of divisions. The more important were—

a. The mountain division, which consisted of troops specially trained and equipped for operations in mountainous terrain.

b. The light division [Jaegerdivision], a variant comparable to the mountain division but often with more motorized equipment.

c. The Panzer grenadier division, which was basically a motorized infantry division, and usually included a tank battalion.

d. The Panzer division, which was the standard armored division of the German Army.

e. The security division, designed for "mopping-up" or occupational duties in rear areas and usually consisting of older soldiers not suited for front line employment.

f. The reserve division, which usually comprised units sent from Germany to occupied territories, in order to receive training and perform occupational duties.

The standard type of corps controlled a group of divisions in which infantry divisions predominated. However, if it controlled an unusual number of Panzer divisions or mountain divisions, the corps was often designated a "Panzer corps" or "mountain corps".

At the beginning of the war, there were no specially designated "armies," but during 1942 the "armored groups" used in the campaign against the Soviet Union were given the status of armies and were thereafter designated "Panzer armies." At the end of the war, six of the twenty-two German armies were "Panzer armies."

9. German Air Force field units. The German parachute troops employed in the early part of the war, as at Rotterdam and Crete, were part of the German Air Force. During the latter part of the war there was no opportunity for their employment as para-

* This "Basic Information" was in the nature of a brief and not submitted as "Evidentiary" material. See the remarks of the defense counsel, the prosecution, and the Tribunal which were made during the opening statement of the prosecution in section IIIA.

chute troops, and they were utilized as regular infantry troops under the command of the army, although they continued to be administratively part of the air force. At the end of the war there were eight "parachute divisions," two "parachute corps" headquarters, and one "parachute army" headquarters.

In addition, there were a number of infantry divisions formed from personnel of the air force and known as German Air Force field [Luftwaffenfeld] divisions. Twenty-one or more such divisions were created, but many of them were disbanded before the end of the war.

10. SS field formations [Waffen SS]. When the war broke out in 1939, Himmler commenced the formation into divisions of units of the SS, armed and trained for employment with the army. Only two or three such divisions were formed prior to the Russian campaign, but by the end of the war there were no less than thirty SS divisions, most of them with special names, such as "Das Reich," "Prinz Eugen," or "Hitlerjugend." Many of them were Panzer or Panzer grenadier divisions, but they included some mountain, infantry, and even cavalry divisions. In addition, the SS formed a number of corps headquarters (including Panzer and mountain corps) and one SS Panzer army headquarters. During the latter part of the war, the members of SS divisions were often drawn from the population of occupied countries.

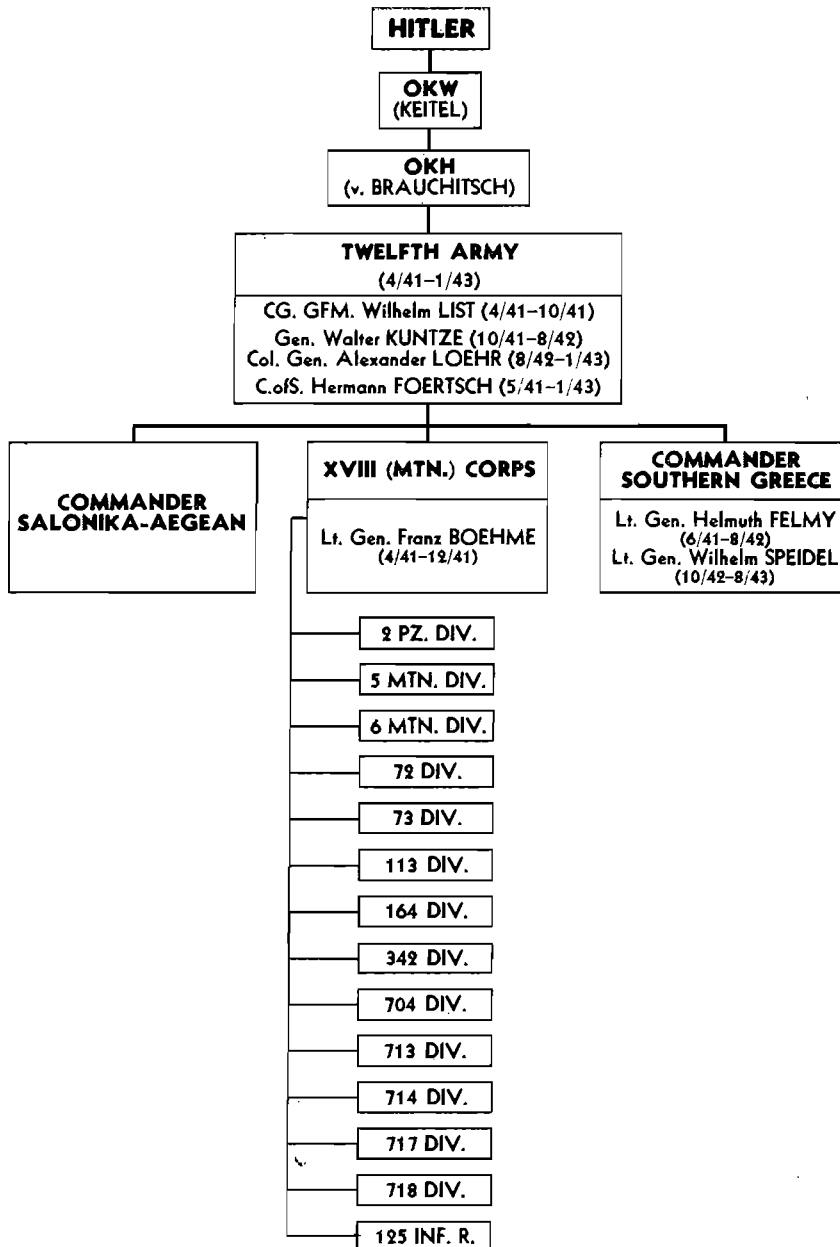
For certain administrative purposes, the Waffen SS units remained part of the SS and under the control and command of Himmler as Reich Leader SS. However, for combat, and in occupied areas, the SS divisions were under the command of the army and their employment differed little from that of the regular divisions of the army.

* * * * *

CHARTS

The following charts are designed to show the subordination and order of battle of the more important headquarters and units of the German Army in southeastern Europe and in northern Norway during the evacuation of Finmark. Because of frequent changes in the location and subordination of various units and in the composition of higher headquarters, the charts do not necessarily give a complete and accurate picture for any particular date. Likewise, unimportant units, or units which are not referred to in the evidence in this case, have been omitted. The charts are based chiefly on captured documents and interro-

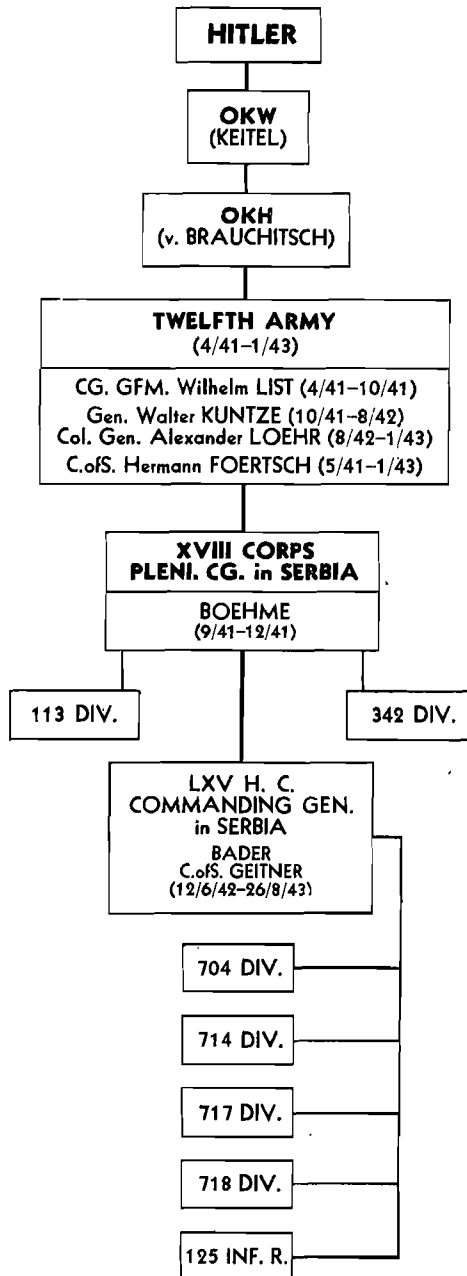
*Chart A—ORDER OF BATTLE OF THE XVII CORPS
OF THE 12TH ARMY*



gations of German officers, and are believed to be sufficiently accurate for all practical purposes in this proceeding.*

* Nine charts, marked A through I, were included in "Basic Information". Three of these charts (charts C, D, and G) have been reproduced where they were referred to in the opening statement of the prosecution in section III A. (pp. 794, 819, 825). The balance of these charts are reproduced on this and following pages.

Chart B—ORDER OF BATTLE OF THE LXV CORPS
OF THE 12TH ARMY



*Chart E—ORDER OF BATTLE OF ARMY GROUP E
(August 1943–March 1945)*

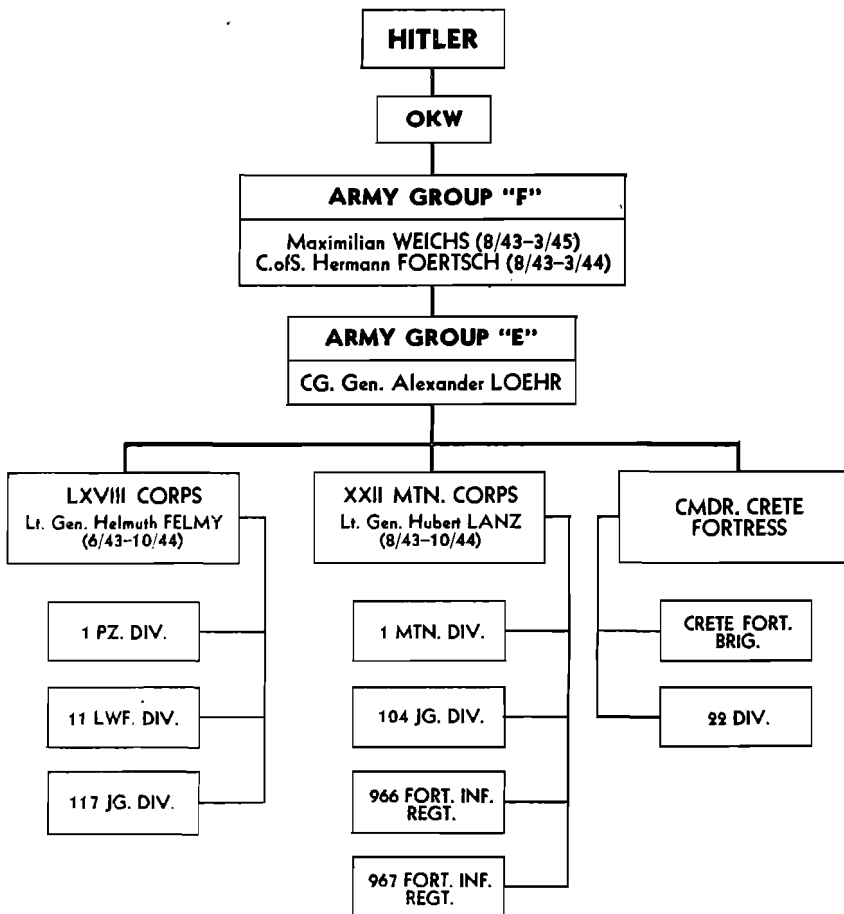


Chart F—ORDER OF BATTLE OF 2D PANZER ARMY
(August 1943–June 1944)

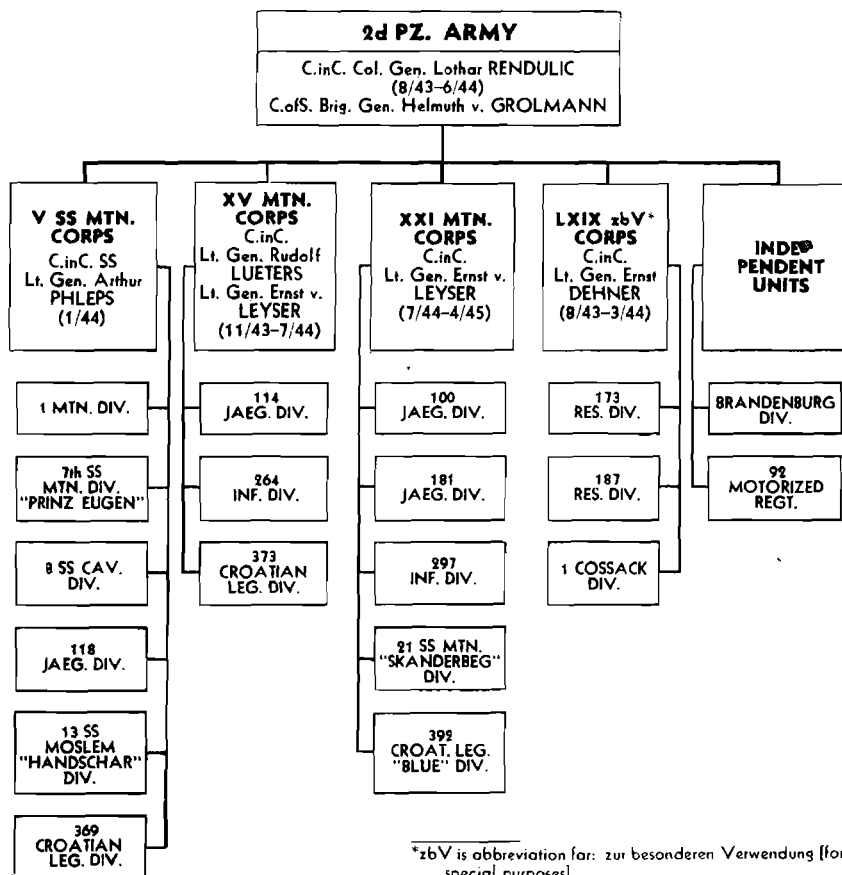


Chart H—CHAIN OF COMMAND FOR ARMED FORCES COMMANDER SOUTHEAST

(June 1941—August 1942)

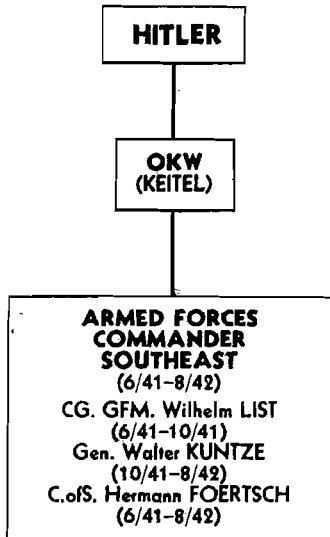
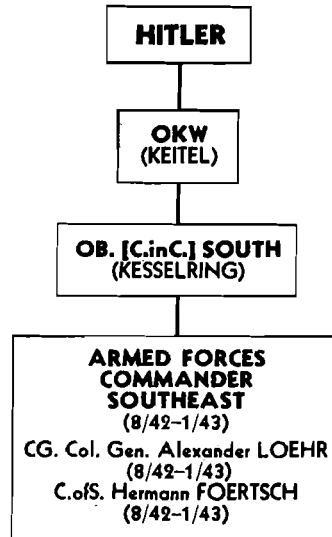


Chart I—CHAIN OF COMMAND FOR ARMED FORCES COMMANDER SOUTHEAST

(August 1942—January 1943)



C. Relations of the German Army with Satellite Governments and Satellite Armed Forces¹

PARTIAL TRANSLATION OF DOCUMENT NOKW-1028²
PROSECUTION EXHIBIT 197

EXTRACTS FROM OPERATIONAL ORDER NO. 5 OF 718TH INFANTRY DIVISION, 14 APRIL 1942, CONCERNING SUBORDINATION OF CROATIAN ARMED FORCES AND USTASHA TROOPS UNDER GERMAN COMMAND

[Stamp] Secret

[Handwritten] War Diary

718th Infantry Division
Az 8 op Branch Ia
No. 1323/42 Secret

Divisional Staff Headquarters, 14 April [19]42

OPERATIONAL ORDER NO. 5

1. *Enemy*—In the area between Praca, Visegrad, Drina, Reka, Han Pijesak, and Gromile, insurgents (primarily partisans) have again established themselves. The exact strength cannot be stated.

Enemy situation—See enclosure 4.

2. *Mission*—The enemy is to be annihilated wherever he shows himself. This time it must be done thoroughly, in order to mop up the area completely and to pacify it. Since the weather is favorable at this time, the troops will fulfill this mission also.

3. *Own forces*—Participating in the operation—German, Italian and Croatian units.

Pursuant to the directive of the commanding general and commander in Serbia, Lieutenant General (Artillery) Bader, all troops of the 718th Infantry Division, troops of the commanding general and commander in Serbia arriving in the area described above, units of the Croatian armed forces and the Ustasha units are under my command. These troops will be organized in groups according to enclosure 1.

The subordinate troops of the commanding general and commander in Serbia, of the Ustasha, and of the Croatian armed

¹ For the background to the German occupation of Yugoslavia and Greece see "The Aggression against Yugoslavia and Greece" in the judgment of the IMT, Trial of the Major War Criminals, *op. cit. supra*, vol. I, pp. 210-213.

² Enclosure 3 to this order, titled, "Combat Directive" (NOKW-1028, Pros. Ex. 197), is reproduced below in section VB.

forces will be subordinate to the 718th Infantry Division tactically and for rations and quarters.

All measures concerning equipment and ammunition supplies for these troop units will be regulated by the 718th Infantry Division via their respective offices.

The groups will be issued orders directly by me.

Tactical reports of the groups are also transferred to me directly.

* * * * *

[Signed] FORTNER

Enclosures—

1. Organization of Groups
2. Identification Signals
3. Combat Directive
4. Enemy Situation
5. Special Directive for Signal Communication
6. Special Directive for Supply

Distribution:

- Group Suschnig
- Group Wuest
- Group Francetic
- Group Commander Serbia (2 copies)
- 668th Artillery Battalion
- Commanding General and Commander Serbia (3 copies)
- German General in Zagreb
- Operations Staff Combat Group, General Bader
- Croatian General (3 copies)
- 718th Signal Communications Company
- 718th Engineer Company

On the premises—Commanding Officer, Ia, Ib, Ic, IIa, III, IVa, IVb, IVc, Staff Quarters, War Diary (2 copies), retained (5 copies).

PARTIAL TRANSLATION OF DOCUMENT NOKW-076
PROSECUTION EXHIBIT 338b

TELETYPE FROM 2d PANZER ARMY TO PLENIPOTENTIARY GERMAN
GENERAL IN CROATIA, 17 SEPTEMBER 1943, CONCERNING
DESERTION OF CROATIAN UNITS

Teletype Office

875/2389

[handwritten]

OB [CinC]

Has been submitted

Teletype Code Address

Current Number

Section 513/

43 Secret

Received for: Sent:

Received: Date: 18 Septem-
ber 1943

[Illegible stamp]
17 September 1943

Time: At 0530 hours

By: To: HURX/Qu 1940 [Initialed] FR

Through: Through: [Illeg-
ible initial] 19

Reel:

[Marginal note] To be filled out by teletype office.

Remarks: Secret

Teletype:

Postal Telegram: From: 2d Panzer Army, Ia 453/43 Secret

Telephone: [Illegible]•5838

17 September 1943 1900 hours To: Plenipotenti-
Date of Transmission Time of Transmission ary German
General in
Croatia

Remarks for transmission:
(To be filled out by sender)

You are requested for information as to what measures are
being taken in order to prevent the further dissolution of the
Croatian armed forces. The 2d Panzer Army believes the best
means would be reprisal measures against family members of the
"traitors to their country," to stop further desertion of the

Croatian units and the subsequent dissolution of the Croatian armed forces.

2d Panzer Army No. 453/43, Secret

Copy:

Ic

Kn

Certified:

[Illegible signature]

1st Lieutenant

[Handwritten] Taken care of

[Illegible signature]

Corporal

TRANSLATION OF DOCUMENT NOKW-1099
PROSECUTION EXHIBIT 251

ORDER OF COMMANDER OF GERMAN FORCES IN CROATIA,
7 JANUARY 1943, CONCERNING THE EXERCISE
OF EXECUTIVE POWER

[Stamp] Top Secret

[stamp] 10 January 1943

[Handwritten] 1177a

Current No. 9

[Stamp]

718th Infantry Division

Received 10 January 1943, Top Secret

No. 8/43

[Illegible initial]

Section Ia

Commander of the German Forces in Croatia

Ia No. 21/43 Top Secret

[Illegible initial]

Local Headquarters, 7 January 1943

16 copies—3d copy

Subject: Exercise of executive power

The development of the situation in Croatia again necessitates a clarification of the chain of command, together with a summary of the previous directives.

1. The areas of the 714th and 718th Divisions are *operation areas*.

Boundaries—German-Italian demarcation line, Drina-Sava [Sava], line Sisak-Bihac (up to demarcation line). Separation line between 714th and 718th Divisions as before. Holders of executive power within their area are Major General Fortner and Brigadier General Reichert. The commander of the German forces in Croatia reserves to himself the right to issue directives.

2. All armed Croatian units situated in the area designated in paragraph 1 are subordinated to the divisions. If possible, some responsibility of their own is to remain with the Croatian headquarters. A breaking up of the Croatian units just formed is unwelcome.

3. The refitting and reorganization, and if necessary the purging of the Croatian armed forces is to be carried out vigorously. Ustasha units, as far as has not already been done yet, are to be incorporated into the Croatian reserve and are to be formed into units not below battalion strength.

4. Rigorous measures are to be taken against the population.

a. In unreliable areas the male population from 15–50 years is to be lodged in assembly camps. Deportation to Germany is intended. [Handwritten] Chetniks * * * [Illegible]

b. Partisans and partisan suspects, as well as civilians in whose homes arms and ammunition are found, are to be shot or hanged immediately; their homes are to be burned down.

c. Town headquarters (German, or Croatian in purely Croatian garrisons) are authorized to decide the hour of curfew for the entire population.

d. In cases of offenses against German regulations, fire arms are to be used ruthlessly and extensively.

e. Personages of the Croatian state, whose cooperation is not sufficient, are to be arrested for sabotage.

5. A general notification in the sense of these directives is being forwarded to the divisions. Further directives will be issued by the holders of executive power according to paragraph 1.

6. The Plenipotentiary German General in Croatia is requested to notify all Croatian headquarters of this order.

[Signed] LUETERS

Distribution being drafted.

PARTIAL TRANSLATION OF LIST DOCUMENT 202*
LIST DEFENSE EXHIBIT 46

EXTRACTS FROM DAILY REPORTS CONTAINED IN WAR DIARY OF
MILITARY COMMANDER SERBIA, SEPTEMBER 1941, CONCERNING
THE ACTIONS AND DIFFICULTIES OF SERBIAN GOVERNMENT

[Handwritten] Appendix 33
Urgent 503

To: Armed Forces Commander Southeast (12th Army) Ia

Daily Report—

1. and 2. Nedic government apparently does not have the anticipated success and does not seem to be able to assert its authority. Insurrection movement extends to the area east of Pozarevac.

3. Attack by dive bombers against manned road obstacles in the area of Sabac. Continued air reconnaissance, also in area of the Iron Gate.

4. Police units committed by the Serbian Government in agreement with Commander Serbia have so far not been in combat against the Communists. In one case refusal to engage in battle. In another case a police unit of 60 to 80 men on the march to their assigned position have surrendered their arms to the Communists without a fight.

5. Attacks on five railroad stations, one of them on the rail line Belgrade-Nis on 10 September. Rail line near Davidovac (Zajecar-Paracin) dynamited for the third time. On 10 September bands fired on armored train near Mladenovac. On 10 September Morave-bridge (7 km., northwest of Kraljevo) as well as two more wooden bridges destroyed. On 11 September road Ljubovija-Rogacica blocked and occupied. Telephone lines Pozarevac-Petrovac and Nis-Leskovac interrupted. No connection with Uzice. Rail traffic Belgrade to Greece is open at the present time.

6. Serbian administration in the rural districts paralyzed by armed revolts.

7. Eight more band attacks on communities and their installations. City Commandant [of] Belgrade has so far been able to maintain order and tranquillity in spite of scattered attacks by Communists.

8. Terrorism increases against the workers who are still willing to work in plants which produce for the German economy.

* Other parts of this document are reproduced in sections D and VB.

Commander Serbia Headquarters Staff Ia/F 12 September 1941

Certified:

[Signature illegible]

Captain, Cavalry

1400 hours

COPY

[Handwritten] Appendix 34
Staff Headquarters, 12 Sept. 1941

Jais, Major in the General Staff
Liaison Officer of the Armed Forces Commander Southeast
to LXV Higher [Corps] Command

Opinion about the military situation in Serbia

On the basis of the descriptions received from *Commander Serbia* and the LXV Higher [Corps] Command, regarding the military situation in Serbia, my opinion about the situation is as follows:

I

The armed revolt in the area of the Commander Serbia is increasing. The main areas of the revolt which in general extends to the entire occupied territory seem to be in the Drina-river bend with the principal towns of Loznica and Krupanj, in the Sava-river bend west of Sabac, and in the area Obrenovac-Valjevo.

A Croatian colonel who had voluntarily participated in a local operation in the area of Loznica assumes that the headquarters of the insurrection movement is located in *Almhuetten* [alpine huts] near Cér. Pl. [Planina] 25 km., southwest of Sabac. The inaccessibility of this terrain and its location in the center of two main areas of revolt make this assumption appear very probable.

The insurrection movement has already grown to such an extent that at present military units in the *strength of a battalion* cannot be moved any longer without facing the danger to be engaged in combat by the insurgents and be encircled in mostly roadless terrain.

The dispatching of half a battalion for the purpose of relieving our own encircled troops has in some cases already resulted in failures.

If a major German troop unit appears, one can generally expect, according to the way of fighting shown so far by the insurgents, that the enemy will *retreat*, or, after throwing away their weapons, attempt to disguise themselves as harmless *native residents*. This conduct by the insurgents, however, seems to be improbable in the above mentioned main areas of revolt since the

bands there have a strength which enables them to take up a fight with the troops. The opinions about the strength of the enemy in the Sava-river bend west of Sabac vary between 2,000 and 10,000 men. According to the statement of Staatsrat Turner about 2,000 insurgents with 50 machine guns are said to be in this area. So far I have not yet been able to estimate the enemy's strength in the rest of the areas.

Movements of motorized troops or individual combat cars is not possible at the present time in large areas because of numerous manned road and highway blocks. The CG of the 704th Infantry Division who had arrived from the Reich in Belgrade was compelled to continue the trip to his Staff in Valjevo by airplane since the road Belgrade-Valjevo is blocked at several places.

II

The new Serbian Nedic Government will not be in a position, even through further arming of the Serbian police, either to check the revolt or to quell it completely.

Thus, according to the statement of Staatsrat Turner, the Serbian police in Sabac was reinforced with 400 men in order to restore tranquillity in that area. This police unit, however, is idle in Sabac for days because the unit considers itself too weak for an action against the insurgents in the more distant surroundings of Sabac. Prime Minister Nedic has asked Staatsrat Turner in a letter, dated 11 September, to appoint a German commander to direct the attack against the insurgents in the area of Sabac. This action taken by the Prime Minister *must* be regarded as a proof of his *own weakness*.

III

The available troops, according to their numbers, kind of training, and armament, are *inadequate* to quell the revolt. With the forces at present at our disposal, a restraint of the insurrection movement will at the best be accomplished only through a strong concentration of the forces and ruthless action.

It is difficult to accomplish the strong concentration of the forces because of the numerous tasks of security requested from Higher [Corps] Command LXV. In order not to lose the objects to be secured, such as railroads, waterways, industrial installations, etc., the units of the occupational divisions are necessarily spread over large areas.

* * * * *

[Handwritten] Appendix 40

To Armed Forces Commander Southeast (12th Army) Ia
Daily Report

Urgent 503

* * * * *
3. Because of failure of Serbian gendarmerie battalion in Sabac, the 3d Battalion, 125th Infantry Regiment, and the 2d Battery, 220th Artillery Regiment, temporarily transferred there.

* * * * *

Commander Serbia Headquarters Staff Section Ia/F
13 September 1941

Certified:

[Signature illegible]

1500 hours

Captain, Cavalry

[Handwritten] Appendix 44

To Armed Forces Commander Southeast (12th Army)
Strategic and Tactical Planning Staff

Urgent 503

Daily Report

1. Combat operations of Serbian gendarmerie appear to have strengthened the reputation of the Nedic government.

2. Serbian Government plans to form special courts to deal with saboteurs and criminals. Death penalty threatened. Further measures to strengthen the administration have been effected.

* * * * *

Certified:

Commander Serbia/Ia/F, 14 September 1941

[Signature illegible]

1330 hours

Captain, Cavalry

[Handwritten] Appendix 46

To the Armed Forces Commander Southeast (12th Army)

Urgent 503

Daily Report

1. No changes.

2. 15 September. Radio address by Minister President [Nedic] to the Serbian people requesting the insurgents to lay down arms,

return from the forests, cease all sabotage acts, and refrain from showing hostile attitude towards the occupation troops. (Ultimatum given till 17 September 1941.)

3. Higher [Corps] Command LXV instructed to conduct clean-up operation in the area of Obrenovac — Ub — Kaljevo.

* * * * *
Commander Serbia Headquarters Staff/Ia/F, 15 September 1941

Certified:
[Signature illegible]
Captain, Cavalry
1345 hours

[Handwritten] Appendix 52

To Armed Forces Commander Southeast (12th Army) Ia

Urgent 503

Daily Report

1. Minister President Nedic's radio proclamation repeated, as evidently good results. Distribution received here.

* * * * *
6. Government cleans up administration.

* * * * *
Commander Serbia Headquarters Staff/Ia/F, 16 September 1941

Certified:
[Signature illegible]
Captain, Cavalry

[Handwritten] Appendix 70

Urgent 503

To Armed Forces Commander Southeast (12th Army)

Daily Report

1. The political situation increasingly difficult, can be considered as very serious.

2. The government tries to establish quiet without success.

* * * * *
7. Attacks on soldiers and Serbian rural policemen repulsed near Arandjelovac. 1 Communist dead. 18 September. At Kneševac (10 kilometers southwest of Belgrade) attack on a police-patrol by firearms. No casualties.

8. Mines at Sevica and Brodica near Kurzevo attacked and plundered.

Commander Serbia Headquarters Staff,
Section Ia, 19 September 1946, 1350 hours

Certified:
[Signature illegible]
Captain, Cavalry

[Handwritten] Enclosure 76

Commander Serbia
Headquarters Staff
Operations Section [Ia/F.]

Belgrade, 20 September 1941

[Illegible initial]

To XVIII Army Corps Headquarters, *Belgrade*

Daily Report

1. The political situation continues to be increasingly difficult. It is to be considered as very serious.

2. The government is trying to establish quiet without success.

3. Since this morning, insurrectionists have attacked the waterways' police and the customs station V. Gradiste (Danube) as well as a German ship to the east of it. Two ships with a platoon of a police battalion and half a company of 433d Infantry Regiment as well as a raiding detachment from the vicinity north of Pozarevac were sent by way of the Danube to fight them. Armed air reconnaissance employed in the Danube area there.

4. Serbian railway guards armed in July 1941 with 1,500 rifles. Due to the development of the situation an honorable turning over of arms has been ordered according to a note addressed to the Nedic government. Eighty-five percent have already been collected, the remaining will be returned as soon as conditions at the railroad permit. 17 September, gun battle between a Serbian rural police detachment and a Communist band near Mala Ivanca (12 kilometers south of Grocka). Enemy casualties—1 dead, 20 captured. 18 September, armed attack on a Serbian rural police detachment near Grocka. Seven Communists, among them two women teachers, captured. Weapons and ammunition captured. 18 September, in a battle between Chetniks and Communist bands northwest of Prokuplje, 2 Chetniks wounded. Enemy casualties—2 dead, 3 wounded.

5. 19 September, bridge blown up near Rabrovo (Belgrade-Kucevo). Traffic interrupted. 19 September, attack on railroad

near Mokrin (Banat). Traffic continues. Telephone lines in the area Uzice-Cacak continue to be interrupted. Route Semlin-Indija wires cut, 20 September.

6. Due to further attacks on rural communities the postal, railroad, and customs administrations outside of Belgrade and of the Banat inactivated.

7. 19 September, technical office of the Communist party at Belgrade raided. One Communist leader and 5 members arrested. 19 September, 42 Communists arrested in a raid at Cukarica (4 kilometers south of Belgrade). Three hundred suspected gypsies arrested. Three further rural communities attacked by bands. Archives destroyed. There are no reports about rural communities attacked from the area Uzice-Cacak. Aside from Uzice and Cacak almost all rural communities are in the hands of the Communists. The population sabotages wood and food supplies in both cities.

8. The condition of industry unchanged.

For the Commander Serbia
The Chief of Staff
[Signed] GRAVENHORST
Lieutenant Colonel, GSC

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-899
PROSECUTION EXHIBIT 250

LETTER FROM COMMANDING GENERAL SERBIA TO PRIME MINISTER
NEDIC, 22 JANUARY 1943, CONCERNING REPRISAL MEASURES
BY THE SERBIAN GOVERNMENT

Headquarters, 22 January 1943

Commanding General and
Commander in Serbia

Ia No. 103/43

Subject: Reprisal measures

Reference: Serbian Ministry of the Interior 83/43 of 20 January 1943

To: Prime Minister Nedic

I agree to the petition for shooting to death 10 insurgents as reprisal for the murder of the head of the community of Samaila on 26 December 1942.

I ask you to tell the head of the district to get in touch with the administrative district headquarters Kraljevo and to decide about the details. Please have the publication done by your administrative offices and inform us when this has been completed.

[Initialed] H
[Signed] BADER
Lieutenant General, Artillery

* * * * *

D. Cooperation of the German Army with the SS and the Einsatzgruppen*

PARTIAL TRANSLATION OF DOCUMENT NO-2943
PROSECUTION EXHIBIT 21

EXTRACTS FROM SITUATION REPORT U.S.S.R. NO. 28 OF THE
SECURITY POLICE AND SD, 20 JULY 1941, CONCERNING
REPRISAL ACTIONS IN SERBIA

The Chief of the Security Police
and of the SD

IV A 1—B. No. 1 B/41 Top Secret

Berlin, 20 July 1941
36 copies—27th copy

To the Einsatz Communication Officer

RR. Paeffgen—or representative on the premises

[Stamp] Top Secret!

Situation Report U.S.S.R. No. 28

1. Political review—

* * * * *

b. Yugoslavia—The German General Lomtscha [Lontschar], Division General of Uzice was fired on by bandits on the road between Uzice and Valjevo in the afternoon of 18 July 1941. The general was not hit; his executive officer was shot in the chest. By order of the Military Commander Serbia an operation was initiated with the task of searching for roving bands in the entire territory. This operation was carried out on 19 July 1941

* The "Einsatzgruppen" were special units of the SS which were sent to territories occupied by the German Army. A number of the leaders of the Einsatzgruppen were tried in the "Einsatzgruppen Case." (U.S.A. vs. Ohlendorf, et al., Case 9, vol. IV.)

by two companies of the German municipal police corps and the troops stationed in Uzice in cooperation with the Serbian gendarmerie and the Einsatzgruppe of the Security Police and SD.

* * * * *

Distribution:

Reich Leader SS and Chief of the German Police
Chief of the Security Police and SD
Chief of the Regular Police
OKW Operations Staff, Lieutenant Colonel Tippelskirch*
All Office [Amt] Chiefs.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NO-2944
PROSECUTION EXHIBIT 22

EXTRACTS FROM SITUATION REPORT U.S.S.R. NO. 30, 22 JULY 1941,
CONCERNING REPRISAL ACTIONS IN YUGOSLAVIA

[Stamp] Top Secret

Situation Room, Berlin, 22 July 1941

36 copies—27th copy

The Chief of the Security Police and SD
IV A 1—B No. L B/41 Top Secret

[Stamp] Top Secret

Situation Report U. S. S. R. No. 30

I. Political Survey—

* * * * *

c. *Yugoslavia*—

* * * * *

In reprisal for the attempted attack on the life of the German General Lomscha [Lontschar] near Uzice, 52 Communists, Jews, and families of band members in the villages of Uzice, Valjevo, and Cacac were shot to death on 20 July [19] 41. In addition to the previously reported measures a large scale operation with support of armed forces units is in preparation, in agreement with the Military Commander Serbia.

* * * * *

* Chief of the Quartermaster Section of the Armed Forces Operations Staff. (United States vs. Wilhelm von Leeb, et al., Case 12, vol. X.)

Distribution :

Reich Leader SS and Chief of the German Police
Chief of the Security Police and SD
Chief of the Regular Police
OKW Operations Staff, Lieutenant Colonel Tippelskirch
All Office [Amt] Chiefs

* * * * *

**TRANSLATION OF DOCUMENT NOKW-529
PROSECUTION EXHIBIT 35**

**ORDER OF MILITARY COMMANDER SERBIA, 21 AUGUST 1941,
CONCERNING TRANSFER OF CAPTURED PARTISANS
TO EINSATZGRUPPEN**

Commander Serbia
Headquarters Staff
Section Ia No. 397/41, Secret

[Illegible initial]
21

[Handwritten] Chief

Ia—Belgrade, 21 August 1941
[Illegible initial]

[Stamp] Secret

[Stamp]

Higher Corps Command for
Special Missions [z.b.V.] LXV
Received 27 August 1941, Section Ic
Diary No. 454/41, Secret

[Stamp]

LXV Higher Corps Command for
Special Missions
Section Ia, Diary No. 517/41, Secret

Subject: Transfer to security police of bandits captured in combat

1. In regard to the capture of bandits captured in combat, vagueness exists in almost all authorities, which emanates from the delays of the interrogation and the proper treatment of the people.

2. As a matter of principle *all bandits* are to be transferred to the "Einsatzgruppe of the Security Police and SD"—in the following [paragraphs] designated by the official abbreviation "SP."

3. Prisoners taken in Belgrade are to be delivered to the SP in the police prison Alexandrova 5.

4. If prisoners are taken they are to be transferred as rapidly as possible to the nearest administrative subarea headquarters or district headquarters. If possible, prior announcement should be made, so that preparations can be made. Telephone discipline is to be observed thereby.

5. There are experts of the SP attached to the administrative subarea headquarters who can give information in case of doubt.

6. Together with the prisoners to be delivered, a *brief* report is to be sent regarding the circumstances of the capture. As a matter of principle protracted proceedings by the unit etc., are to be avoided, except in special individual cases.

7. It has happened that units and organs of the indigenous police service have retained prisoners and exposed them to long interrogations without enabling the SP to get hold of these people. *Such interrogations are, as stated above, the affair of the SP.*

8. In this connection, attention is to be called expressly to the fact that the unit is authorized to shoot down any prisoner attempting to escape.

Distribution: Plan C

On the Premises—Ia 02, IIa, III, Kdt., IVb, IVc.

[Distribution subsequently added on bottom of page 1 of original document]

9. This explanation pertains accordingly to all other political prisoners.

Distribution being drafted.

FOR THE COMMANDER SERBIA:

The Chief of Staff
[Signed] GRAVENHORST
Lieutenant Colonel, GSC
[Initials] FE

PARTIAL TRANSLATION OF LIST DOCUMENT 202*
LIST DEFENSE EXHIBIT 46

ORDER OF 6 SEPTEMBER 1941, ENCLOSED IN WAR DIARY OF
MILITARY COMMANDER SERBIA, CONCERNING POLICE DUTY
OF SECURITY SERVICE ON TROOP TRAINS

Commander Serbia
Headquarters Staff/Operations Section [Ia] No. 106/41

Belgrade, 6 September 1941

It is requested that the subordinate units be given the following orders:

1. On the trains operating on the Belgrade-Salonika line compartments in the front, middle, and last cars are to be reserved for the Security Service.
2. Men on leave who are equipped with rifles are forbidden to stow the rifles which have been given to them away in the baggage car. They must keep them with them ready for use.

For the Commander Serbia

The Chief of Staff

BY ORDER:

[Signature illegible]

Major, GSC

PARTIAL TRANSLATION OF DOCUMENT NOKW-1438
PROSECUTION EXHIBIT 419

LETTER FROM COMMANDER IN CHIEF SOUTHEAST, ARMY GROUP F,
11 OCTOBER 1943, FORWARDING KEITEL ORDER OF
7 SEPTEMBER 1943, CONCERNING THE APPOINTMENT AND
JURISDICTIONAL RELATIONS OF "HIGHER SS
AND POLICE LEADER" IN GREECE

Commander in Chief Southeast

Headquarters Army Group F

Group Ic/AO Counter Intelligence III

No. 279/43 Secret

[Stamp] Draft

[Stamp] Secret

Local Headquarters, 11 October 1943

[Handwritten] War Diary

* Other parts of this document are reproduced in sections C and V B.

Enclosure: 1

Reference: None

Subject: Directive for the Higher SS and Police Leader in Greece

To: Chief, Field Police

Enclosed please find directive for information and for your files.

For Commander in Chief Southeast
Army Group F
The Chief of Staff

BY ORDER:

[Illegible signature]

Lieutenant Colonel

[Handwritten]

To the files E XIV

[Illegible initial]

[Handwritten] to 279/43 Secret
Copy of copy

[Stamp] Secret

The Chief of OKW

Fuehrer Headquarters, 7 September 1943

No. 63876/43 Secret, Armed Forces Operations Staff/QM/Adm.

Directive for the Higher SS and Police Leader in Greece

1. By agreement with the Chief of OKW, the Reich Leader SS and Chief of the German Police appoints a Higher SS and Police Leader for the area of the Military Commander Greece.

2. The Higher SS and Police Leader is an office of the Reich Leader SS and Chief of the German Police, which is subordinate to the Military Commander Greece for the period of its employment in Greece.

3. In the area of the Military Commander Greece, the Higher SS and Police Leader embraces all duties which are incumbent on the Reich Leader SS and Chief of German Police in the Reich.

He has authority to direct and supervise the Greek authorities and police forces within the sphere of these duties.

4. The primary duty of the Higher SS and Police Leader is the command of the SS and police units (excluding Waffen SS units subordinated to Army Group E) in their combat against bands and sabotage, pursuant to the general directives of Reich Leader SS. For this purpose, definite combat areas under their own

responsibility are to be assigned to them by the military commander.

The military commander regulates command authority and assignment of forces in the event of combat missions outside the regularly assigned combat areas.

5. In all affairs concerning police matters and service matters, the Higher SS and Police Leader is the superior authority of the SS and police forces employed in Greece.

The military commander is authorized to employ units of the regular police only if the fulfilment of the tasks set to the Higher SS and Police Leader by Reich Leader SS permits it.

6. The military commander is authorized to issue directives to the Higher SS and Police Leader which are necessary to avoid interference with armed forces operations and duties. They take precedence over any other directives.

7. The Higher SS and Police Leader will receive policies and directives for the execution of these duties from the Reich Leader SS and Chief of German Police. He will carry them out independently, currently and opportunely, informing the Military Commander Greece in as far as he does not receive any restricting directives from the latter.

The military commander is to be informed in good time concerning reports submitted by the Higher SS and Police Leader to the Reich Leader SS and Chief of the German Police.

Signed: KEITEL

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-159
PROSECUTION EXHIBIT 417

EXTRACT FROM ORDER OF MILITARY COMMANDER SOUTHEAST TO
HIGHER SS AND POLICE LEADER 23, OCTOBER 1943,
CONCERNING EXECUTION OF HOSTAGES

Military Commander Southeast
Section Ia/No. 246/43

Headquarters, 23 October 1943
[Handwritten] Supplement 110

To the Higher SS and Police Leader

For the information of: 809th Administrative Area Headquarters;
German Liaison Staff with the 1st Royal
Bulgarian Occupation Corps

1. As revenge for the surprise attack on the cattle purchasing detachment at Sljivar (6 km., SW of Zajecar), by a D.M. and a Communist band, through which 8 German and Bulgarian armed forces and police members were killed, 8 German and Bulgarian armed forces members wounded, and 2 German military police were missing; 100 D.M. reprisal prisoners and 300 Communist reprisal prisoners are to be shot under consideration of the reprisal measures which have already taken place, consisting of burning down of houses and the losses which the bandits suffered in this operation.

2. As revenge for the surprise attack on the collecting detachment of the 8th Auxiliary Police Battalion on 6 October 1943 at Jelasnica by a D.M. band, during the course of which 3 auxiliary policemen were killed, 8 heavily wounded, and 9 slightly wounded, 100 D.M. reprisal prisoners are to be shot.

The Higher SS and Police Leader is charged with carrying out the execution. It is to take place in the Zajecar district.

In the publication of the reprisal measures relating to 1 above, reference is to be made to the horrible treatment of the wounded who fell into the hands of the bandits and the mutilation of the corpses; in the proclamation concerning 2 above, it is to be expressed that the reprisal quota would have been considerably higher if the wounded had not been decently treated.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-1352
PROSECUTION EXHIBIT 386

EXTRACTS OF REPORT FROM 2d PANZER ARMY, 14 MARCH 1944,
SIGNED BY DEFENDANT RENDULIC, CONCERNING COOPERATION
WITH SS IN NORTHERN CROATIA

[Stamp] Top Secret

Enclosure for War Diary No. C 167

[Stamp]

[Entry Stamps]

* * * * *

Personal Report to Commanding General

[Illegible initials]

24 copies—4th copy

2d Panzer Army

Section Ia No. 800/44 Top Secret

Army Headquarters, 14 March 1944

Reference: 2d Panzer Army Ia No. 627/44 Top Secret of 1 March
1944

Subject: Chain of command in the North Croatian Sector
1 Enclosure

* * * * *

3. *The main task* of the command authorities (as per par. 2) in these areas is to protect the railroad line Zagreb-Belgrade as well as the main lines (Indija-Neusatz, Vinkovci-Palj-Esseg, Zagreb-Karlovac, Sunja-Bihac, and Brod Doboje only up to the area borders) during the course of operation "Cannae", and to keep open these vital supply lines. Due to the lack of forces it will be necessary for this purpose to organize mobile task troops including all possible aids and to commit these flexibly and continuously. Beyond this, all military and economically important objects are to be secured as far as is at all possible and the command areas to be kept pacified in closest cooperation with the deputy of the Reich Leader SS for Croatia.

The Representative Reich Leader SS for Croatia will be requested to contact the command authorities and—in close cooperation with them—to employ all forces at his disposal for railroad security and other local security duties.

* * * * *

8. *Headquarters, 1st Cossack Division and Commander Symia* are instructed to cooperate with the Representative Reich Leader SS for Croatia and the police offices and units subordinated to him in the command areas as per paragraph 3 ' * *.

[Signed] RENDULIC

Distribution :
Draft only!

TRANSLATION OF DOCUMENT NOKW-1353
PROSECUTION EXHIBIT 387

ORDER FROM 2d PANZER ARMY TO XV MOUNTAIN CORPS,
17 MARCH 1944, CONCERNING TACTICAL SUBORDINATION
OF SS TO 2d PANZER ARMY

[Handwritten] Highest Priority

[Handwritten] Ia 482/44 Top Secret

[Stamp] Chief 21 March
Ia [Illegible initials]
01

Signal Office—XV Mountain Corps M. Fu. d.

Received from 2d Panzer Army, 17 March, 1933 [hours]

17 March 1944

Remarks: Top Secret [Handwritten]

Transmitted: 17 March, 1010 [Hours]

To XV Mountain Corps Ia.

1. Effective immediately the Representative Reich Leader SS for Croatia and his subordinate offices and units are tactically subordinated to the 2d Panzer Army pursuant to the order of the Commander in Chief Southeast (Headquarters Army Group F). The police sector leaders subordinate to the Representative Reich Leader SS for Croatia remain subordinate to him in every respect. They will be instructed to cooperate directly with the command authorities of the armed forces and they will be informed that these command authorities are authorized in emergency cases to issue tactical orders directly to the police sector leaders. The Representative Reich Leader SS for Croatia is to be informed at the same time.

2. The purpose of this subordination is to unite all available German forces in the Croatian sector for the period of the opera-

tion "Cannae" with the aim of making more secure the vital traffic lines and economic objects for troop movements and supply.

3. To this end the Representative Reich Leader SS for Croatia is requested to contact and/or instruct the police sector leaders to contact the command authorities in the Croatian Sector (Corps Headquarters, LXIX Infantry Corps and Headquarters, 1st Cossack Division, Commander Syrnia, V SS Mountain Corps, and XV Mountain Corps). By agreement with the command authorities, he is to employ all available forces in the first instance for the protection of vital railroads at the same time withdrawing them as far as possible from less vital objects.

4. LXIX Army Corps, Commander Syrnia, V SS Mountain Corps and XV Mountain Corps on their part will immediately make contact with the competent police sector leaders for the purpose of rapid and coordinated regulation of the security measures. Completion of mission is to be reported.

5. Representative Reich Leader SS for Croatia is to report to the 2d Panzer Army as soon as possible his forces which are available for security purposes, as described under paragraph 2 and their planned commitment.

2d Panzer Army Ia, No. 826/44 Top Secret

[Handwritten] Army headquarters answered
[Illegible initial]

Certified:

[Signed] SCHINDLER

Excerpt sent to 375 [?] Division

E. Extract from Testimony of Defendant Rendulic*

* * * * *

EXAMINATION

PRESIDING JUDGE WENNERSTRUM: General Rendulic, you and the other defendants and your respective counsels have from time to time made a distinction as to the authority of these various groups down there. The SS, the SD, and the Rosenberg Group, and various other organizations that were in this particular area in the southeast. What was the respective authority of first, the army, the Wehrmacht, the SS, and SD, and these various other organizations; and who was in charge of the whole operation and was there any conflict of authority and if there was a conflict of authority who had the final word?

* Complete testimony is recorded in mimeographed transcript, 28-31 October; 3 November 1947; 22 January 1948, pp. 5125-5472; 9504-9519.

DEFENDANT RENDULIC: May I give you my answer?

Q. I want it purely for information purposes on my own part.

A. From a purely military point of view, the Balkan area was—as far as the protection of the area was concerned—under Army Group F and the units under it, such as for instance the 2d Panzer Army, Army Group E, etc. In other respects, other agencies had their sphere of authority in that area. For instance, the Representative for Economy.

Q. Let's start with the SS.

A. In the SS we must make a distinction between what was known as the Waffen SS and the police formations. The Waffen SS was subordinate to military agencies only in tactical respects. That is to say, they were only subordinate to military agencies as far as combat tasks were concerned; they would receive orders only for the fighting and for preparations for fighting. From among the units of the SS, there were in the Balkans the 7th SS Mountain Division, the V SS Mountain Corps and then later on, the 13th SS Division, and the SS Division "Skanderbeg" in Albania, which was about to be formed.

These divisions and troops were under the 2d Panzer Army in purely military respects. They were not subordinate in judicial, disciplinary, and personnel matters, and in all those fields where they had special assignments which they received from their highest superior and their highest superior was the Reich Leader SS. As to the police formations, there were in the Balkans police regiments and also elements of the SD. These elements were not under the German troops, but they had their special assignment; they received from their special superiors their orders, and the German troops were not in a position to prevent the carrying out of these orders which these special groups of the SS had received, or even to forbid them.

Q. How do these references to them come into these orders then?

A. Because it might have been possible—and I believe I gave an example yesterday—that units of the SD could be asked to support the troops in carrying out some of their tasks such as the screening of those parts of the population who were suspected of being members of bands. For that purpose, the troops did not have sufficiently trained and versed officials, and for the rest there is mention of these units now and then because they took certain liberties and claimed privileges to which they were not entitled so that they then had to be told where their limits were.

But the picture one should form of this should be the following: The Balkans and all other areas occupied by German troops were not territories where the Wehrmacht ruled exclusively, but a large number of Reich agencies were interested in these terri-

tories and equally claimed these territories as their sphere of influence. They therefore established their offices in these areas and pursued their intentions. They took the view that they had as much right to carry out their tasks there as had the Wehrmacht in carrying out their duties in these territories, and in the final analysis their orders came from their highest superior. The peculiarity of these positions can only be explained by the fact that although there was a dictatorship in Germany and although Hitler combined all power in his hands, there did not exist one overall agency which coordinated the activities of all these agencies that worked parallel to each other and that is the reason why there were so many frictions. The Wehrmacht, however, achieved one thing in the Balkans. If the situation had become mortally dangerous from the point of view of safety in the Balkans, for instance an Allied landing, then all available forces would have been turned over in a tactical respect to Army Group F. And then the authority of Army Group F would have been boundless, but it would never have gone so far as to completely eliminate what the other Reich agencies did. This emergency never arose.

Q. Well, that gives me a little broader picture of the situation. It has been somewhat confusing as to the division of authority. You may proceed.

A. If I may sum up what I have said, the real explanation is that these were various Reich agencies pursuing the same interests without the existence of a head to coordinate work, and another explanation is that colossal jealousies existed between these agencies. All of them insisted on their own competencies.

DR. FRITSCH: General, the last document we discussed was in volume 16, but perhaps, I could put one question to you now which is connected with the problem His Honor has just touched upon. How could you interfere if you found something amiss with, say, the SD or any of the other formations mentioned? To whom would you turn?

DEFENDANT RENDULIC: All I could do was write a report which had to reach the OKW in the end and which would then decide this matter with whatever highest Reich agency would be involved as being the superior of the respective agency in the Balkans.

Q. What I understand you to say, Witness, is that you in the southeast could do nothing. You simply, so to speak, had to go to Berlin.

A. Yes, there existed no other way out; that is correct. At the utmost, there would have been the method of violence.

* * * * *

V. HOSTAGES, REPRISALS AND COLLECTIVE MEASURES IN THE BALKANS. MEASURES AGAINST PARTISANS AND PARTISAN AREAS

A. Introduction

Charges contained in all four counts of the indictment dealt with hostages, reprisals, and various collective measures in Greece, Yugoslavia, and Albania. The evidence compiled in this section on these and related topics has been divided into two types—contemporaneous documents offered in evidence by either the prosecution or defense (sec. B), and testimony of defendants and defense witnesses (sec. C). The defense testimony contains extracts from the testimony of the defendants List and Foertsch, the expert defense witness Dr. Ibbeken, and three affidavits by defense affiants.

The contemporaneous documents include orders by the High Command of the German armed forces and orders by several of the defendants, intelligence reports, situation reports, periodic reports, and war diaries of various German army units.

The issues dealing with partisans and the various groups resisting the Germans in the Balkans gave rise to questions concerning the qualifications of belligerents. On this subject, the Annex to the Hague Convention No. IV of 1907, "Regulations Respecting the Laws and Customs of War on Land," declares—

"Chapter I. The Qualifications of Belligerents

"Article 1

"The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

"1. To be commanded by a person responsible for his subordinates;

"2. To have a fixed distinctive emblem recognizable at a distance;

"3. To carry arms openly; and

"4. To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'

"Article 2

"The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms

to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

“Article 3

“The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”

B. Contemporaneous Documents

PARTIAL TRANSLATION OF DOCUMENT NO-2952
PROSECUTION EXHIBIT 26

EXTRACT FROM SITUATION REPORT U. S. S. R. NO. 37, 29 JULY 1941,
CONCERNING REPRISAL ACTION AGAINST JEWS IN BELGRADE

Berlin, 29 July 1941

The Chief of the Security Police and SD—IV A 1 – B. No. 1 B/41
Top Secret

45 copies—23d copy

Situation Report U. S. S. R. No. 37

I. Political Review—

* * * * *

Yugoslavia—

The Chief of the Einsatzgruppe of the Security Police and SD in Belgrade reports—

On 25 July [19] 41 at 1520 hours in Belgrade an unidentified Jew, wearing the yellow brassard, threw a bottle of gasoline at a German motor vehicle in an attempt to set fire to the automobile. He was prevented from doing so and escaped. On the same day in three more incidents unidentified culprits threw bottles of gasoline at German motor vehicles. In an identical incident a 16-year-old Serbian girl was arrested. She admitted that she was incited to the deed by a Jew. In reprisal 100 Jews were shot to death in Belgrade on 29 July 1941.

* * * * *

PARTIAL TRANSLATION OF LIST DOCUMENT 205
LIST DEFENSE EXHIBIT 45

EXTRACTS FROM ACTIVITY REPORTS, 704th INFANTRY DIVISION,
4 APRIL 1941 TO 30 SEPTEMBER 1941

* * * * *
4 August 1941, Valjevo—Rail line Valjevo-Belgrade interrupted through dynamiting of a bridge near Stubline, 20 km. southwest of Belgrade. All telephone lines along the rail line disrupted through sawing off of the telephone poles. At 1700 hours on 4 August rail line will be open again.

At 0500 Mionica, 16 km. southeast of Valjevo, attacked by Communist band, 1 Serbian policeman, 1 civilian killed, 1 Serbian policemen wounded, 12,000 dinars stolen. Two companies of the 64th Reserve Police Battalion with a small detachment of the 704th Signal Company pursue the band up to Belanovica, 40 km. southeast of Valjevo, there they are fired upon from a distance of 1,500 meters; they attack the band which at once escapes in the terrain which is obstructed from visibility.

It is suspected that secret communications of the insurgents are transmitted by motor vehicles which are frequently disguised as armed forces vehicles. Division orders the control of the motor vehicle traffic.

* * * * *
5 August 1941—It is reported that the Pantic band is planning an attack on Valjevo during the night from 5 to 6 August or during the following night. The division orders increased alertness of all security posts.

5 August 1941—Pantic band detachment of the people's liberators attempts to take hostages from the population and sends threatening letters to the police.

Activities by the band of the Jewish physician Dr. Kraus in and near Pecka.

6 August 1941, Valjevo—Truck from 10th Company of 724th Regiment is fired upon on its way from Vrbic, 8 km. east of Krupanj, where two men suspected of being members of a Communist band were arrested; two soldiers suffered injuries on legs and ankles, one of the arrested Serbs was wounded below the knee. After the men riding on the truck opened fire the band immediately fled into the thicket. The soldier with the leg injury was taken to field hospital 704 in Valjevo; the Serb who suffered the knee injury was taken to the civilian hospital where he died shortly thereafter.

* * * * *

7 August 1941—Disturbances in Bogatic, 20 km. northwest of Sabac. The district capital and district offices were raided by Communists, the district governor, his deputy, and one civilian were shot, wounded persons among the civilian population, prison opened, Serbian police disarmed, district headquarters Sabac sends 3 military policemen and 15 Serbian policemen to Bogatic. LXV Higher [Corps] Command gives orders to the 718th Light Division to have companies frequently advance in this area for reasons of safety.

8 August 1941—In Belgrade, too, cases of Communist sabotage and raids are increasing.

It is reported from Ljig, 28 km. southeast of Valjevo, that the police stations in Babaic and Ljig were raided by Communist bands, and the policemen disarmed and kidnapped. A woman, who had previously given a statement about the band, and a teacher were also kidnapped. Division announces the establishment of a company leadership course and measures to be taken for the safety of the motor-vehicle convoys.

9 August 1941—Railroad train moving from Cacak to Belgrade is attacked at 0100 at the railroad station Latkovic, 28 km. east of Valjevo, two members of the 724th Light Regiment and one soldier from Sarajevo killed, one master sergeant from Cacak escapes with one unharmed member of the 724th Light Regiment. Two members of the band were injured.

Since infantry is no longer available, in view of the operation "Baden", 654th Artillery Regiment with 100 men is to move at 0500 to Lajkovac, from where the raid was first reported and is to establish the facts and return to Valjevo at 0930. The same band fired on another train near the railroad station Prnjavor, directly north of Latkovic.

3d Company of 724th Regiment receives information of a band in the Ravna Gora area, 54 km. southeast of Valjevo, under the leadership of a Serbian colonel.

* * * * *

15 August 1941, Valjevo—0200-0600 hours at Lajkovac railway station, 24 km. northeast of Valjevo, an ammunition train standing there and a passenger train from Cacak were attacked by a band 80-100 men strong. Station holds out, 4 soldiers and 1 Serb railroad official dead, 7 injured. Band probably withdraws to southwest between the Valjevo-Lajkovac and Lajkovac-Cacak rail lines. Maintenance team 704th Signal Company, which eliminated disturbances on Valjevo-Belgrade line, is also used to reinforce the railroad station. Near Slovac, 16 km. northeast of Valjevo, track damaged by explosion; repaired in 2 hours from

Lajkovac railroad station. 1700 hours Cacak-Belgrade train, 3 km. east of Lajkovac, runs into locomotive and is derailed, train was fired on, 30 men going on leave were able to fight their way through to Cacak, 1 injured.

On 15 August 1100 hours, division sends out two platoons of 9th Company 724th Regiment, with 2 field ambulances of field hospital 704, to Lajkovac to protect the railroad station. 2245 hours, 3d Company, 724th Regiment arrives in Lajkovac from Uzice. Lajkovac is connected with the telephone network of the Division. Two platoons of 9th Company, 724th Regiment, return again, on 16 August 0800 hours, to Valjevo with ammunition train.

* * * * *

18 August 1941—A strong band is reported in the Bukova Forest, 17 km. south of Valjevo.

Twenty meters of railroad track blown up 10 km. east of Obrenovac.

Truck with army mail and maintenance team 704th Signal Company is fired upon 7 km. south of Losnica. Escort detachment takes two prisoners.

The red flag is hoisted between Sabac and Losnica, north of the road as far as the Sava. 2d Battalion 750th Regiment undertakes thrusts from Mitrovica and Sabac to the especially threatened villages of Lipolist (to which 120 Communists have withdrawn), Badovinci, Crnobarski, Glogovac. Near Dublje the railroad station is attacked and a stretch of railroad track torn up. First Company of 2d Battalion 750th Regiment comes into conflict with a band there on 19 August [19] 41.

18 August 1941, Valjevo—Telephone lines to Sabac and Losnica disturbed. Maintenance team 704th Signal Company eliminates the disturbances. The lines are immediately cut again. Radio connection with 704th Engineer Company in Koviljaca must be established.

1st Battalion 724th Regiment with 5 pursuit detachments of 30 soldiers each, 20 Serbian policemen, 20 Arnauts, in addition 1 platoon of 1st Battery 654th Artillery Regiment, surrounds a band 100 men strong in the Gradina mountains, 11 km. southeast of Uzice; 38 enemy dead, 10 farmhouses burned down, 15 set afire by artillery.

Our losses—1 Arnaut dead. Booty—5 light machine guns, 12 rifles, 10 hand grenades, 1 pistol, ammunition, 9 tents, 1 horse, 1 typewriter, 1 town stamp of an attacked town, 2 camp newspapers, camp library with identity cards of personnel, including photographs, railroad tickets, Communist literature, a large stock of hard tack. Fifty to sixty men break through chain of Serbian

police and escape to the west, 20 Arnauts pursue them, capture 3 light machine guns and pistols; 3 men and 1 woman shot.

18 August 1941, Valjevo—Reports of a band in Vlastic Forest (15 km. x 5 km. large) 30 km. northwest of Valjevo and in the village of Bukovica, 15 km. northwest of Valjevo.

18 August 1941, Valjevo—Bands are reported around Loznica, Zajaca, and Krupanj.

19 August 1941, Valjevo—0200 hours. For reinforcement of 3d Battalion 738th Regiment, 1 squad is dispatched on motor cars of the 704th Engineer Company to Krupanj, and 1 squad to Losnica. Eleventh Company 738th Regiment reinforced by Engineer Company of 704th Regiment is by force reconnoitering the road Loznica Sabac in direction Petrovica and Lipolist during the night. Action advanced only up to Prinjavac. There, road blocks and heavy gun fire at around 0400 hours. Village half burnt down. After main attack by the enemy at 0930 enemy sustained 7 dead. Own losses 11th Company 738th Regiment—7 wounded, 2 seriously, 1 hopelessly. 1 national flag, 1 Soviet flag captured. On the way back 11th Company 738th is so strongly attacked before Losnica that withdrawal must take place over Badovinci and beyond the Drina towards Koviljaca.

19 August 1941, Valjevo—* * * Railway line Uzice/Cacak closed because of unexploded bomb on the railway tracks at Rasna, 4 km. south of Pozega. All telephone communications cut. Bomb will be removed from Uzice.

19 August 1941, Valjevo—* * *

Division received report of a Communist band in Sokolplanina at Stave, 15 km. west of Valjevo. Through terror the band is compelling the peasants to join and an attack on Stolica and Krupanj is planned.

* * * * *

816th Military Administration Headquarters Uzice reports—According to a report by a peasant from Kapavnik-mountains east of the Ibar valley, about 1,000 Chetniks with machine guns and mountain artillery are supposed to be between Raska and Mitrovica, planning to attack Novi Pazar and Mitrovica during the next days. Five hundred men are said to have passed during the last days from the Rogosna mountains, west of the Ibar valley, to the Kapavnik mountains.

20 August 1941, Valjevo—An army mail truck with escorting squad shot at between Ub and Obrenovac. Escort returned fire, no losses. Prior to that, mayor of Valjevo and treasurer were arrested by the band and 105,000 dinars robbed from the town treasury. Treasurer set free again. Band writes to post com-

mander [garrison headquarters] Valjevo that the mayor of Valjevo is to be exchanged for the mother-in-law of Dr. Pantic, arrested because of her son-in-law's Communist activities. Division orders post commander [garrison headquarters] to forward the request to the authority which arrested Pantic's mother-in-law, probably the SD Belgrade.

Bands attempt to cut supply line into Valjevo. Bakers of Valjevo have closed their shops.

In Zovanje, 7 km. southwest of Valjevo, a band is reported.

2230 hours—Attack of a strong enemy reconnaissance troop on Loznica. 2300 hours quiet again.

Band concentration around Krupanj and Loznica. 704th Engineer Company prepares to leave Valjevo on 21 August [19] 41.

Antitank company of the 714th Infantry Division and motor truck of 704th Signal Company are shot at several times from cornfields and houses while on their way from Obrenovac to Ub, on the same spot on which the mail bus was shot at this morning. The houses from which the shots came are put to fire. Four dead are recognized on enemy side. Losses—1 slightly wounded.

Three raiding detachments, 1st Battalion, 734th Regiment (4 officers, 100 enlisted men, plus 92 Albanian soldiers plus 40 Serbian Gendarmes) try to find bands reported in the area of Banja Basta, 26 km. northwest of Uzice on the Drina. No band found.

Long distance communication Valjevo-Loznica-Krupanj disrupted.

20 August 1941, Valjevo—Mine of Zajaca closed, because—on account of Communist threats—workers don't show up for work. Supply of ore for one more day available, then the plant will have to be closed also because of lack of coal.

* * * * *

21 August 1941, Valjevo—Decree of the Serbian Minister of the Interior regarding struggle against Communist bands and restoration of peace and order.

Division orders again to reexamine the security of quarters. SF [express—long distance]—trains Belgrade-Salonika are being made safe by an escort detachment in the strength of one squad of 734th Infantry Regiment.

* * * * *

22 August 1941—100 bandits are reported 4 km., south of Osecina in the village of Bojcica, 24 km. west northwest of Valjevo. Raiding operation of the 1st Battalion, 724th Regiment (1 officer and 36 enlisted men of the 4th Company of the 724th Regiment; 1 officer and 25 enlisted men of 592d Regional Defense Battalion; 15 Serbs and 40 Albanian gendarmes) towards Arilje,

12 km. south of Pozega, where bands attacked the village and the Serbian gendarmery sustained the loss of two dead and 4 wounded. Because of the break-down of one motor truck, no success. Bands left one-half hour before raiding detachment arrived in Arilje. During pursuit 5 km. south of Arilje, machine gun shots are fired from cornfields. Enemy fled. Pursuit had to be discontinued because of darkness.

22 August 1941—One platoon of 3d Battalion, 724th Regiment, riding in motor trucks to Krupanj-Loznica reports—Loznica firmly held by Communists.

23 August 1941—816th Military Administration Headquarters, Uzice reports—Band attack on Ivanjica, 236 km. south southwest of Cacak, and the antimony plant there is imminent. Division informed 717th Infantry Division.

In Stupnica, 12 km. southeast of Loznica close to westerly road Valjevo-Loznica, Communists through placards are calling all men between the ages of 16 and 60 for recruitment and are threatening reprisals in case of noncompliance.

Call for mass meeting at monastery Korenita, 10 km. southwest of Loznica on road Stolica-Loznica, where the abbot, teacher, and innkeeper will speak on 24 August [19] 41 on the subject "Procurement of More Weapons and Ammunition."

23 August 1941, Valjevo—In Klinci, 5 km. southwest of Valjevo, one student arrested for Communist activities.

* * * * *

23 August 1941, Valjevo—LXV Higher [Corps] Command orders to search and surround the village of Grabovac, 14 km. southwest of Obrenovac, presumably the seat of the Communist central agency of the Obrenovac district. Operation is named "Geier".

23 August 1941, Valjevo—Committed—2 raiding detachments of 734th Infantry Regiment together with 20 Serbian gendarmes from Obrenovac, and 2 groups of a police company of 64th Reserve Police Battalion, Obrenovac; 1 platoon of 734th Infantry Regiment, 2 platoons of 7th Company, 750th Infantry Regiment, Sabac; and 1/2 a platoon of 3d Police Company, 64th Reserve Police Battalion, Sabac, and 30 Serbian gendarmes; 1 raiding detachment of 3d Battalion 724th Regiment, and radio car of 704th Signal Company, and 3 portable radio sections, 654th Artillery Regiment, 1 platoon, 2d Battery, 654th Artillery Regiment, Belgrade.

Course—Encirclement of the place developed according to plan. First Battalion, 734th Regiment, was shot at from cornfield; attacked with parts of 3d Battalion, 734th Regiment; surrounding maneuver unsuccessful since enemy withdrew, presumably because

of the very quickly starting fire of the artillery sent forward for support.

Result—Five men shot during flight. One mimeograph machine with Communist pamphlets, one bag of rifles captured. Three houses of not present Communists secured.

One truck with 2 medical soldiers of 704th Field Hospital, scheduled to transport 4 seriously wounded and 1 dead of 2d Battalion, 750th Regiment, from operation "Geier" to Sabac, was forced to return because of a wrecked road bridge. There, a unit of 7th Company, 750th Regiment, returning from Sabac also ran into a new fight. Wounded were left in Ub and are being treated by a Serbian doctor.

23 August 1941—The truck was shot at again on its way to Valjevo with the wounded. Return to Ub.

* * * * *

27 August 1941, Valjevo—11th Company, 724th Regiment, receives word through middleman that allegedly 25,000 well armed Chetniks are in the Cer mountains, 20 km. northeast of Loznica. Their aims are—

1. Struggle against Communism.
2. Struggle against the Ustasha.
3. Prevention of antimony export.
4. Liberation of Serbia.

The middleman wants to arrange for a meeting with the leader of the Chetniks on a hill 9 km. north of Stolica. Three man escort is agreed upon for each side.

28 August 1941 [Sic] Valjevo—At the same time LXV Higher [Corps] Command orders—Bands known to be Chetniks should not be attacked. Distribution of pamphlets originating from Chetniks should not be prevented; communism is to be fought with the help of the national Chetniks.

* * * * *

27 August 1941, Valjevo—Divci, 5 km. east of Valjevo, attacked in the evening. Raiding detachment of the 3d Battalion, 724th Regiment, with 25 Serbian gendarmes states—Serbian gendarmerie fled Divci. Band has plundered archives of the town office. One civilian car shot at, son of a Serbian Nationalist shot, car burnt, small railway bridge wrecked.

27 August 1941, Valjevo—All long distance telephone communications emanating from Valjevo disrupted, except the one to Uzice. The occupation of Priboj, Prijepolje, and Novo Varos by an Italian battalion—reported by Colonel Gialla on 26 August [19] 41 to the 2d Battalion of 724th Regiment at Visegrad—supposed to go into effect on 27 August, did not take place.

Italians advanced only up to Brodarevo, 18 km. south of Prijepolje. Apparently they are pressing forward in the strength of one regiment against the rebellious Montenegrins there, while at the same time deploying bombers from the south against the Croatian units fighting in the north.

* * * * *

27 August 1941, Valjevo—On way back from Koviljaca to Valjevo near Osladic 17 km. northwest of Valjevo, at 1830 hours, again shot at by 4 machine guns along a track of 2 km. and attacked with hand grenades.

Own losses—2 killed, 1 missing, 12 wounded, one of whom seriously, 1 truck burnt out; enemy losses unknown.

One raiding detachment, 3d Battalion, 724th Regiment, which had been sent out at 2000 hours from Valjevo to reinforce the police station Kamenica, 14 km. northwest of Valjevo, which is threatened by bands, was joined by the escort detachment.

Near Osladic a 10-meter wide road-bridge was blown up, according to reports from inhabitants.

* * * * *

29 August 1941, Valjevo—On 29 August 1941, the missing soldier is brought with a sprained ankle to Valjevo by a peasant. He had fallen from the back seat of the cycle through a sudden start, had been captured by the bandits, beaten up, and released after a day, with the remark that they were out for officers only.

* * * * *

2 September 1941, Valjevo—Telephone line Valjevo-Uzice interrupted.

0615 hours, 11th Company 724th Regiment Krupanj reports—1 September, 0700 and 2100 hours. Stolica attacked surprisingly by rather strong enemy forces. One lieutenant, director of the plant, captured, another lieutenant probably killed, the platoon dispersed. One NCO, who was supposed to report on situation at Stolica Zajaca to Krupanj, wounded at strong road block 2 km. before Krupanj. 11th Company 724th Regiment tried to re-assemble dispersed soldiers by way of light signals during the night of 1-2 September 41.

0625 hours, 11th Company, 724th Regiment, reconnoitres with patrol in the direction of Stolica.

0815 hours, LXV Higher [Corps] Command communicates that Croats have committed one battalion Ustasha on the line Koviljaca-Loznica.

0917 hours, Return of reconnaissance patrol to Krupanj with

a group of the field guard Stolica. Advance to Stolica impossible, as patrol meets with machine-gun fire from the hills 400 meters before the mine. Twenty men of the field guard still missing, two of which are certainly dead. Krupanj threatened as well, because of gatherings on the surrounding hills. No radio contact with 12th Company, 724th Regiment, which was detailed to Loznica. 11th Company, 724th Regiment, reports gatherings on the hills of Krupanj. Companies prepare for defense.

1045 hours, LXV Higher [Corps] Command orders immediate transportation of a company of 2d Battalion, 724th Regiment, Visegrad, with loading space which it will have to procure for itself, to Valjevo. To 2d Battalion, 724th Regiment, via radio.

2 September 1941, Valjevo—Higher [Corps] Command communicates—

1305 hours, 3d Battalion, 738th Regiment, fighting near Koviljaca and Loznica, forced to withdraw towards east. Croats are trying to cross the Drina near Koviljaca and Zvornik, succeeding only near Zvornik. There, after crossing the Drina, again repulsed.

1555 hours, 11th Company, 724th Regiment, Krupanj, reports—11 men not yet returned, 2 of them certainly dead. At Stolica 300 kilograms of explosives and 2 machine guns, one of which was made unusable, fell into the hands of the Communists or the Chetniks.

2 September 1941—1630 hours, division inquires at LXV Higher [Corps] Command, whether 10th and 11th Company, 724th Regiment, may be withdrawn from Krupanj. Commander Serbia decides that the plant must be held.

1810 hours, LXV Higher [Corps] Command communicates—reconnaissance by aircraft has shown 50 men are defending themselves in the castle of Koviljaca and are under fire from the west. Over Koviljaca the Serbian flag is flying. On the road Loznica-Koviljaca a motor-ambulance burnt out. The aircraft was fired upon from the mountains, had to stop reconnoitering because of engine trouble. 12th Company, 724th Regiment, probably involved in the fighting near Koviljaca.

1820 hours, LXV Higher [Corps] Command communicates—According to report from 718th Infantry Division, 3d Battalion, 738th Regiment, likely to be able to hold out at Koviljaca. On 3 September the following are to be committed: Antitank Company Lazarevac (714th Infantry Division) via Sabac with 2d Battalion, 750th Regiment, [and] 5 companies of Croatian Ustasha. 2d Battalion, 750th Regiment, will get contact with Croatian regimental staff on 3 September. Koviljaca is free.

1835 hours, division orders on telephonic order by LXV Higher

[Corps] Command that Krupanj is to be held under all circumstances.

1910 hours, 724th Infantry Regiment reports—Railway line Visegrad-Uzice blocked up by landslide between Vardiste-Mokra Gora. Track will be reopened on 3 September, 1200 hours, 5th Company, 724th Regiment, left on 2 September, 1815 hours; arrival at the place of the accident 2215 hours; change into train from opposite direction from Uzice. Arrival Uzice probably 3 September 0200 hours.

2000 hours, Chetniks, who have surrounded Krupanj, demand surrender, threatening, for the reverse case, slaughtering to the last man.

* * * * *

11 September 1941, Valjevo—6 wounded transported from Valjevo to Belgrade by a Junkers 52.*

1025 hours, Staff of the 724th Regiment's 2d Battalion, the 6th and 7th Company of the 724th Regiment, marching from Valjevo to Uzice, are engaged in combat according to air reconnaissance.

* * * * *

1700 hours, another 28 wounded are transported to Belgrade by air. Weapons, rations, mail moved to Valjevo from Belgrade. * * * Railway line Valjevo—Lajkovac again destroyed over a stretch of 100 meters in the vicinity of **Slovac**.

2000 hours, the 3d Antitank Company of the 220th Regiment reports—railway line Valjevo—Lazarevac-Arandjelovac-Mladenovac open for traffic in the morning of the 12 September, Obrenovac line destroyed. No coal at Lajkovac for the railroad. The 3d Antitank Company of the 220th Regiment has dispersed a band near Stepojevac, but has been unable to destroy them. A band supposed to be 800 strong is reported on the march from Ocedina, 10 km. northwest of **Valjevo**.

11 September 1941, Valjevo—The division orders the alarm stations to be manned and strict check-up of the approaches to the city on the next morning; also by cavalry patrols in the neighborhood.

12 September 1941, Valjevo—Cattle receipts at Valjevo extremely small. Communist bands prevent delivery of farm products by the peasants around Valjevo. Four armed civilians detained on this occasion. Supply of fresh meat has to be secured by requisitioning in the surrounding villages. Food supply of the civilian population very much endangered.

According to Chetnik reconnaissance the town of Ub completely

* German transport plane.

controlled by Communist rabble. Captured Serbian field policemen and respected citizens are shot dead, looting occurs.

At Banja Basta from 0600 to 1100 skirmish between Communists and Chetniks. German customs officials (22 men) from Ljubovijca and Banja [Banjina] Basta have made their way fighting over the Sokolina, north of Kremna, to Uzice. Bridges between Uzice and Banja [Banjina] Basta blown up. The Chetnik commander Prinska remarked at Banja [Banjina] Basta, showing a German army pistol: "For the rest, we are free Serbs, and are just waiting for the time when the Germans will have left for good".

In the area 10 km. northwest of Uzice bands several hundred men strong are reported.

12 September 1941, Valjevo—Serbian field police station Divci raided by Communists according to a report, policemen captured, according to another report, forced to go over by the Chetniks. Chetniks posted guards on the road Valjevo-Lajkovac.

* * * * *

Fourth Company, 724th Regiment, is attacked by Communists during the night of 12–13 September. Attack against barracks repelled. On 12 September 4th Company, 724th Regiment, pursues with 2 officers and 37 enlisted men, as well as 10 Serbian field policemen as far as Arilja, incurring the following losses: 2 killed, 1 wounded. Strength and losses of enemy unknown; 1 bandit shot dead, 1 house burned down. Communists are in positions between the 4th Company at Pozega and the fuel depot Jemenicka Stena, which is 3–5 km. to the east of Pozega and protected by 1 platoon, and have occupied Pozega railway station.

* * * * *

13 September 1941—0000–0300, Ammunition depot Valjevo is fired upon from three sides with machine guns (tracer bullets), submachine guns and rifles. No casualties. Enemy strength and losses not known.

* * * * *

13 September 1941, Valjevo—Ammunition transports are reported northwest of Valjevo on the road Valjevo-Loznica. At Stave the staff of the bands apparently coming from Krupanj is supposed to be located; those bands are planning an attack against Valjevo. Agents report as the precise date 14 September 0300 hours. Division orders manning of alert positions; the attack does not materialize.

2130 hours, 3d Antitank Company, 220th Regiment, Lazarevac, reports that railway line Lajkovac-Mladenovac was destroyed

again by dynamiting at 1700 hours. Two railway engines on their way from Lajkovac to Mladenovac had to turn back. Repair work on the track has started.

Commander of the Kolobara Chetnik detachment writes again to station headquarters Valjevo. There are differences of opinion between him and the Chetnik commanders of Valjevo.

Arrest of a Communist worker in Belgrade, who is in possession of a Communist leaflet, by guard of 734th Infantry Regiment.

Raiding operation by 1st Battalion, 724th Regiment (2 officers and 46 enlisted men of 4th Company, 724th Regiment; 2 officers and 50 enlisted men of 3d Company of 724th Regiment), to Arilje. Houses searched and burned down. People escaping shot at. Army equipment, ammunition, weapons found.

* * * * *

15 September 1941, Valjevo—Bands advancing towards Valjevo from the north, northwest, west, and southeast. Strength unknown; at Stave supposedly 1,000 men. Artillery shelling advanced detachments of the Stave band at Kotarci (6 km. west of Valjevo) with surprise fire during the night.

Raiding detachment 1st Battalion, 724th Regiment (2 officers and 28 enlisted men of 1st Company, 724th Regiment; 1 officer and 25 enlisted men of 2d Company, 724th Regiment; 3 officers and 75 enlisted men of 3d Company, 724th Regiment; 1 officer and 25 enlisted men of the 529th Regional Defense Battalion for special missions), goes to Kadinjaca, 4 km. northwest of road intersection Uzice-Visegrad/Uzice-Dub-Banjina Basta; supporter of the bands arrested, whereabouts of the bands ascertained; a farm building in which ammunition was found, burned down.

* * * * *

16 September 1941, Valjevo—2000 hours, convoy arrives in Valjevo. Behind the convoy the road is again destroyed. Reportedly, a bandit force of approximately 300 men is moving in on Valjevo.

* * * * *

PARTIAL TRANSLATION OF LIST DOCUMENT 202*
LIST DEFENSE EXHIBIT 46

EXTRACTS FROM WAR DIARY OF MILITARY COMMANDER SERBIA,
SEPTEMBER 1941

* * * * *
Commander Serbia
Headquarters Staff Ia [Operations Section]

No. 113/41 Belgrade, 1 September 1941

In the evening, 31 August 1941, a thick wire tied around a tree was discovered in Dedinje, Chestnut Avenue, for the fastening of which there was a hook with a few links of chain on the tree on the opposite side of the street.

That is to say, it was a so-called automobile trap.

Further automobile traps of this and similar kind are to be feared. Therefore, cautious driving is necessary, especially during night trips, keeping the road under strict observation, in which connection it is once more reminded that recently foottraps were repeatedly set by Communists.

Distribution:

A, B, C, D.

For the Commander Serbia
The Chief of the General Staff

BY ORDER:

[Illegible signature]

Major, GSC

Teletype

Appendix 3
[Initial] F

To Armed Forces Commander Southeast (12th Army)
Ic [Intelligence Section]

Consigner
LXV Higher [Corps] Command

Daily Report dated 1 September 1941

704th Infantry Division

II/724 [2d Battalion of 724th Regiment] will be concentrated on 1 September 1941 at Visegrad.

714th Infantry Division

1. 9/721 [9th Company of 721st Regiment] will be transferred on 1 September from Kikinda to the Iron Gate.

* Other parts of this document are reproduced in sections IV C and D.

2. Railroad line Cuprija-Senjski-Rudnik blown up at three points. Railroad ticket offices at Senjski-Rudnik and Ravna Reka, 21 kilometers northeast of Cuprija, robbed, at the same places the consumers' cooperative shops were looted.

3. On 31 August, bandits forced inhabitants of the village of Mirilovac, 6 kilometers southeast of Paracin, to join the guerilla band by threatening them with the death penalty.

717th Infantry Division

1 September 1941, Raiding Detachment I/749 went into action in order to seize a meeting of Communists at Milicevci, 8 kilometers north of Cacak.

718th Infantry Division

1. As on 31 August, police platoon was attacked by bands at Bogatic; 7/750 and a police platoon were set in march from Sabac, and a raiding platoon from Mitrovica to Bogatic. Both reached Bogatic without losses, towards 2000 hours.

2. Supply train on the way from Jajce to Banja Luka, fired upon at road blocks, reached Banja Luka without losses on 31 August at 1700 hours, and returned to Jajce with reinforced escort on 1 September 1941.

LXV Higher [Corps] Command
Ia

[Illegible initial]

* * * * *

Appendix 6

To Armed Forces Commander Southeast (12th Army), Ia

KR 503

* * * * *

2. *Bands' activity*, 31 August–2 September—raids by bands against 8 more villages. 2–3 September—3 attempts at dynamiting railway lines (2 near Cacak, 1 between Zajecar and Paracin). Furthermore, for the first time, railway line Kraljevo–Skoplje damaged by dynamiting; 6 injured. Two raids by bands against the rural police station Boljevac (22 kilometers south of Zajecar) and Ivanjica. Policemen disarmed. 2 September—at 1530 hours surprise fire against maintenance party northwest of Kragujevac. One NCO dead, signal car burnt out. 2–3 September—telephone lines Uzice-Valjevo, Uzice-Cacak, Uzice-Kraljevo disturbed. 3 September—attempted raid against munition depot at Jafodina beaten off. 3 September—bridge dynamited between Vlasenica and Mesarci (30 km. southeast of Sabac). 3 September—attack with hand grenades against interpreter at Pozarevac. Two seriously injured.

3. *Special.* Bands are trying to seal off the Uzice, Cacak, and Valjevo areas by planned disruption of our communications and signal communication channels.

Commander Serbia/Headquarters Staff

Section Ia/F

4 September 1941

* * * * *

Appendix 11

KR 503

To Armed Forces Commander Southeast (12th Army) Ia

Daily Report

1. *Armed forces activity*—Fighting near Loznica continues. Dive-bombers went into action several times. Krupanj appears lost. Detailed news about troops missing. 3 September in Belgrade at the station two people suspected of an attempted attack arrested by patrol.

2. *Bands' activity*, 4 September—raid by the bands against supply train of the District Command Semlin near Ralja (25 km. south of Belgrade). Own losses—4 wounded. 4 September—at 2112 hours armed forces transportation train in direction Nis stopped by strong band, held up by dynamiting of the track. 4-5 September—raids against 3 railway stations on the main line to Nis (40 km. south of Belgrade). Stations destroyed, tracks dynamited, train service discontinued. 4-5 September—dynamiting of railway tracks on the lines Belgrade-Sarajevo, Paracin-Zajecar, Belgrade-Kucevo, Lapovo-Kraljevo. Bands prevent repairs. 3 September—extraction work in the Drpca mines at Kos. Mitrovica temporarily paralyzed by Communist bands. 4 September, 1300 hours—Sava steamer captured south of Sabac, the crew kidnapped. 3 September—raid by the bands against the Miseca mines (5 km. north of Arundelovac), machinery destroyed. 5 September—telephone lines south of Belgrade interrupted. 3 September—bands raid three more villages.

Commander Serbia/Headquarters Staff, Section Ia

5 September 1941

* * * * *

Appendix 14

KR 503

To Armed Forces Commander Southeast (12th Army)

Ia [Operations Section]

Daily Report

1. *Activity of armed forces*, 5 September [19] 41—Stuka attacks were able to free parts of units cut off in Krupanj. Our own losses are not yet known. 5 September—1 company is guarding

the work at the Ripanj tunnel on the Belgrade-Nis line. 6 September—traffic to Nis continues up to now by rerouting through Mala-Krsna. Line near Markovac free again. 1125 hours, partisan attack on line near Mala-Krsna is now interrupting rail communications.

Further details on destruction are not yet available, since wires cut. 6 September, Stuka attack launched on Zlot (30 km. northwest of Zajecar). Objective—destruction of Communist preparations directed against Bor. Report on results follows.

2. *Bands, activity*, 4 September, 0530 o'clock—rails blown up on Lapovo-Kraljevo line (5 kilometers south Kragujevac). 4 September—100 meters of track removed again between Brgule and Stubline (50 km. southwest of Belgrade). Train traffic to Sarajevo not possible at present, since the line is destroyed in many places and almost all the stations are being attacked. 5 September—police in Bacevac disarmed (Bajina-Basta district). 6 September—all telephone lines to Uzice destroyed. 6 September—Sava steamboat on the trip from Mitrovica to Belgrade forced to turn back near Sabac by rifle fire. Further partisan attacks on 4 communities. Records burned.

3. *Special*, 6 September—Belgrade-Agram [Zagreb] line blown up near Slav. Brod (Croatia). In service again after 10 o'clock. Belgrade quiet up to now.

Commander in Serbia—Headquarters Staff Ia/F

6 September 1941

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Appendix 16

To Armed Forces Commander Southeast (12th Army)
Ia [Operations Section]

KR 503

Daily Report

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3. *Bands' activity*, 1–2 September—Lissa antimony mine (40 km. southeast of Uzice) shut down by bands. 1 September—one Serbian police lieutenant and 15 Serbian policemen in Ivanjica (40 km. southeast of Uzice) disarmed by bands. 5 September—Rudnik-Bare mine (north of Cuprije) attacked by Communists. Operations disturbed. Surprise machine gun fire on Wehrmacht army trucks near Cacak. Our losses—7 dead, 2 wounded. 6 September—Wehrmacht patrol in Jagodina (near Cuprija) attacked by Communists. Our losses, 2 dead, 2 wounded. Lubovija occupied by 100 Communists. Sub-prefect [Landrat] fled. Police and customs guards' withdrew before superior

strength to Bajina Benta (30 km. west of Uzice). 7 September—operations in Vistad plant in Valjevo disturbed by continued sabotage. Five railway stations on the Uzice-Krusevac and Paracin-Zaejcar lines attacked by bandits. Traffic installations destroyed. Partisan attacks on 14 more communities. Records burned. Telephone installations destroyed. Mladenovac-Cacak and Jagodina-Kragujevac telephone lines cut in several places. Disturbances removed.

Commander in Serbia/Headquarters Staff Section Ia/F

* * * * *

Appendix 18 b

Copy

Radio Message 8 September 1405 hours

To Commander in Serbia/Headquarters Staff Ia and Belgrade

1. Systematic character of the insurgent movement in encirclement of vitally essential mines and army billets. Interruption of means of communication and disturbance of supplies.
2. Attacks on 36 community offices, 13 railway stations, 6 government offices, 3 police stations, 5 customs stations, 400 kilograms explosives with accessories and 800 rounds of ammunition captured. 13 German soldiers dead.
3. Situation very serious due to lack of troops. Central leadership lacking. Local conditions apparently unknown higher up.
4. Administrative Area Headquarters unable to take special measures.

816th Administrative Area Headquarters

* * * * *

Appendix 24

KR 503

To Armed Forces Commander Southeast (12th Army) Ia

Daily Report

* * * * *

2. *Armed forces losses*—Period of 1–8 September—dead, wounded, and missing, 414.

3. *Bands' activity*, 8 September—Passenger ship “Kralj Maria” fired upon by bandits between Belgrade and Sabac. Three injured. A tugboat and 1 barge of the waterways administration sunk by Communists near Drenovac, and 1 motorboat captured. Partisan attacks on 2 railway stations on secondary lines and almost all stations on the Belgrade-Sarajevo line around Uzice. Eastward rerouting line (Belgrade-Mala-Krsna-Velika-plana) again blown up at three places. Repairs will presumably

take 2 days. 9 September—train collision due to sabotage near Milosevo (Lapovo-Nis main line). Civilian losses, 6 dead, 25 injured. Will take at least 24 hours to clear up. Partisan attacks on 62 more communities and public offices, 10 police stations. Part of Serbian policemen disarmed and carried off.

* * * * *

Appendix 38

For official use only

Belgrade, 13 September 1941

Commander Serbia/Headquarters Staff Section Ia/F

Subject: Instruction of the Central Committee of the Communist Party of Serbia regarding the operative method of band warfare

A member of the Central Committee of the Communist Party of Serbia, arrested by the Security Police, Einsatzgruppe Belgrade, had on his person the enclosed—*Instructions of the Communist Party of Serbia for band warfare*.*

The tactics used up to now by the Communists at their execution of acts of sabotage and raids of all kinds, also against personnel of the army, show clearly that they are guided by these instructions.

The instructions are sent, therefore, by the quickest way to all command authorities, offices, and military units (down to company level), with the direction to instruct the troops immediately and comprehensively about orders and method of fighting of the Communist bands.

The exact knowledge of Communist tactics and method of fighting will, doubtlessly, contribute to a successful offensive war against the Communist bands.

The LXV Higher [Corps] Command may, for immediate delivery of the instructions to the troops, request aircraft from the Commander Serbia, if necessary.

Signed: DANCKELMANN

Lieutenant General, Air Force

Certified:

[Illegible signature]

Captain, Cavalry

Distribution: All military offices in the area of the Commander Serbia down to the company level

* * * * *

* The enclosure, titled "Partisan War" is reproduced immediately following.

Copy of Translation

PARTISAN WAR

1. The lines of communication in the rear area [hinterland] are very suitable objects for the Guerrilla war. Therefore, organized bands frequently push into the hinterland of the enemy, destroy RR tracks, telegraph lines, and bridges, set magazines afire, raid transports, and harass the enemy in every conceivable manner.

2. Exact intelligence [service] and the great mobility of the troops are the best guaranty of success. The enemy is attacked at his weakest points, selecting those having the least guarding.

3. If the population actively supports the bushwar and the territory is favorable, the enemy hinterland can be seriously menaced and the enemy forced to bring up stronger security forces.

Raids

During raids it is necessary to approach the enemy unnoticed and to attack him suddenly. Therefore, all movements must be carefully disguised, even from the population. Highways must be detoured, nightly shelter is to be taken either in lone houses or at well hidden places. It is useful, sometimes, to set out in quite a different direction and to turn towards the true destination only later. The raids must take place at night if possible. It is, therefore, necessary to master well the territory and the position of the enemy. Intelligence [information] in regard to this must be carried by spies. At favorable places an ambush may be laid on highways used by the enemy, in order to make a surprise attack against the enemy driving by.

Destruction of the RR tracks

The destruction of RR tracks is apt to freeze the traffic for a greater length of time. If no explosives are available the track is to be broken up shortly before the arrival of a train. The disturbance of the RR net is to be effected especially near sharp curves or in the neighborhood of woods. Removal of only one rail is not sufficient to impair the line, however it may put the railway temporarily out of commission.

Raiding of transports

1. Above all, the strength and size of the transport, the distribution of the escorting force, as well as the direction and time of passage must be found out.

2. The best moment to attack is during the passing of a diffi-

cult spot, e.g., at a bridge, in a ravine, and while driving uphill into a forest.

3. The transports may be raided openly if the strength of the escort troop offers chances of success. Nevertheless, it is of advantage to entice the escort troop away from the transport, in order to then launch a forceful attack against the transport. If the escort is too strong for a successful raid a surprise attack is imperative in which the vehicles must be damaged, the tires cut, and the motor magnetos removed. Here raiding from ambush is recommended. Smaller detachments, not suitable for larger scale raids, may specialize in destruction of bridges. If the transport tries flight, the horses leading the transport must be killed in order to delay the flight. Raids on strong enemy columns are not to be undertaken, but after the passage of the column, single groups or the train may be attacked.

Remarks concerning night fighting

1. At night, the knife plays the principal part. Firearms are to be used only in order to mislead the enemy. A night raid takes the enemy by surprise, thereby increasing the chances of success. The enemy has no possibility to ascertain the force and direction of the attack, all of which enables even a numerically small group to have great success.

2. The night raid is undertaken—

a. After, by day and by night, the position of the enemy and the points of approach have been well observed.

b. If the hostile forces can be sized up, with their distribution and equipment.

3. Firearms are outruled on principle, since their effect is small at night, and shots only serve to give away our position.

4. The greatest possible order and quiet must prevail. Neither smoking nor any use of light may be permitted. All communication is by whispering.

5. The knife attack takes place in deployed formation.

6. Ahead of the troop, a patrol with the guide will march. The storming is done by the combat lines. The reserves remain in back. Communication to the base, all along the front, is maintained by allies.

7. On the defensive, the troop holds together, yet always remaining in contact with the enemy.

Instructions for mountain warfare

When executing tasks in mountain regions, spies and well oriented scouts must be used in greatest possible number. The best way for a mountain raid is, after surrounding the enemy,

to push in his flanks and rear. Mountain walls are the best position for defense, for they offer view and power of resistance. Narrow passes must be occupied. Nowhere is the chain system more advantageous than in mountains, as it precludes counter-attacks.

The soldiers' tasks

1. The soldier must come to the aid of his comrades, even when he exposes himself to the greatest danger.

2. He must courageously look ahead, even when his comrade in front of him is killed, as the man who persists 5 minutes longer than the enemy will be victorious.

3. If he meets with difficulties, he must only consider how to overcome them, and not reflect on their magnitude. Nothing is impossible.

4. No shot must be fired without taking meticulous aim, except if this is necessary to deceive the enemy. Taking correct aim is the best protection for one's self.

5. Those who weaken the morale by failing to obey orders or by rumor propaganda, who throw away their weapons or ammunition, and who deliberately leave their allotted place will receive the death penalty.

6. Be considerate toward your own countrymen, do not loot or steal, but render assistance. The people should see in you the true fighter for their freedom, and consider you their upright friend.

-
1. Security for the terrain.
 2. Knowledge of the terrain.
 3. The surroundings—
 - a. Gendarmerie posts.
 - b. Members of the fifth column.
 - c. Identification marks.
 4. Guards.
 5. Food supply administrator, train.
 6. Ammunition and arms depot.
 7. Troop commanders and political leaders.
 8. Meetings—
 - a. Military.
 - b. Political.
 9. Discipline and distribution of work.
 10. Reconnaissance parties for new terrain.
 11. Detachments for agitation and propaganda.
 12. Detachments for the collecting of food and supplies.
 13. Detachments for operational duties.

14. Courier.
15. Bases in the surrounding villages.
16. Rest period, retreat, and reveille.
17. Practical military training.
18. Knowledge and experience gained in action.
19. Medical officer and medic.
20. First aid kit—iodine, dressing material, gauze, alcohol, chinine, aspirin, vaseline, cotton wool, hydrogen peroxide.
21. Rewards for bravery and success.
22. Criticism and self-criticism.
23. Suggestions, remarks, and complaints.
24. Vengeance for fighters killed in action.
25. Naming of partisans.
26. Maps.
27. Tents, rucksacks, knapsacks, water bottle, helmet, various pieces of apparel, blankets, rope, battery, knuckle ring, stone, pickaxe, spade, hatchet, nails, horse, bicycle.
28. Literature on partisans.
29. Recruiting of new people.
30. Preserves, peximit, food supplies for 3 days.
31. Lighting material—gasoline, petroleum, wick [Fetzer] phosphorus, matches.
32. Pass word and watchword.
33. Attitude towards the population—Do not steal or loot, assist them in their work.
34. Fight cowards and talkative persons.
35. Scouts, spies.
36. How to take charge in any operation.
37. How to save the wounded.
38. Opiates and anesthetics—Various poisons for dogs and horses.
39. Three-cornered cloth for first aid purposes.
40. Binoculars and compass.
41. Hammer, pair of tongs, wire shears, spanners, watches, awl, drill, chisel, files, circular saws.
42. Disguises and camouflage.
43. Battle songs and gusla [musical instrument].

Appendix 63

KR 503

To Armed Forces Commander Southeast (12th Army) Ia
Daily Report

1. - - -

2. - - -

3. LXV Higher [Corps] Command ordered to protect the coal

mines north of Pozarevac, vital to the city of Belgrade, because the bands already have interfered with work-willing laborers. Increased safeguarding of the main railway routes ordered. German Danube fleet not yet arrived.

4. - - -

5. Attack on railroad station at Ostruznica (Belgrade-Obrenovac) and on three additional railroad stations near Uzice. 16 September—attempted attack on viaduct near Ralja prevented by German soldiers and Serbian rural policemen. 18 September—attack on night train prevented near Martinica (8 km. southeast of Petrovgrad), 10 Communists will be hanged. Attack on railroad tunnel near Ks. Mitrovica. One rural policeman killed, 1 wounded. 18 September—due to the blowing up of a bridge between Jagodina and Jovac, traffic to Nis and Bulgaria interrupted for about 4 days. Train toppled into river and burned. 16 September—all telephone communications from Nis to Skoplje, and on the routes Uzice-Valjevo, Uzice-Belgrade, Uzice-B. Basta interrupted.

Traffic interrupted due to acts of sabotage on highways in the direction Belgrade-Obrenovac, Belgrade-Lazarevac, Jagodina-Kragujevac, Uzice-Valjevo. Bands prevent repair work from being accomplished.

6. - - -

7. During the attacks by bandits on Bajina-Basta enemy casualties 2 dead, 1 wounded, 8 prisoners. Own casualties—1 Serbian rural policeman dead. On 16 September—attack on munition depot at Mrsao (10 kilometers northwest of Kraljevo) repulsed. Attacks by bands on 10 more rural communities. Archives burned. Means of communication destroyed.

8. During the last few days repeated attacks by bands on the mines at Ravna-Reka and Senjski-Rudnik repulsed. Own casualties—2 dead; enemy casualties—1 dead, 1 wounded. Bandits disturb operation. Cessation of operation has to be taken into consideration.

Certified:

Commander Serbia/Headquarters, Staff Ia

18 September 1941

[Illegible signature]

Captain, Cavalry

* * * * *

Appendix 67

Commander Serbia/Headquarters Staff Section Ia/F

Belgrade, 18 September 1941

Very urgent

Important Enemy Report

According to a report on hand Chetniks and Communists intend to avenge their comrades who died in the Cer Mountains, in Sabac and in Obrenovac. They intend to carry out an attack on Dedinje, dressed in German officers' and soldiers' uniforms. The uniforms are those of captured German soldiers. By this disguise the insurrectionists intend to deceive the German guards and murder them. The intended time of the plan's execution so far could not be ascertained.

It is of interest to note that Dedinje was particularly chosen as target of attack.

For the Commander Serbia
The Chief of Staff

Signed: GRAVENHORST
Lieutenant Colonel, GSC

Certified:

[Illegible signature]
Captain, Cavalry

* * * * *

Appendix 92

Commander Serbia/Headquarters Staff Section Ia/F

Belgrade, 25 September 1941

To the Plenipotentiary Commanding General Belgrade

Daily report

1. No change.
2. No change.
3. - - -
4. 23 September—gun battle between Serbian gendarmery and Communist bands at Beljina (30 km. southeast of Obrenovac). Enemy losses—15 dead, 10 wounded.
5. Attacks on railway stations Glibovac (line, Belgrade-Velika Plana) and Vitkovac north of Kraljevo (line, Lapovo-Kraljevo). Sidings and installations destroyed. Attack on German Army train at station Vitkovac repulsed. Communications with Athens out of order.

Detour via Salonika possible.

Telecommunication lines to Agram [Zagreb] clear again on

24 September, 1400 hours. Sabotage act on telephone poles between Semlin and Batajnica.

6. No change.

7. Larger band concentrations south of Milanovac-Kucevo endanger the cataractline on the Danube. Strong band concentration in the Rudnik mountains (15 km. northwest of Kragujevac). Band attacks on three more communities.

There is no more communication with the area around Uzice. Field Commander Nis [administrative area headquarters] reports all quiet at 0930 hours in Krusevac. Sixty bandits killed in battle. Own losses—23 dead. The insurgent Vojvode is said to have died in battle.

8. 23 September—band attack on antimony mine in Bujanovac south of Vranje (in the Albanian settlement area). Dynamite and money stolen. Bands menace those willing to work. Enemy losses—2 dead, several wounded. Bands act in this area exactly like those in the insurgent area of Serbia.

For the Commander Serbia
The Chief of the General Staff

Signed in draft: GRAVENHORST
Lieutenant Colonel, GSC

[Illegible signature]
Captain, Cavalry

* * * * *

Appendix 101

* * * * *

Daily report

1. No change.
2. No change.
3. Order issued—To transfer the 6th Regional Defense Company of 920th Regiment from Grn. Milanovac (north of Cacak) to Kragujevac. If necessary, support by one battalion from Cacak and Stuka unit [squadron].
4. - - -
5. 25 September—through sabotage on track yard near Jagodina and between Ripnik and Laniste (5 km. north of Jagodina) 2 derailments, slight damage. 25–26 September—between Brgule and Stubline (Belgrade-Cacak) track explosion caused by bandits. Considerable damage. 22–23 September—on line Lapovo-Kragujevac 197 telephone poles sawed off or damaged. Further damages on telephone communications on the lines Mladenovac-Velika Plana, Belgrade-Indija as well as at Cacak. 25 September—through acts of sabotage on road Jagodina-Lapovo and Jagodina-Varvarin, traffic interrupted.

6. - - -

7. In the area Paracin-Cuprija-Krusevac the insurgents are systematically carrying out intensified forced recruitings. 25-26 September—50 insurgents attack the Rumanian border guards at Jimbola (20 km. east of Gross-Kikinda) with machine guns. Three Rumanians wounded. Besides the damage reported in the daily report of 26 September in Mjr. Julia (at Nem. Crnja 20 km. southeast of Gross-Kikinda), bands have burned 35 wagons of hemp. A hand grenade was thrown into a Rumanian border guard house. Band attacks on 5 more communities, 4 attacks on Serbian country letter carriers. Money stolen. 27 September—an ethnic German shot at by Communists in Belgrade. Travel of aliens into Belgrade decreases considerably in consequence of intensified check. During the last 10 days the commander of the city has checked at the town border 9,904 persons, 2,346 vehicles, and 2,225 automobiles. 27 September—in the north of Belgrade a police company and a unit of the Serbian gendarmery carried out a raid. Result is yet outstanding.

8. 25-26 September—during attack on dynamite depot at Vinoraca (8 km., southwest of Jagodina) two insurgents are captured, several wounded.

For the Commander Serbia
The Chief of Staff
Signed in draft: GRAVENHORST
Lieutenant Colonel, GSC

Certified:

[Illegible signature]
Captain, Cavalry

TRANSLATION OF DOCUMENT NOKW-084
PROSECUTION EXHIBIT 42

DIRECTIVE OF DEFENDANT LIST, 5 SEPTEMBER 1941, CONCERNING
SUPPRESSION OF SERBIAN PARTISAN MOVEMENT

[Stamp] Top Secret

The Armed Forces Commander Southeast and
the Commander in Chief of the 12th Army

Ia No. 1857/41, Top Secret

Headquarters, 5 September 1941
6 copies—6th copy

Subject: Suppression of the Serbian insurrection movement

1. *The situation in Serbia does not seem to eliminate the pos-*

sibility of a spread of the insurrection movement. Increased attacks on soldiers and armed forces installations by strong, well-armed bands apparently organized and adroitly led prove that previous countermeasures are not adequate.

Commander Serbia and LXV [Higher] Corps Command consequently are to make all preparations *immediately* to enable them to cope with any aggravation of the situation and to *pacify the country completely before the beginning of the winter.*

2. In regard to the above, the following aspects are to be taken into consideration:

a. If the tension in the situation in Serbia increases, the divisions are to be concentrated *at the focal points and at the local centers of the insurgent regions.* (Area Sabac-Valjevo-Krupanj-Loznica; area Topola-Kragujevac-Kraljevo-Uzice-Lazarevac; and area Bor-Zajecar-Nis-Krusevac.) Villages are to be garrisoned not below battalion strength! Considerations of comfort and improved billets must be secondary! The units are to regard themselves as living under campaign conditions. They will have to do without permanent billets during this period and make their billets more like those of mobile warfare. This requires a constantly maneuverable composition and equipment free of any unnecessary ballast.

b. *Surprising*, sudden attacks on the centers of insurrection by surrounding them with *superior* forces (including artillery)! The operations are to be commanded by senior, experienced officers, *divisional commanders*, according to detailed plans of operation and after preceding patrolling and reconnaissance. It is obvious that the weak light infantry commandos assigned up to now as need arose are no longer sufficient in the present situation.

c. The billeting, which at present is spread over a wide area, and the desire to protect and to supervise everything simultaneously, harbors in it the great *peril of being split up.* It must necessarily lead to setbacks which, in the interest of the reputation of the German armed forces, are not tolerable.

The protection must therefore—when not necessary—be limited to objects whose preservation is *vital.* In this category belong primarily—Belgrade, as the capital (here sufficient mobile reserves!), the railway Leskovac-Nis-Belgrade direction Zagreb, the Danube, and the Sava bridges, the Danube break-through near the Iron Gate, the copper mines of Bor, etc.

d. *Active strengthened propaganda* in the Serbian language with all means at our disposal (radio, leaflets, newspapers, picture posters, etc.).

e. *Increased pressure on the population* in areas where insurgents are tolerated in order to bring the residents to a point

where they will report the appearance of bands to the German authorities or otherwise cooperate in neutralizing the focal points of unrest.

f. Ruthless and immediate measures against the insurgents, against their accomplices and their families. (Hangings, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps.)

g. Close supervision of the Serbian gendarmerie. Effective punishment must follow immediately in case of passive behavior, for instance, permitting oneself to be disarmed without suffering casualties! On the other hand it is recommended that the prospect of rewards be held out for courageous behavior and for corresponding procedure.

h. Increased commitment of confidential agents to find out who and where the ringleaders, organizers, and focal points of insurrection are.

i. Full employment of the influence of the Serbian Government, which is to be made to accept responsibility and to cooperate actively.

3. *All members of the German armed forces in Serbia are to be instructed again and again on the situation in Serbia and on their behavior in case of attacks, etc. These instructions are to stress that initiative and prompt action must be demanded from every German soldier. That in no situation may he negotiate with insurgents, and that he may never surrender.*

4. I particularly expect of the *unit leaders* of all ranks exceptional energy and initiative as well as full personal devotion to the *task assigned which at this time consists solely and exclusively of suppressing the Serbian insurrection movement rapidly and finally.*

Incapable leaders are to be relieved without delay and if circumstances warrant, they are to be called to account!

[Signed] LIST
Field Marshal

Distribution:

LXV [Higher] Corps Command
Commander Serbia
Commander Salonika-Aegaen
Ia [Operations]
Id [Training]
War Diary

TRANSLATION OF DOCUMENT NOKW-1424
PROSECUTION EXHIBIT 48

REQUEST OF DEFENDANT LIST TO OKW, 13 SEPTEMBER 1941,
FOR UNIFICATION OF COMMAND IN FIGHT AGAINST
SERBIAN PARTISANS

[Handwritten] Oberquartiermeister
Quartiermeister 2 [Illegible initials]
[Initials] M.V.

[Handwritten] 14 September

[Stamp] *Top Secret—Priority*

5 copies—4th copy

Teletype

To OKW/Operations Group
same text High Command of the Army
Army General Staff

Threatening development of the over-all situation in Serbia demands energetic measures. Even the new Serbian Government does not come up to expectations, according to reports of the commander in Serbia. The gendarmerie is unreliable on an increasing scale. Association between the insurgents—in my opinion not aptly described as Communists by the commander in Serbia—and the Chetniks, has been confirmed.

First requisite is a rigid uniform leadership of the offensive operations which are necessary for the restoration of unconditional authority. Moreover it is essential that the over-all executive power, including command over the troops which will be committed, should be united in one agency. This can only be that of the supreme troop commander. The present command regulations are based on peaceful conditions and are unbearable under the present turbulent combat conditions.

Lieutenant General Boehme is a person to be considered as especially suited for this position since at the same time he has an excellent knowledge of conditions in the Balkans. Together with his staff, he could be made free for this task.

[Stamp] 12th Army

Received 13 September 1941
Oberquartiermeister No. 1163
Top Secret

[Handwritten] Oberquartiermeister/Administration
134/41 Top Secret

It is fully understood that the interests of the Four Year Plan will also be taken into consideration in this case. The main condition for its realization is security and order in the country.

Even after the transfer of the reinforced 125th Infantry Regiment, the German armed forces are in no way sufficient for carrying out the necessary operations in Serbia. The divisions of the 15th stage of mobilization, both as regards personnel and material composition, as well as regards leadership, are unsuitable—according to experiences made up to now—for the destruction of this revolt, which is universally breaking out. Mobile supply installations for larger sized operations are also lacking.

I therefore see myself forced, in spite of my appreciation of the over-all situation, to propose the speedy transport of at least one powerful front line division with tanks.

Armed Forces Commander Southeast (12th Army)

Ia No. 1913/41 Top Secret

13th September 1941

Signed: LIST
Field Marshal

Certified:

[Illegible signature]

Colonel, GSC

After release.

Chief (Teletype)

Ia

Ic

Oberquartiermeister

War Diary

TRANSLATION OF DOCUMENT NOKW-1492
PROSECUTION EXHIBIT 49

HITLER ORDER, 16 SEPTEMBER 1941, CHARGING DEFENDANTS LIST
AND BOEHME WITH THE TASK OF SUPPRESSING THE INSURGENT
MOVEMENT IN SOUTHEASTERN AREA

[Stamp] Top Secret

[Handwritten] Directives

The Fuehrer and Supreme Commander of the Armed Forces
OKW/Armed Forces Operations Staff/Department
National Defense (I Operations) No. 44 1538/41

Fuehrer Headquarters, 16 September 1941

Top Secret Matter

[Stamp] Top Secret matter, through Officer only

[Illegible handwritten notes]

22 copies—11th copy

[Initial] W [Warlimont] 17/9

1. I charge the *Armed Forces Commander Southeast*, Field Marshal List, with the task of suppressing the insurgent movement in the southeastern area.

The primary task is to secure in the Serbian area the traffic arteries and objects which are important for the German war economy, and to reestablish order in the entire area on a long term basis by the application of the most severe means.

In Croatia (up to the line of demarkation) measures deemed imperative against the bands are to be taken in agreement with the Croatian Government through the mediation of the German general in Zagreb.

2. *For the duration of the execution* of these tasks all army forces stationed in the insurgent area, as well as those to be brought there, are to be concentrated under the order of the Commanding General of the XVIII Infantry Corps, Lieutenant General (Infantry) Boehme. The latter will exercise executive power in the insurgent area itself, pursuant to directives of the Armed Forces Commander Southeast. Insofar, all military and civilian offices must follow his instructions. The Armed Forces Commander Southeast will regulate a more accurate definition of his authority. The interests of the Four Year Plan are to be taken into consideration as a matter of principle.

3. An infantry division, Panzer platoons* and captured tanks will be sent by the *Commander in Chief of the Army* into the Serbian area in addition to other security forces (these for Croatia also). He prepares for the bringing up—in case of need—of an additional division as soon as one is released in the east. I request that the measures be reported in detail to the OKW.

4. As before, the *Commander in Chief of the Air Force* will support the operation in the insurgent area with all the forces available for this purpose. He will designate to the Armed Forces Commander Southeast a leader for tactical cooperation with Lieutenant General (Infantry) Boehme.

5. It is not permissible to employ forces of the *Hungarian, Rumanian and Bulgarian* armies and air forces for these operations without the approval of the OKW. However, Hungarian and Rumanian ships which are offered may be employed together with the Danube fleet for the security of *Danube traffic*. With a corresponding commitment of the German flotilla they are to be assigned such duties as will prevent them having anything to do with each other.

The use of *Croatian* troops in the Serbian border areas adjoining Croatia has been conceded by the Croatian government, and may therefore take place.

The *Italian High Command* will be informed of the intended measures and will be requested to take suitable energetic action in the territory occupied by the Italians, in agreement with the Armed Forces Commander Southeast.

6. The *Foreign Office* will carry out a joint *political action* of the Balkan States against the Communist Central Offices in these countries.

A representative of the Reich will inform the Armed Forces Commander Southeast regarding the details.

[Initialed] W [Warlimont]

[Initialed] K [Keitel]

[Signed] ADOLF HITLER

Distribution:

Armed Forces Commander Southeast, copy 1
Military Commander Serbia, copy 2
German General in Zagreb, copy 3
German Armed Forces Mission in Rumania, copy 4
German General with the Headquarters of
the Italian Armed Forces, copy 5

* The German word "Panzerzuege" conveys two meanings—tank platoons and/or armored trains.

Commander in Chief of the Army
(Oberquartiermeister I), copy 6
(Operations Section), copy 7
Naval High Command (Naval Operations), copy 8
Air Force High Command (Air Force Operations Staff),
copy 9
Chief, Armed Forces Transportation, copy 10
OKW—
Armed Forces Operations Staff, copy 11
Department National Defense, copies 12–17
Armed Forces Signal Communications, copy 18
Armed Forces Propaganda, copy 19
Foreign Counter Intelligence Office, copy 20
Branch Foreign Countries, copy 21
Armament Economy Office, copy 22

PARTIAL TRANSLATION OF DOCUMENT NOKW-258
PROSECUTION EXHIBIT 53

KEITEL ORDER, 16 SEPTEMBER 1941, CONCERNING SUPPRESSION
OF INSURGENTS IN OCCUPIED TERRITORIES

Excerpt!

(No. 888/41 Top Secret)

The Chief of the OKW

WFSt/Department National Defense (IV/Quartiermeister)

No. 002060/41 Top Secret

Fuehrer Headquarters, 16 September [19]41

Subject: Communist Insurgent Movement in the Occupied Ter-
ritories

40 copies—2d copy

Section Qu. No. 175/41 Top Secret

1. Since the beginning of the campaign against Soviet Russia
* * * Communist insurgent movements have broken out. The
forms they take have increased from propaganda measures and
attacks against individual members of the armed forces to open
revolt and widespread band warfare. It is established that it is
a question of *centrally directed mass movement* which also must
be made responsible for minor isolated incidents appearing in
territories quiet up to now. In view of the manifold political
and economic tension in the occupied territories one must also

assume that *Nationalists and other circles* will exploit this opportunity to cause difficulties for the German occupation power by joining the Communist revolt. In this way an increasing *danger for the German conduct of the war arises*, which shows itself at first in a general insecurity for the occupation units, and which has also led to the transfer of forces to the main places of unrest.

2. *Measures taken up to now* to counteract this general Communist insurgent movement have proved themselves *to be inadequate*. The Fuehrer now has ordered that *severest means* are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples, can quiet be restored.

3. The following *directives* are to be applied here:

a. Each incident of insurrection against the German armed forces, regardless of individual circumstances, must be assumed to be of Communist origin.

b. In order to stop these intrigues at their inception, severest measures are to be applied *immediately at the first appearance*, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure—to proceed at first with relatively easy punishment and to be satisfied with the threat of measures of increased severity as a deterrent—does not correspond with these principles and is not to be applied.

c. - - -

d. *Indigenous forces* generally will fail in the execution of such violent measures. Their reinforcement brings with it increased danger for our own units and consequently must be avoided. However, premiums and rewards for the population may be employed to a large extent, in order to insure their assistance in appropriate form.

e. - - -

4. - - -

Signed: KEITEL

Certified true copy:

[Signature illegible]

Captain, GSC

TRANSLATION OF DOCUMENT NOKW-458
PROSECUTION EXHIBIT 69

KEITEL ORDER CONCERNING TAKING OF HOSTAGES,
28 SEPTEMBER 1941, AND LETTER OF TRANSMITTAL SIGNED
BY DEFENDANT FOERTSCH, 4 OCTOBER 1941

[Stamp] Top Secret!

Ic/Counterintelligence Officer

No. 1561/41 Top Secret

7 copies—1st copy

To Section Ic No. 163/41 Top Secret

Copy

Supreme Command of the Armed Forces

Fuehrer Headquarters, 28 September 1941

Armed Forces Operations Staff/Dept. L. (IV/Administration)

No. 002204/Top Secret

To Quartiermeister Section No. 183/41

Top Secret

5 copies—2d copy

Top Secret!

Subject: Taking of hostages

To High Command of the Army/Generalquartiermeister,
Armed Forces Commander Southeast

Because of the attacks on members of the armed forces, which have taken place lately in the occupied territories, it is pointed out that it is opportune for the military commanders always to have at their disposal a number of hostages of the different political persuasions, i.e.—

1. Nationalists,
2. Democratic middle-class, and
3. Communists.

It is of importance that among these there should be leading personalities or members of the families of leading personalities. Their names are to be published.

In case of an attack, hostages of the group corresponding to that to which the culprit belongs are to be shot.

It is requested that commanders be informed accordingly.
The Chief of the High Command of the Armed Forces
Signed: KEITEL

Certified true copy:
[Signed] PFAFFMATT
Major, GSC

For information to:
Ia, O.Qu., III, Ic
4 October 41. Ok

[Stamp] Top Secret

Armed Forces Commander Southeast
Section Ic/Counter Intelligence
Officer/No. 1561/41 top secret

Section Ic No. 163/41 Top Secret
Army Headquarters, 4 October 1941

7 copies—1st copy

1 Enclosure

(Copy)

Quartiermeister Section No. 183/41 Top Secret

[Stamp]

XVIII Corps Commando
Received 8 October 1941 [Illegible initial]
No. 897/41 Top Secret
1 Enclosure
Section Ic

To:

The Plenipotentiary Commanding General in Serbia
Commander of Salonika—Aegean
Commander Southern Greece

[Handwritten] Quartiermeister 2 [illegible initial]
Received 18 October [illegible initial]

Enclosed copy for further action in accordance with the political situation prevailing in the area. Please report action taken.

For the Armed Forces Commander Southeast
The Chief of the General Staff

[Signed] FOERTSCH
Colonel, GSC

4 October 41
Ok

TRANSLATION OF DOCUMENT NOKW-203
PROSECUTION EXHIBIT 70

ORDER FROM DEFENDANT LIST TO COMMANDING GENERAL SERBIA,
4 OCTOBER 1941, CONCERNING TREATMENT OF MALE POPULATION
IN CLEARING AREAS OF PARTISANS

[Handwritten] Supplement 28, War Diary

Copy

Teletype Office, XVIII Infantry Corps

HMYX/FUE 24 611

Remarks—Priority

Teletype

4 October [1941] 2000 hours German summer time

To Plenipotentiary Commanding General in Serbia

The male population of the territories to be cleared of bandits, is to be handled according to the following points of view:

1. Men who took part in combat are to be judged by courts martial.

2. Men in the insurgent territories who were not encountered in battle, are to be examined, and—

a. If a former participation in combat can be proved of them, to be judged by courts martial.

b. If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the armed forces in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the armed forces is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot.

c. All other unsuspecting men are to be led under guard into their home towns. In the most simple form they are to be obliged to offer the bandits no support of any kind and not to undertake anything against the armed forces. The mayors of the individual localities who are to be replaced, circumstances permitting, must testify as to the local residence of the individual.

Men foreign to the region are to be held in the collecting camps. The localities are to be searched for weapons first.

3. This regulation is to be made known to all the men named under 2 above. It is to be explained to them, furthermore, that the most severe measures of punishment will be used without further investigation against localities, above all against the male population of such localities, in which or in the proximity of which bandits appear, bandits are supported, surprise attacks take place,

sabotage acts take place, or anything is undertaken against the armed forces.

4. It is to be explained to them further, that similar treatment will be meted out to the male population of localities and to localities themselves, from which men join the bandits, surprise attacks and sabotage acts are practiced, or anything is undertaken against the armed forces.

Signed in draft: LIST
Field Marshal

Certified true copy:
[Illegible signature]
1st Lieutenant

TRANSLATION OF DOCUMENT NOKW-192
PROSECUTION EXHIBIT 78

ORDER OF COMMANDING GENERAL IN SERBIA, 4 OCTOBER 1941,
DECLARING THAT 2,100 CONCENTRATION CAMP INMATES BE SHOT
FOR THE KILLING OF 21 GERMAN SOLDIERS

The Plenipotentiary Commanding General in Serbia
Quartiermeister Section

[Handwritten] Supplement 24, War Diary

Local Headquarters, 4 October 1941

Supplement 24

Subject: Reprisals for the cruel murder of German soldiers by
Communist bandits

To:

Chief of the Military Administration with the Commander of
Serbia

342d Infantry Division

449th Corps Signal Battalion

Twenty-one soldiers were tortured to death by Communist bandits in a bestial manner on 2 October in a surprise attack on units of the signal regiment between Belgrade and Obrenovac. As reprisal and retaliation, 100 Serbian prisoners are to be shot at once for each murdered German soldier. The chief of the military administration is requested to pick out 2,100 inmates in the concentration camps Sabac in Belgrade (primarily Jews and Communists) and to fix the place and time as well as burial place. The detachments for the shooting are to be formed from the 342d Division (for the Sabac concentration camp) and from the 449th Corps Signal Bat-

talion (for the Belgrade concentration camp). They are to be furnished by the chief of the military administration through the Plenipotentiary Commanding General of Serbia.

The chief of the military administration is requested to order the camp leaders to inform the prisoners of the reason for the shooting.

[Handwritten] Only verbally ordered.

Lieutenant General, Infantry
[Illegible initial]

PARTIAL TRANSLATION OF DOCUMENT NOKW-557
PROSECUTION EXHIBIT 88

ORDER OF COMMANDING GENERAL SERBIA, BOEHME,
10 OCTOBER 1941, DIRECTING THE SHOOTING OF 50 AND 100
PRISONERS OR HOSTAGES FOR EACH GERMAN, OR ETHNIC
GERMAN, SOLDIER WOUNDED OR KILLED

The Plenipotentiary Commanding General in Serbia
III/Chief of Military Administration/Quartiermeister
No. 2848/41 Secret

[Handwritten] Supplement 48

War Diary

[Stamp] Secret

Local Headquarters, 10 October [19]41
Quartiermeister Section No. 470/41 Secret

[Crossed out] Top Secret

Subject: Suppression of Communist insurgent movement

Reference: Supplements of the Plenipotentiary Commanding General in Serbia to "The Chief of OKW Armed Forces Operations Staff/Department National Defense (IV/Quartiermeister) No. 00 2060/41 Top Secret of 16 September [19]41"

1. In Serbia it is necessary, on the basis of the "Balkan mentality" and the great expansion of insurgent movements both Communists and camouflaged as national, to carry out the orders of the OKW in the most severe form. Speedy and ruthless suppression of the Serbian resistance is a consideration not to be underestimated for the German final victory.

2. In all garrison towns in Serbia all Communists, male residents suspicious as such, all Jews, a certain number of nation-

alistic and democratically inclined residents are to be arrested as hostages, by means of sudden actions. It is to be explained to these hostages and to the population that the hostages will be shot in case of attacks on Germans or on ethnic Germans. The LXV [Higher] Corps [Command] and the Chief of the Military Administration (for Belgrade and Banat) are to report on the 10th, 20th and last of each month (for the first time, on 20 October) the number of hostages.

3. If losses of German soldiers or ethnic Germans occur, the territorially competent commanders up to the regimental commanders are to decree the shooting of arrestees according to the following quotas:

a. For each killed or murdered German soldier or ethnic German, (man, woman, or child) 100 prisoners or hostages;

b. For each wounded German soldier or ethnic German, 50 prisoners or hostages.

The shootings are to be carried out by the troops.

If possible, the execution is to be carried out by the part of the unit suffering the loss.

In each individual case of losses a statement is to be made in the daily reports, whether and to what extent the reprisal measure is carried out or when this will be finished.

4. In the burying of those shot, care is to be taken that no Serbian shrines arise.

Placing of crosses on the graves, decorations, etc., is to be prevented. Burials are, accordingly, to be carried out best in distant localities.

5. The Communists captured by the troops in combat actions are to be hanged or shot as a matter of principle at the place of crime [Tatort] as a frightening measure.

6. Localities which have to be taken in combat are to be burned down, as well as farms from which troops were shot at.

[Signed] BOEHME
Lieutenant General, Infantry

Distribution:

Commander Serbia/Headquarters Staff, 2 copies.

Commander Serbia/Military Administration, 2 copies.

Commander Serbia/for Administrative Area Headquarters,
4 copies.

LXV [Higher] Corps [Command] and Divisions, each 2 x,
10 copies.

342d Infantry Division, 2 copies.

125th Infantry Regiment, 1 copy.

* * * * *

TRANSLATION OF DOCUMENT NOKW-1202
PROSECUTION EXHIBIT 106

GERMAN PROCLAMATION TO SERBIAN POPULATION,
OCTOBER 1941, ANNOUNCING THE 100:1 REPRISAL RATIO

TO THE SERBIAN POPULATION

The German armed forces do not want to take your freedom and to prevent you from working peacefully. But just like your Belgrade Government, it demands peace, order, and security in the country.

Insurgent Communists, Jews, and plunderers have united. They force you to join their ranks, endanger your property and life.

Repeatedly, German soldiers have been murdered cruelly. Also, individual national organizations of your country have made alliance with these insurgents in order to harm the German armed forces.

The German armed forces have looked on at this activity for a long time, to give you time to think it over. Instead of acknowledging gratefully the generous attitude of the German armed forces you, in many cases, have believed more in the lies and provocative whispers of Communist and ambitious leaders. So it happened, that many of you not only did not resist the insurgents but even supported them. Thereby, you have become accomplices to the criminal acts of the insurgents.

Lately, raids on vital installations of economy and traffic have increased, as well as organized attacks on German forces. Here again many German soldiers were murdered brutally.

The German armed forces must and shall put an end to this activity with all means and unyielding severity to restore peace and security—also for you.

The following directives become effective immediately:

1. Anyone who supports the insurgents or their accomplices, by means of arms and ammunition, by erecting road blocks, by destroying bridges, by transmitting information, by giving food, by providing transportation, or by any other manner, will be shot.

2. Anyone who carries fire arms, pointed weapons, hand grenades, or other weapons, will be shot.

3. Anyone who conceals arms and ammunition will be shot.

4. The communities—in whose areas arms and ammunition are found, in whose areas road blocks or destroyed bridges are found, without being prevented or immediately averted by you, in whose area other hostile acts occur—will be severely punished by the burning down of houses and shooting of inhabitants.

For every killed German soldier, 100 inhabitants will be shot.
Do not permit yourself to be deceived by Communist leaders or other ambitious leaders. The German armed forces are strong and victorious. Armies of millions of your alleged friends in Russia have been destroyed with their entire equipment.

The rest is being destroyed.

St. Petersburg [Leningrad] and Moscow are about to fall.

The German armed forces are also in a position to break all resistance in Serbia.

Beware of heavy penalties! Keep peace!

The German Commandant

[Back strip of file containing NOKW-1202]

342d Infantry Division, Operations Section

Supplements 2

War Journal III, Serbia

12 October 1941

31 October 1941

[Stamp] Checked [Illegible Signature]

[Handwritten] 4 March 1942

Current No. 4

[File number] 15.365.8

PARTIAL TRANSLATION OF DOCUMENT NOKW-387
PROSECUTION EXHIBIT 99

REPORT TO COMMANDING GENERAL IN SERBIA, 20 OCTOBER 1941
CONCERNING SEVERE REPRISAL MEASURES

* * * * *

[Handwritten] Supplement 37
Kragujevac, 20 October 1941

Copy

District Headquarters I/832

Diary—A./41

To the 610th Administration Area Headquarters Pancevo

And simultaneously for information:

To Commander Serbia, Section Ia, Belgrade

During the period 14-17 October 1941, the 3d Battalion, 749th Regiment, stationed in this area carried out an operation at G. Milanovac, where the 6th Company, 920th Regiment, had been

kidnapped. The unit was accompanied by two interpreters, in German uniform, of the district headquarters who informed me about details. The unit, marching on the highway, was allegedly shot at numerous times from the surrounding heights whereby they sustained losses of 9 dead and 27 wounded (of the latter one more died later). The interpreter, who knew the country, called the attention of the battalion's commanding officer numerous times to the fact that different tactics were necessary in this terrain in order to be able to combat the bandits, otherwise he would have unpreventable losses, without being able to do anything himself. That is what actually happened in the end. Eighty-seven of the enemy were killed.

The battalion found G. Milanovac rather empty. About 40 male inhabitants who had concealed themselves, according to information of the battalion commanding officer and had waited for the return of the German armed forces, were arrested and brought back with them as hostages.

G. Milanovac was completely destroyed; likewise the villages bordering on the highway on the way back.

After the return from there the battalion of the 749th Regiment received the order to shoot 100 Serbs from Kragujevac for each soldier killed and 50 [Serbs] for each wounded.

Accordingly, in the late evening hours of 18 October [19]41, all male Jews and a number of Communists, altogether about 70 men, were arrested according to lists.

Since this number was not sufficient by far for the 2,300 to be shot, it was proposed to collect the number lacking through arrests on the streets, squares, and dwellings in a unified action in the town of Kragujevac by both the 3d Battalion, 749th Regiment, and the 1st Battalion, 724th Regiment, stationed in Kragujevac.

Since the planned measure was in contradiction to the orders of the Plenipotentiary Commanding General—file note 73/41 Secret (Section III) of 9 October 1941 and file note III/Chief of Military Administration/Quartiermeister No. 2842/41 Secret of 10 October 1941, as well as Commander Serbia, Administration Staff-Diary No. 224/41 of 10 October 1941—I attempted to inform the senior garrison officer, Major Koenig, of the execution, in the sense of the order cited, in that I suggested that the villages in the vicinity and surroundings of Kragujevac, known to the district headquarters for a long time as completely strewn with Communists, be surrounded and the necessary number to be shot obtained there. He accepted my suggestion voluntarily at once, and it was proposed that the 1st Battalion of the 724th Regiment mop up the villages Grosnica and Belosovac on Sunday. On Monday both battalions were to mop up, by a joint action, the vil-

lages Meckovac, Marzic, Korman, Botunje, and Dl. and Gor Komarice in the middle of which the ill-famed Parlog mountain lies, where the bandits allegedly have their forest quarters.

If then the number of those arrested would not have been sufficient, I suggested the combing through of villages further infested with Communists according to my information. I emphasize expressly that in the whole time of the existence of the district headquarters, not a single member of the German armed forces or ethnic German was wounded or shot in the city.

The citizens of the city, numbering about 42,000, always showed themselves loyal and inclined toward cooperation with the German armed forces, whereby it should not be disregarded that a part of these citizens were always inclined to the bandits; but nothing happened.

In the evening of 19 October 1941, I was invited to a renewed conference with Major Koenig, where I learned to my astonishment that the whole plan had been thrown over. On 19 October 1941, the villages Grosnica and Milatovac were mopped up by the 1st Battalion, 724th Regiment, and burned down, and Meckovac and Marzic by the 3d Battalion, 749th Regiment. At the same time 422 men were immediately shot on the spot in the villages without any losses on our side, among them a priest of the Russian church in whose church tower munition had been found concealed.

In order to obtain the number of 2,300 lacking, a combing of the town Kragujevac was ordered again for 20 October 1941.

The arrests on the streets, squares, shops, dwellings, stores, etc., took place accordingly today without regard for the persons involved, taking men between 16 and 60 years of age.

According to a statement of Major Koenig, the following were to be pulled out from those under arrest in German hands:

a. Those who were in possession of a special pass of the district headquarters or another troop unit stationed here.

b. Members of a vital profession or trade (doctors, druggists, bakers, butchers, grocers, technicians, workers of the light and water plants, etc.)

c. Those who could prove themselves members of the Ljotic movement.

In this case, no consideration was taken in any way for the points stated under paragraph 2 in the order 2848/41 secret. Furthermore, the last sentence of the second paragraph in the order, diary 4224/41 ("in order to prevent the annihilation of completely innocent people * * *"), was observed in no way.

This order of State Counsellor Turner which I brought expressly to the attention of Major Koenig, the latter did not even wish

to read saying that he had to act exclusively according to the order of the regimental commander of the 749th Infantry Regiment, which set him the task of bringing together the necessary number of those to be shot from the men of the town of Kragujevac.

By radio, I urgently requested at 0600 hours, 20 October 1941, an airplane from the Ic section, Commander of Serbia, in order to attain through personal conference in Belgrade that the orders issued would be carried out according to their sense. Unfortunately the airplane was not sent so that an interference of the superior office is no longer possible because the shootings were set for 7 o'clock in the morning of 21 October 1941. I should like to state that the losses of the 3d battalion 749th Regiment occurred in an operation against the guilty locality G. Milanovac and not in the city of Kragujevac. If 2,300 bandits and those sympathizing with them had been captured and shot, the order issued would have been taken care of to a sufficient extent.

According to my viewpoint, the shooting of people from this city, some of whom are entirely innocent, can have directly harmful effects. It is to be expected that embittered relatives of those shot will now practice acts of revenge on members of the German armed forces.

Sabotage acts on drinking water and on the current temporary light supply, as well as a large attack of the bandits against the city, in which the units could suffer more losses than before, are not out of the realm of possibility. Above all, the psychological effect will be catastrophic. The residents of Kragujevac have expected of the German armed forces the elimination of the Communist danger and the aligning into the new framework of Europe. With the methods used here, we shall certainly not manage to win back the favorably inclined elements.

Signed: v. BISCHOFSHAUSEN
Captain and Commandant

Captain v. Bischofshausen reported personally in the above affair—

On 28 October 1941, to the Chief of Staff, Commander Serbia.
On 29 October 1941, at Plenipotentiary Commanding General in Serbia (through Major Jais).

Certified true copy:
[Illegible Signature]
Captain

PARTIAL TRANSLATION OF DOCUMENT NOKW-1379
PROSECUTION EXHIBIT 137

EXTRACT OF INTELLIGENCE REPORT OF 342d INFANTRY DIVISION,
1 NOVEMBER 1941, CONCERNING INSIGNIA WORN BY
CHETNIKS AND PARTISANS

342d Inf. Div., G-2 (Open) of 1 November 1941—Enemy Information/Sheet 5

* * * * *

10. The *insignia* of the various units have *not changed*. The Chetniks as a rule wear on their lamb fur caps a Serbian cockade and, underneath it, a skull and cross bones; the Communists wear on their headgear a red star, sometimes below it a narrow strip of ribbon in Yugoslav colors or the Soviet emblem with hammer and sickle, or also plain red stripes. Arm bands with the word "partisan" written on them have been noticed.

Leaders often wear, in addition, tassels in their caps—the Chetniks gold colored ones, the Communists red ones.

11. *Clothes* as already known—mostly peasant costumes in all units; only few in uniforms, almost exclusively among the Chetniks; the Chetnik officers often wear over their peasant costume a Serbian officer's coat with epaulettes.

12. Valid *passes* in green color which are certified by the German military offices by means of a stamp are only at the disposal of a part of the Chetnik group Valjevo. The remaining Chetniks who are loyal to the government have in their possession passes issued by Pecanac.

[Handwritten] Probably dating from the period before the split of the Chetnik units.

* * * * *

PARTIAL TRANSLATION OF FOERTSCH DOCUMENT 83
FOERTSCH DEFENSE EXHIBIT 72

EXTRACTS FROM SITUATION REPORT BALKANS, 2 NOVEMBER 1941,
ISSUED BY INTELLIGENCE SECTION, ARMED FORCES
COMMANDER SOUTHEAST

Armed Forces Commander Southeast
Section Ic/Counter Intelligence Officer
No. 7324/41 Secret

Army Headquarters, 2 November 1941

Secret

Situation Report Balkans

Preliminary Remarks

To be used only for the instruction of officers (up to company commander), as a basis for a discussion of the political situation; public display—for instance on bulletin board—is *prohibited*. The paragraphs lined in the margins are only for oral instruction of the commanders,—*written transmission is prohibited*.

Serbia

I. *State territory* (compare attached sketch)—The borders of today's Serbia coincide essentially with the language borders. In the West, however, the Serbian settlement territory still goes deeply into Croatia. In the Northeast a territory was separated from the Serbian area to form a "German Protectorate." On 10 October 1941, the territory of Semlin (west of Belgrade) was ceded to Croatia. The details of determining the border—especially in regard to Bulgaria and Montenegro—are still to be worked out, on the spot, by mixed commissions. *Serbia contains about 3.8 million inhabitants; about the same number lives outside the borders.*

II. *Government*—The provisional government of Acimovic, which was first set up, was unable to operate. The people rejected it as a German puppet government. The government of former General Milan Nedic, which was then formed, worked independently under German administration. Gen. N. [Nedic] is known as a convinced Serbian patriot, and an enemy of communism, *as energetic, incorruptible, and relentless*. As Minister of War he supported collaboration with Germany. He is credited with farsightedness and discernment.

N. [Nedic] has known how to surround himself with a number

of strong personalities. After some failures in the beginning, the government seems to be gaining ground with the people; only the future will show whether it can assert itself against the extremists, who have always been numerous in Serbia.

III. Serbia is under German military administration. All important administrative acts (for instance, decrees) must have the approval of the commander in Serbia.

Internal reconstruction is greatly restricted by the continuous disorders. In part it has not gotten past the stage of giving orders. *But in spite of everything, a strong desire for reconstruction can be recognized.*

IV. *Economy*—Important for the German conduct of the war is—

a. Navigation route on the Danube; especially important are the rapids between V. Gradiste and Turnus-Severin (Iron Gate), because it is especially easy to sabotage the river bed and the system of sluices.

b. The railway line Belgrade-Nis-Salonika as well as the main road and communication lines.

c. Industrial installations, especially the copper mine Bor in the northeast; Preussag mines in the northwest, Trepca mines in the south, as well as numerous individual plants scattered over the country.

V. *Armed forces and police*—Since the armistice, Serbia no longer has any armed forces. In September of this year the Military Commander Serbia allowed the Serbian Government to increase the strength of the police force within a certain limit. It shall be used in agreement with the German army commanders to fight the insurgents. It has proved its worth after initial setbacks.

VI. *Insurrectionist movement*

a. Reasons for the insurrection are—

1. Recovery from the shock effect of the short campaign, which scarcely touched large parts of the country or did not touch them at all.

2. Panslav and Communist tendencies.

3. Merger of remaining parts of the Serbian Army.

4. The Serbian refugees expelled from the separated territories (*from Croatia 110,000, from Hungary 37,000, from Bulgaria 20,000*) who were transported across the frontier without means and without sufficient care.

b. Mainsprings of the insurrection are—

1. Remaining parts of the former Yugoslav Army.

2. Communist bands.

3. National units of the Chetniks. The Chetniks are a free

corps organized in a military manner (Cheta-Group, Company), which has been in existence since the war of liberation against Turkey and received a legal basis for existence after the World War through the establishment of a Chetnik organization. The words with which their secret broadcasting station opens each broadcast, "*It is not Communists who are speaking here but National Chetniks who are ready to fight for the liberation of Serbia and Yugoslavia*", characterize their political attitude. *Strictest discipline, silence, and absolute dedication of personal efforts are the basic pillars of this organization. The Vojvode (leader of the band) is master over the life and death of his people—only his will governs.*

Today part of the Chetniks fight together with German troops and the Serbian police under the Vojvode Kosta Pecanac against the Communists.

4. Mixed bands (Chetniks and Communists).

c. Territories in rebellion—Main territories in rebellion at the present time are (1) around *Valjevo* and westward past the Croatian border (remainder of the Serbian Army and Chetniks); (2) around *Kragujevac* (mixed bands), (3) *around Bor and northward up to the Danube* (predominantly Communist bands).

The Chetniks of the Vojvode Kosta Pecanac, who participate in the fight against the Communists, are in the *Jastrebac* mountains (west of *Nis*). After beginning with single cases of sabotage, the rebellion now extends almost over the entire Serbian state. Bands appear in strength up to 1,000 men and possess light and heavy weapons, and in some cases even artillery. *Between 2 and 11 October 1941, for instance, there were 62 acts of sabotage and 51 ambush attacks in the Serbian sector. In 33 cases the sabotage affected traffic installations and in 26 cases it was directed against lines of communication. Five ambush attacks were made on members of the German armed forces, while 46 attacks were directed against Serbs (civilians and police).*

* * * * *

The population of *Belgrade* is troubled because of the daily increasing difficulties in food supply, and the hitherto unsolved problem of fuel supply to *Belgrade*. Not the insecurity caused by the insurgents, but the German occupation forces are blamed for it. There are rumours running that *Belgrade* itself is blockaded. An operation of the insurgents against *Belgrade* is expected. In this case—it is said—the population will side with the "just cause". The events at the east front are eagerly discussed; an English victory is hoped for.

Croatia

I. *State territory* (compare the attached sketch)—After the transfer of the Semlin territory from Serbia to Croatia, performed on 10 October, the frontiers towards *Serbia* are now determined in general.

The frontier towards *Hungary* is still in dispute, since the Mur Island is kept occupied by the Hungarians. The Mur Island was Croatian possession up to the beginning of the 18th century and then again from 1848–1867, and from 1919–1941 it belonged to Yugoslavia. Ninety-eight percent of its population profess allegiance to the Croatian ethnic group.

The present frontiers coincide approximately with those of old Croatia, Slavonia, Bosnia, Hercegovina, and parts of the coastal regions and of Dalmatia. Considerable parts of the last mentioned territories were ceded to *Italy*.

Croatia is divided into a German and an Italian sphere of interests. The cooperation between Croatians and Italians is strained.

The population of Croatia amounts today to about five *million*, whereof nearly two million are Serbs.

II. *Government*—State Leader (Poglavnik) of the “independent State of Croatia” is Dr. Ante Pavelic. He is assisted by a council of 12 members (Doglavnici); besides by another council of 7 members (Poglavni-Pobocnici).

The acceptance of a king from the Italian royal house is not welcomed by all parts of the people. The Duke of Spoleto is being considered as king, however is not yet elected.

III. *Administration*—The administration is but in a state of organization and is very much handicapped by encroachments of the Ustasha on the one hand and by revolts of the oppressed Serbians on the other hand. The German military interests are safeguarded by the German General in Zagreb, Brigadier General Dr. H. C. von Glaise-Horstenau.

IV. *Armed forces*—Minister of War and commander of the Croatian armed forces is Marshal Kvaternik; chief of the General Staff, General of the Air Force Laxa. At present the Croatian Army consists of—5 *division staffs*, 46 infantry battalions activated as regards personnel, and 1 bicycle battalion. The 10 activated artillery battalions are not yet fully equipped. Furthermore, there exists 15 infantry replacement battalions. Three cavalry battalions are employed for the most part as infantry units, since there is lack of horses. Three corps staffs, one more division staff, two signal battalions, and four engineer battalions are being activated. The arms are for a great deal material

captured by the Germans, and only a small part of the army are trained with them so far.

A Croatian Legion (army, navy and air force units) is attached to the German armed forces for the fight against bolshevism.

V. *Internal political situation*

a. *The Ustasha*—Dr. Pavelic established in Italy the organization of the Ustasha (insurgents). In Yugoslavia Eugen Kvaternik saw to a further extension and consolidation of this formerly secret organization.

The goal of the Ustasha was the creation of an independent Croatian national state by uncompromising fight against the Serbs.

According to its organization statute the Ustasha consists of—

The political organization—It has the task to educate the members, to imbue the minds of the whole nation with the Ustasha spirit, and to care for the youth.

The Ustasha militia (para-military organization)—It is responsible for the pre and post military training, and has also to do some racial education work.

The Ustasha are fanatical enemies of the Serbs. After Dr. Pavelic's accession to power the unbridled attitude of numerous Ustasha men, especially against the Serbian part of the people, was very detrimental to the reputation of the movement. The Ustasha ministry is now doing what is necessary for discipline and for a strict organization of the Ustasha units. They are organized into *Stuerme* (units corresponding to a company) and are also operating in the insurgent areas under the command of Croatian army officers. There they proved themselves.

b. *The Jewish and Serbian problem*—There have always been strained relations between the Roman Catholic Croatians and the Greek Orthodox Serbs (Pravoslavs). The young Croatian State at once issued laws according to the model of the Nuernberg Laws concerning Jews, to which Jews and Serbs were subject in like manner. This resulted in most severe persecutions of Serbs, and at some places degenerated into a religious war against the Orthodox Church. Serbs were chased by thousands over the frontiers and thereby robbed of their last property.

c. *Insurgent movement*—The reasons for the insurrection were the partly artificially intensified animosity towards the Serbs, Communist and English agitation, and the disunion within the Ustasha.

Upolders of the insurrection are undisciplined Ustasha units, Serbian, and Communist bands. The insurrection is kept alive by atrocities, committed on both sides, and by foreign agitators.

Fight against the insurrection—In the Italian sphere of inter-

est, after its being occupied by numerous Italian divisions, the situation is generally calm. In the German sphere of interest Croatian units, partly with German assistance, are fighting the insurrection centers with varying success. Acts of sabotage against railroads and means of signal communication increase in number. In Zvornik (near the Serbian-Croatian frontier) a German battalion successfully defended itself for weeks against continuous enemy attacks. A large scale relief operation is being staged by the Croats.

Montenegro

Montenegro is an independent kingdom under a King of the Italian royal house. The King was not yet elected, since here, as in Croatia, the people reject the Italians.

In the area of the Sandshak Novi Pazar, all over northern Montenegro as well as near Kolasin, bands with military organizations under the command of Serb General Ljubo Novakovic are fighting against Italians and Croats. Southern Montenegro is calm. The population complied here with the request of the Italians to deliver up the arms.

Albania

Albania is an Italian Protectorate. The Albanian Government is experiencing a continuous crisis. The public opinion accuses Prime Minister Verlaci of a too great deference to Italian demands. The Ministers of Party, of Education, and of the Interior tendered at the beginning of October their resignations, which, however, were refused.

By strong troop concentrations and energetic measures the Italians are masters of the situation. There are isolated islands of insurrection. Rumors of an imminent national insurrection are spreading.

Guerrilla bands are gaining ground. Raids and burglaries frequently occur. Communist pamphlets are distributed. The police cannot do anything against this.

The population is discontented because the promised autonomy was not yet granted.

Greece

I. *Government*—After King George II and his government escaped from Greece in April 1941, General Tsolakoglou, former Commander in Chief of the Albania Army, formed a new government. After a reshuffling, made on 20 September 1941 under pressure of public opinion, its members are—

Tsolakoglou	Prime Minister.
Logopetopoulos	Vice-President, Minister for National Welfare, and Minister for Education.
Papadopoulos	Minister of the Interior and Minister of Security.
Gotsamanis	Minister of Finance.
Livieralos	Minister of Justice and Labor.
Bakos	Minister for National Defense.
Markou	Minister without Portfolio.
Mutussis	Minister of Communications and Minister for the Merchant Marine.
Hatismichalis	Minister for Economics.
Karamanos	Minister for Agriculture and Food.

This government cannot fully assert itself either. Tensions within the government are partly based on old class and party feelings.

Although Tsolakoglou owing to his successful combat engagements in Albania enjoys, to a certain extent, a good reputation among the population, he nevertheless is generally accused of nepotism and an all too great deference in all important questions.

II. *a. Domestic situation*—In spite of the generally prevailing distressing conditions, large scale acts of sabotage have not occurred. Numerous British subjects—most of them with Greek identification papers—could be recaptured. The British officers and soldiers who are still in hiding have allegedly received the order recently to remain in the country and join Greek organizations. Very recently sabotage equipment is said to have been brought to Athens from abroad in order to carry out acts of sabotage during British air raids, especially on German food depots.

Greek officers and soldiers have fled into Turkey. Turkish authorities are supposed to back up the departure to Palestine if the Greek Government in exile requests so. A Greek Legion does already exist in Egypt.

b. Executive power—As a result of the dismissals, decreed by the Italians for the constabulary and police, their numbers have decreased to one third of the prewar strength. The executive power, as a result of its insufficient numbers, but also due to its present attitude, can no longer be regarded as an element of security. It takes a passive attitude towards the various abuses.

c. Economic and food situation

1. *The economic life* is dominated by the black market, price rigging, and illicit currency traffic. Organized bands are buying up food in the country in order to sell it on the "black market" at fantastic prices. Decrees against these conditions are disregarded. The government attempts in vain to ease the lot of

the population through increases in pensions and salaries, settlement of military compensation, maximum price regulations, etc. All measures, however, are in no proportion to the devaluations of the currency.

2. The food situation has furthermore deteriorated. The rate of infants' mortality is said to have risen from 6 percent to 50 percent as a result of the famine.

In bringing up food the government has to cope with extraordinary transportation difficulties. The steamer "Theophile Gautier" which, among other items, was carrying German flour from the Banat to Athens and Piraeus was sunk by the British.

Besides this, owing to the advanced season, the products of the summer season, especially fruits and vegetables, were gradually disappearing. The bread ration had to be temporarily reduced from 60 drams (192 grs.) to 30 drams (96 grs.) since an anticipated transport of grain and flour failed to arrive. The present issue of bread is again 50 drams (160 grs.) daily per head, which is the result of the arrival of one Italian and two German steamers laden with grain. Moreover, a steamer under the Turkish flag of the red half-moon, laden with 1,200 tons of food supplies, arrived in Piraeus. The Minister for Agriculture and Food, Karamanos, declared that, for the moment, even the greatest difficulties in the procurement of bread could be regarded as overcome. In spite of the *temporary improvement* the over-all situation with regard to food is as bad as before.

The supply with coal and fuel continues to remain insufficient. Negotiations between a German coal company and the Croatian Government were conducted in Agram for the purpose of delivering 200,000 tons of coal to Greece. The negotiations reached a deadlock since Greece at the present time is in no position to deliver the products requested as compensation (resin, sesam-oil, etc.).

d. Morale—The people bear the acute food situation with indifference and apathy.

The political sentiment of certain groups has changed considerably. The Communist propaganda, in view of the enormous German victories in the East, has lost some of its driving power although the British propaganda in this matter does not work without skill. One begins to realize that the German fight against bolshevism meets the interests of all European nations and hopes that a just solution will be found for the Greek question in the framework of the European reorganization. Particular attention is directed to the tobacco regions of Kavalla and Xanthe which are occupied by the Bulgarians. The export of tobacco is the economic backbone of Greece. One hopes that in future settle-

ments of territorial questions Germany will take those vital economic problems into consideration.

* * * * *

TRANSLATION OF DOCUMENT NOKW-235
PROSECUTION EXHIBIT 140

ORDER OF GENERAL BOEHME, 2 NOVEMBER 1941,
CONCERNING SUPPRESSION OF SERBIAN RESISTANCE

Supplement 113

[Handwritten] War Diary

The Plenipotentiary Commanding General in Serbia
Quartiermeister/Military Administration/Ic
No. 3345/41, Secret

Quartiermeister Section No. 586/41, Secret

Local Headquarters, 2 November 1941

[Stamp] Secret

Subject: Suppression of the Serbian resistance—signs of dissolution among the insurgents

1. Under the pressure of the ruthless and successfully carried out operations of the unit, in consideration of the approach of winter and on the basis of the destruction of the Russian armed forces, which is gradually becoming noticeable, the *first indications of signs of dissolution* are to be recognized among the insurgents.

2. These signs were to be expected; they do not signify by any means that the opponent will give up his aims. It depends on—

a. Destroying communism in Serbia in such a manner that flaring up again under more favorable circumstances is impossible.

b. Destroying Serbian chauvinistic circles which now and in the future refuse close economic and political cooperation with the Reich.

3. At the same time those parts of the Serbian population must now be won, which have placed themselves on the side of the Serbian Government of Nedic, installed by the Reich. (See directive of the Plenipotentiary Commanding General in Serbia/Ia No. 33446/41, Secret, of 2 November 1941).

4. The following directives are published *for the commitment of the units and the conduct of the administrative offices:*

a. As before, all insurgents who were taken *in combat*, even if they deserted, are to be shot as partisans. Negotiators who come from territories in which combat actions take place or will happen soon, are likewise to be shot.

The arrest and shooting of *hostages* is regulated by the order of the Plenipotentiary Commanding General in Serbia/Chief of Military Administration/Quartiermeister No. 2848/41, Secret, of 10 October 1941 and No. 3208/41 of 25 October 1941.

b. Negotiators who do *not* offer the capitulation of small or large groups under the pressure of combat actions taking place or to take place are to be told that the battle against insurgents will be continued with unabated severity and only unconditional capitulation with surrender of all weapons will be accepted.

c. Unconditional surrender is to be carried out as follows: The insurgents are to lay down their weapons at a place determined by one of the troop commanders or the administrative area and/or district commandant and are to be brought together in a reception camp of the battalion, regiment, or division. They are to be examined there by the Secret Field Police, SD, and Serbian auxiliary police. For this purpose, administrative orders in my mission proceed through the chief of the military administration.

d. The divisions are to report in the daily reports, place of the reception camps and the number of prisoners.

5. The *exploitation of the signs of dissolution* lies exclusively in the hands of the German armed forces (unit and administrative offices). Serbian auxiliary police may not accept offers of capitulation, but must obtain the decision of the German offices. The insurgents will, nevertheless, first of all approach the units of the Serbian auxiliary police with offers of capitulation. Through getting into close touch with them, it is to be guaranteed that the initiative will remain unequivocally with the German offices. It is understood that a crossing over of insurgents into the Serbian auxiliary police is to be prevented with all possible means.

Orders of this sort to the Serbian Government are issued through the Chief of the Military Administration. A copy of the order of the Prime Minister Nedic to the branches of the Serbian Government is enclosed as a supplement.

6. *The larger number of the insurgents* will attempt to strike through to their home localities unnoticed, in order to conceal themselves there. Such groups are to be arrested by the units or by the Serbian auxiliary police, if necessary with force of arms, and are to be brought into collection camps.

The following is valid for the seizure of insurgents who succeed in escaping and reaching their home localities:

a. The administrative offices have received from the Chief of the Military Administration an order to prepare exact reports and submit lists, from which the names of leaders of the bandits, members thereof, and all persons absent from the localities or returning there may be obtained. They are to note in addition the localities which have offered the bandits assistance.

b. In addition, frequent surprise raids are to be carried out by the unit in collaboration with the administrative offices. Because of their knowledge of the locality and population, it will often be practical to use the Serbian auxiliary police.

7. In doubtful cases—above all, when it is uncertain whether individual groups are to be regarded as “insurgents” or not—the decision of the Plenipotentiary Commanding General in Serbia is to be obtained.

[Signed] BOEHME

Lieutenant General, Infantry

Distribution:

Down to battalion and district headquarters

[Stamp] Secret

TRANSLATION OF DOCUMENT NOKW-905
PROSECUTION EXHIBIT 143*

REPORT FROM 734TH INFANTRY REGIMENT TO 704TH INFANTRY
DIVISION, 4 NOVEMBER 1941, ENCLOSING REPORT OF THE
SHOOTING OF JEWS AND GYPSIES

[Stamp] Secret

734th Infantry Regiment
Diary No. 437/41 Secret Ia

4 November 1941

[Stamp]	704th Infantry Division	IVa
	Received 8 November 1941	IVb
704th Infantry Division		IVc
Received 10 November 1941	Diary No.	IVd
Branch Ia 598/41 Secret -1-	C.O. IIa IIb Ia Ib Ic III	
	[Handwritten]	
	Diary 1351/41 Secret 470a	
	[Illegible initials]	
	Ia	

To 704th Infantry Division
Subject: Reprisal measures
1 Enclosure

For information, the regiment encloses the report of First

* Photographic reproduction of this document, including enclosure thereto, is reproduced in Section VIII.

Lieutenant Walther, 9th Company, 433d Infantry Regiment, concerning the shooting of Jews and gypsies on 27 and 30 October 1941.

[Illegible signature]

[Stamp] Secret

1st Lt. Walther

C. O. 9th Company, 433d Infantry Regiment

Local Headquarters, 1 November 1941

Report concerning the shooting to death of Jews and gypsies

By agreement with the SS office, I picked up the selected Jews and gypsies from the prisoner camp Belgrade. The trucks of 599th Administrative Area Headquarters available to me for this purpose were impracticable for two reasons:

1. They have civilian drivers. Hence, secrecy is not assured.

2. All of them were without cover or tarpaulins so that the population of the city saw whom we had put in the vehicles and where we went. Wives of the Jews had assembled in front of the camp; they cried and screamed when we drove off.

The location where the shooting to death was carried out is very favorable. It is situated north of Pancevo immediately on the road of Pancevo-Jabuka where there is a grade high enough to make it difficult to climb. Opposite this grade is swamp terrain; behind it a river. When the water is high, as on 29 October, it almost comes up to the grade. Thus, an escape of the prisoners can be prevented with few troops. The sandy ground also is favorable which facilitates digging of the ditches and consequently shortens the time of labor.

After arrival, approximately 1½ to 2 kilometers before the selected site, the prisoners got off, marched to the selected site, while the trucks with their civilian drivers were sent back immediately in order to afford them as little grounds for suspicion as possible. Then, I had the road blocked for all traffic for reasons of security and secrecy.

Place of execution was secured by three light machine guns and twelve riflemen— (1) against attempts to escape by the prisoners, and (2) to protect ourselves against possible attacks by Serbian bands.

The largest part of the time was consumed by the digging of the ditches, while the actual execution by shooting (100 men in 40 minutes) went very rapidly.

Luggage and valuables had been collected previously and taken along in my truck in order to turn them over later to the National Socialist Peoples' Welfare.

The shooting to death of Jews is simpler than that of gypsies. It must be admitted that the Jews accept death very calmly, they stand very quietly, while the gypsies cry, scream, and move continuously when they are already on the spot where they are to be shot to death. Some of them even jumped into the ditch before the firing and attempted to feign death.

In the beginning, my soldiers were not impressed. The second day, however, it had become noticeable that one or the other did not have the nerve to carry out shooting to death for a longer period of time. My personal impression is that one does not develop any psychological inhibitions during the shooting to death. However, these appear if one contemplates it quietly in the evening, after a few days.

[Signed] WALTHER
First Lieutenant

Appendix I

Map showing location of burial place of Jews and gypsies shot by 9th Company, 433d Infantry Regiment, between 27 and 30 October 1941, near Belgrade on the road between the towns of Pancevo and Jabuka. [Attached to original, not reproduced here]

PARTIAL TRANSLATION OF DOCUMENT NOKW-1052 PROSECUTION EXHIBIT 146

ACTIVITY REPORTS OF 342d INFANTRY DIVISION TO PLENIPOTENTIARY COMMANDING GENERAL IN SERBIA, 30 OCTOBER AND 18 NOVEMBER 1941, CONCERNING REPRISAL MEASURES

* * * * *

342d Infantry Division

Ia Section (open)

Subject: Reprisal measures

Reference: Today's daily report

Division Command Post, 30 October [19]41

[Handwritten] Addendum to 15 November

To The Plenipotentiary Commanding General in Serbia

According to daily report of 15 October-- 1,900 shot to death
 For 15 to 29 October 1941:

10 dead	1,000
39 wounded	1,950
[Total]	<u>4,850</u>
Executions by shooting to date.....	1,600
Remaining	<u>3,250</u>

Division requests further instructions, as no prisoners are available at present.

FOR THE DIVISION HEADQUARTERS

The First General Staff Officer

Signature

Major, GSC

Addendum:

Losses during the period from 31 October to 15 November 1941—

1 dead	100 to be shot
5 wounded	250
[Total]	<u>350</u>

Enemy losses—

73 dead	
129 shot to death	
<u>202</u> —[minus] 350	148
<i>Balance carried forward</i>	<u>3,250</u>
<i>Losses, for which reprisals have not yet been taken</i>	3,398

342d Infantry Division _____

Divisional Command Post, 18 November 1941

Report according to status on 15 November inclusive of shootings, arrests of hostages, and reprisal measures, during the period from 21 September to 15 November 1941.

	dead	wounded
1. <i>Own losses</i> —		
a. During the period covered by the report..	32	127
b. Losses before the period reported on, for which reprisals have not been taken.....	--	---
[Total]	<u>32</u>	<u>127</u>

2. *During the period covered by report there were shot to death*—

a. Insurgents during combat actions.....	905
b. Hostages as reprisal.....	2,685
Including paragraph 5b.....	<u>3,590</u>

3. *Therefore, total for which reprisals not yet taken—5960.*

Remark: Further shootings not carried out, as hostages were sent to concentration camps.

4. *Number of hostages:*

a. At the beginning of report period.....
b. Arrested during the report period..... 22,175
c. Of these, shot to death or sent to concentration camps 21,875
d. Therefore, still remaining..... 300

5. *During the period covered by report there were further shot to death—*

a. As reprisal for losses of troop units not belonging to the Division
b. *By special orders (Corps Order of 7 November 1941) .. 129*

Divisional Command Post, 18 November 1941

Enemy losses from 24 September to 15 November 1941

	Killed in Combat	Shot to Death	Arrested
Report of 9 October.....	88	1,127	17,420
10-day report of 20 October... 546	546	1,081	4,295
10-day report of 31 October... 200	200	100	110
10-day report of 10 November.. 53	53	248	45
Daily report of 11 November..	129	..
Daily report of 13 November.. 18	18	..	5
[Totals]	905	2,685	21,875

TRANSLATION OF DOCUMENT NOKW-945
PROSECUTION EXHIBIT 174*

DRAFT OF TELETYPE FROM ARMED FORCES COMMANDER SOUTHEAST
TO COMMANDING GENERAL SERBIA, 6 FEBRUARY 1942, REQUESTING
REPORTS ON ALL REPRISAL MEASURES

[Stamp] Secret

[Handwritten] War Diary SSD
59

[Stamp] Draft

Teletype

To Plenipotentiary Commanding General in Serbia

1. All subordinate units, including the Bulgarians, are to be instructed that all forthcoming reprisal measures and/or counter-measures are to be included in reports regarding sabotage attacks, etc.

* Photographic reproduction of this document appears on p. 1137.

2. The treatment of prisoners in the course of operations requires application of a more severe criterion. Prisoners taken in combat can not be innocent. People who loiter in the combat terrain and are not in their residence *will be mostly* considered as having participated in combat and consequently *must* accordingly be shot to death.* The lenient attitude of the troops in view of the same attitude during the past summer and consequences resulting therefrom, is to be combatted most vigorously!

[Initial] K [KUNTZE] 6 February
Lieutenant General (Engineers)
Armed Forces Commander Southeast (12th Army)

Ia No. 431/42, Secret
6 February 1942 1600 hours

After release:

Ia
Id
O1
Ic
War Diary

TRANSLATION OF KUNTZE DOCUMENT 64
KUNTZE DEFENSE EXHIBIT 7

EXTRACTS OF REPORT TO ARMED FORCES COMMANDER SOUTHEAST FROM WAR DIARY OF PLENIPOTENTIARY COMMANDING GENERAL SERBIA, MARCH 1942, CONCERNING COURT MARTIAL INVESTIGATIONS AND CARE FOR PRISONERS OF WAR

The Plenipotentiary Commanding General in Serbia
Section Ia No. 1367/42, Secret

[Handwritten] Appendix 2

Belgrade, 1 March 1942

[Stamp] Secret

Subject: Ten-day report

2 Enclosures (only to Armed Forces Commander Southeast)

To *The Armed Forces Commander Southeast*

I. Enemy situation

1. Serbian area

* * * * *

* Words in italic represent handwritten corrections made on original document.

3. *Acts of sabotage and surprise attacks* have decreased in numbers as compared with the previous report period, however, they extended over the entire eastern area of Croatia and Serbia. The total number of the reported incidents amounts to 45.

4. *General*—The interior political tensions in Serbia have become more acute. The formation of new bands and increased activities by those which already have been reported, as well as increased Communist propaganda, make a new revolt early in the war increasingly likely.

* * * * *

II. Own and subordinated troops

* * * * *

The 714th Infantry Division inflicted heavy casualties upon the enemy in numerous skirmishes and, during a search, arrested a number of suspected persons who were detained for court martial investigation.

* * * * *

IV. Supply

* * * * *

Five hundred and ninety-four seriously injured and sick Serbian prisoners of war arrived in Belgrade from Germany. They were assigned to the military hospitals in Belgrade and Kragujevac for further medical care by Serbian medical personnel.

V. Losses (period from 16 to 25 February 1942)

Own losses—

Germans	-----25 killed	---61 wounded	---13 missing.
Croatians	-----42 killed	---92 wounded	---15 missing.
Bulgarians	-----17 killed	---24 wounded.	
Total	84 killed	177 wounded	28 missing.

Enemy losses—

Losses inflicted by German troops 858 killed, 73 arrested.
 Losses inflicted by Croatian troops 73 killed, 8 arrested.
 Losses inflicted by Bulgarian troops 764 killed.

Total losses of the enemy 1,696 killed, 81 arrested.

* * * * *

VI. Administration

* * * * *

The Serbian Government, with the approval of the administrative staff, arranges for meetings in which the population is

informed about the situation by prominent persons, warned not to commit any rash acts, and an attempt is made to win their loyal cooperation.

FOR THE PLENIPOTENTIARY COMMANDING GENERAL IN
SERBIA

The Chief of the General Staff
[Illegible initials]

[Signed] KEWISCH
Colonel, GSC

* * * * *

TRANSLATION OF KUNTZE DOCUMENT 65
KUNTZE DEFENSE EXHIBIT 10

EXTRACTS FROM REPORTS OF COMMANDING GENERAL SERBIA TO
ARMED FORCES COMMANDER SOUTHEAST, 10, 20, AND 31 MARCH
1942, CONCERNING PLANS FOR REVOLT, SABOTAGE, AND
RECRUITING ACTIVITIES OF PARTISANS

Copy

Enclosure 26

[Handwritten] War Diary

Commanding General and Commander in Serbia

Operations Section No. 1610/42 Secret

Belgrade, 10 March 42

Subject: Ten-day report

2 Enclosures (only to Armed Forces Commander Southeast)

[Stamp] Secret

To *Armed Forces Commander Southeast*

I. Enemy situation

1. *Serbian area*—An operation plan of the Communist party was found in Belgrade with directions for the revolt early in the year, which presumably is to begin in the middle of March. The revolt is to be introduced by acts of sabotage on oil transports on the Danube and blowing up the Sava railroad bridge.

* * * * *

3. *General*—In comparison with the period of the previous report, the recruiting activity of the Communists and Nationalists

has increased throughout the entire country. Energetic propaganda is being made for the annexation of eastern Bosnia to Serbia * * *.

4. *Acts of sabotage and attacks*—The number of acts of sabotage and attacks has not changed substantially in comparison with the period of the preceding report. A total of 43 cases was reported.

* * * * *

III. Serbian armed battalions [*Abteilungen*]

* * * * *

In the course of the reorganization of the Serbian police, approval has been granted to renaming it "Serbian State Guard," with the subformations "Serbian Military Guard," "Serbian Municipal Guard," and "Serbian Border Guard." Planned and present strengths of the Serbian State Guard are seen in the following survey:

Planned	-----580 officers---	14,420 men---	Total---	15,000
Present	-----635 officers---	12,470 men---	Total---	13,105

Besides that, the strength of the Belgrade Municipal Guard amounts to—

48 officers---	1,223 men---	Total---	1,271
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* * * * *

V. Losses (26 February—5 March [19] 42)

Ours—	Germans	-----13 dead	-----16 wounded
	Croats	-----14 dead	-----92 wounded
	Bulgarians	-----	-----4 wounded
	Ethnic Germans and Serbian Auxiliary Police	-----4 dead	-----1 wounded
		31 dead	113 wounded

Enemy—	By German troops and Serbian Auxiliary Police	-----884 dead	-----231 arrested
	By Croatian troops	-----97 dead	
	By Bulgarian troops	-----136 dead	-----223 arrested
		1,117 dead	454 arrested

* * * * *

[Illegible initials]

[Signed] BADER

Lieutenant General, Artillery

Copy

Enclosure 55

[Handwritten] War Diary

Commanding General and Commander in Serbia

Operations Section No. 1872/42 Secret

Belgrade, 20 March 1942

Subject: Ten-day report

2 enclosures

[Stamp] Secret

To *Armed Forces Commander Southeast*

I. Enemy situation

* * * * *

3. *General*—Parts of proletarian brigades have pushed forward out of Montenegro across the demarkation line into the east Bosnian area; the advance of other Montenegrin bands across the demarkation line into the Serbian area can be counted on. In general a certain calm has descended on Serbia; in Croatia, on the other hand, further increasing activity of the insurgents is to be noted.

4. *Sabotage and attacks*—The number of 36 acts of sabotage and attacks keeps within the same limits as in the period of the preceding report.

* * * * *

V. Losses (6 March-15 March)

Ours—	Germans	----1	dead----	1	wounded				
	Croats	-----24	dead---	28	wounded---	10	missing		
	Bulgarians	None							
			-----	25	dead---	29	wounded---	10	missing

Enemy—According to German reports, 377 dead, 131 arrested
According to Serbian reports, 543 dead, 125 arrested
According to Croatian reports, 218 dead, 61 arrested

As a result of joint fighting these figures may in part overlap.

* * * * *

[Illegible initials]

[Signed] BADER
Lieutenant General, Artillery

Copy

[Handwritten] Enclosure 79 War Diary
Commanding General and Commander in Serbia
Operations Section No. 2279/42 Secret.

Headquarters, 31 March 1942

[Stamp] Secret

Subject: Ten-day report

2 enclosures (only to Armed Forces Commander Southeast)

To *Armed Forces Commander Southeast*

I. Enemy Situation

1. *General*—Generally quiet in Serbian area. Communist tendencies seem to be constantly gaining more ground in the entire Croatian area.

* * * * *
The number of 49 acts of sabotage and attacks constitutes an increase in comparison with the period of the preceding report.

* * * * *

V. Losses (16-25 March)

Ours—	Germans	_____1	dead_____3	wounded_____1	missing
	Croats	_____40	dead_____68	wounded_____98	missing
Enemy—		_____504	dead_____84	wounded_____256	arrested

* * * * *

[Illegible initials]

[Signed] **BADER**
Lieutenant General, Artillery

TRANSLATION OF DOCUMENT NOKW-946
PROSECUTION EXHIBIT 189

ORDER OF HEADQUARTERS ARMED FORCES COMMANDER
SOUTHEAST, 27 MARCH 1942, CONCERNING DESIGNATION
OF PARTISANS AND CHETNIKS

Headquarters, 27 March 1942

[Handwritten] 131

Armed Forces Commander Southeast (12th Army)

Ia No. 388/42

Subject: Designation "Chetniks"

The designation "Chetniks," often used in reports, has frequently caused misunderstandings; it should, therefore, be used no more.

Enemy groups are to be called "insurgents," "rebels," or "bands," or other unequivocal designations, for instance, the term used by the enemy "insurgents of the 2d Mounted Montenegrin Proletarian Brigade" and so forth. The fighters on the German and Croatian side are to be designated by the usual troop designation, for instance, "Serbian State Guards," "Auxiliary Police," [or] "Ustasha."

FOR THE ARMED FORCES COMMANDER SOUTHEAST
(12th Army)

The Chief of Staff

BY ORDER:

[Initialed] J

[Signed] MACHER

Distribution:

Commanding General and Commander in Serbia

German General in Zagreb

War Economics Staff Southeast

Armed Forces Commander Southeast: Ia

Ic

Oberquartiermeister

War Diary

PARTIAL TRANSLATION OF DOCUMENT NOKW-1028
PROSECUTION EXHIBIT 197

ENCLOSURE TO OPERATIONAL ORDER NO. 5 OF 718TH INFANTRY
DIVISION, TITLED "COMBAT DIRECTIVE," 14 APRIL 1942,
CONCERNING IDENTIFICATION AND TREATMENT OF PARTISANS*

[Stamp] Secret

Enclosure 3 to No. 1323/42 Secret of 718th Infantry Division
Ia of 14 April 1942

COMBAT DIRECTIVE
(For the instruction of the troops)

1. *Enemy*—The following are to be considered and treated as enemies:

a. Partisans—Communist insurgents.

External marks of identification—uniforms—German, Italian, Serbian, or peasant clothing with rank insignia—Soviet Star on the cap, rank insignia on sleeve. Political commissars—Hammer and sickle superimposed on star.

b. Chetniks—Nationalists—Serbian insurgents (in as far as they offer resistance).

Marks of identification—mostly brown national dress. Officers in Serbian uniform, black fur cap with Serbian coat of arms and national colors.

c. Dacic—Chetniks (in as far as they offer resistance).

d. All nonresidents and residents who, according to statements, have returned just recently.

Refugees are to be pursued immediately, particularly since they will be mostly leaders.

2. Not to be treated as the enemy are soldiers of the Italian armed forces in uniform, soldiers of the Croatian armed forces in uniform (cap insignia large badge), soldiers of the Croatian Ustasha in uniform (cap insignia "U"), civilians, some of them with military overcoats, with a permit for carrying arms issued by the Croatian armed forces, or with blue-white brassards on their civilian clothing (voluntary militia).

3. *Treatment of the insurgents*—

a. Insurgents captured while carrying arms, as well as all their followers and supporters or whoever owns ammunition, are to be shot to death.

b. Chetniks who do not offer resistance are *not* to be treated as insurgents. They are at first to be sent in a group under guard as prisoners to the prisoner collecting point.

* Extracts from the operational order to which this enclosure was attached is reproduced in section IV C.

c. In searching the villages which were in the hands of the insurgents, the inhabitants, in particular the village elders, are to be asked to state the names of those families whose men have taken "to the woods" and who have cooperated with the insurgents.

4. *Negotiations with the insurgents*—Troops are to be prohibited from all negotiations, as a matter of principle. Should the insurgents offer to negotiate, the regimental commander is to be informed immediately and action is to be taken according to his orders.

5. *Procedure during capture*—During the preceding operations it has been found that all persons present during the search of houses or villages were driven together by the troops and taken away as prisoners. During interrogations difficulties arose in the effort to find out under just what circumstances the capture was made. That is why each sergeant has to give a slip to a prisoner describing briefly how the capture was made. For instance, "Taken in house while working in stable," signature and unit. The use of prisoners for carrying wounded is prohibited as a matter of principle.

6. *Interrogation of prisoners*—In order to make possible the evaluation of prisoner statements, the following factors to be evaluated by the troops should be stressed already at the first interrogation:

a. What are the names of the leaders, and where are the leaders, including those of smaller insurgent units?

b. Where are the depots for arms, ammunition, and food?

c. Where are family members of the insurgent leaders?

d. An investigation is to be carried out to determine whether the prisoners include such as might be used as guides to hide-outs and depots.

7. *Treatment of the civilian population*—

a. The evacuation of the civilian population from entire areas in the villages is to be carried out only by special order of the Combat Command [Kampfgruppe], General Bader.

b. Villages and houses in which areas ammunition has been found, from which shots have been fired, or the residents of which have aided and abetted insurgents are to be burned down. Other than that, the burning down of villages is to cease in consideration of the necessity for troop billets.

c. Village residents whose relatives are with the insurgents or who have supported the latter's activities are to be taken away as prisoners.

d. The approach to villages which are to be searched is, as a

matter of principle, to be made under the protection of heavy weapons.

e. Just and understanding treatment of the population by the troops must show that they are only fighting the insurgents and that the peaceful population has nothing to fear.

8. *Executive power*—The executive power in the operational area is in the hands of the commander of combat command, General Bader, and will be carried out according to his directives by the divisional commanders. The Croatian gendarmerie units, the Croatian police units, and the Croatian administrative officials who remained in the area will be available along with the troop units until the employment of the civilian Croatian authorities.

9. *Croatia is a friendly country*—Troops must be conscious of this fact and are to avoid transgressing the prescribed limits of their duties. Regarding food taken from the country, attention is called to the directive issued via Section Ib of the Division.

FOR THE DIVISION HEADQUARTERS (Ic)

As Deputy:

[Illegible Signature]

Lieutenant

TRANSLATION OF KUNTZE DOCUMENT 66
KUNTZE DEFENSE EXHIBIT 14

EXTRACTS FROM TEN-DAY REPORTS OF COMMANDING GENERAL
IN SERBIA TO ARMED FORCES COMMANDER SOUTHEAST,
30 APRIL 1942

Copy

[Handwritten] Enclosure 80 War Diary

Commanding General and Commander in Serbia

Operations Section 3320/42 Secret

30 April 1942

Subject: Ten-day Report

2 enclosures (only to Armed Forces Commander Southeast)

To Armed Forces Commander Southeast

I. Enemy situation

1. *General*—Generally quiet in Serbian area. Isolated attacks on communities are further to be noted, the majority in the

area occupied by the Bulgarians. In the area of eastern Bosnia, after the retreat of the proletarian brigades following the abandonment of the siege of Rogatica, the masses [of the troops] have, in general, withdrawn in time towards the south under the pressure of the mopping up operation.

* * * * *

VII. Losses and booty for the period from 15 April to 24 April 1942

	Dead	Wounded	Missing	Captured
Enemy losses -----	11	2	-----	158
Germans in Serbia ----- (in fatal accidents)	2	1	-----	-----
Serbian Auxiliary Police ---	4	2	24	-----

* * * * *

FOR THE COMMANDING GENERAL AND COMMANDER IN SERBIA

The Chief of the General Staff as Deputy:
 [Signed] KOGARD
 Lieutenant Colonel, GSC

TRANSLATION OF KUNTZE DOCUMENT 67
 KUNTZE DEFENSE EXHIBIT 19

EXTRACTS OF REPORTS FROM COMMANDING GENERAL SERBIA TO ARMED FORCES COMMANDER SOUTHEAST, 1 AND 20 JULY 1942, CONCERNING REVOLT IN CROATIA AND SITUATION IN OTHER AREAS

Copy

[Handwritten] Enclosure 7

[Stamp] Secret

Commanding General and Commander in Serbia
 Operations Section No. 3959/42 Secret

Headquarters, 1 July 1942
 [Handwritten] War Diary

Subject: Situation report for the period 21-30 June 1942
 2 Enclosures (only to Armed Forces Commander Southeast)

To Armed Forces Commander Southeast

I. Enemy Situation

1. General—The situation in Serbia has not changed in comparison with the period of the last report. At present it cannot

be seen to what extent the *revolt in Croatia* will affect Serbia and especially the Draja Mihailovic movement, since the insurgent organization of Draja Mihailovic is no longer limited solely to the area of old Serbia. Activity of the Draja Mihailovic organization extends to the territory of southern Serbia and Albania, as far as Skoplje-Prilep, eastern Hercegovina, as well as eastern Bosnia.

The situation in Croatia is unchanged. The entire Croatian area is in a state of fermentation, insofar as it has not already come to open rebellion. The prevailing insecurity of law and the hopeless failure of the public administration are to be regarded as the chief reasons for this.

Further difficulties result for the Croatian state from the evacuation of large stretches of territory south of the demarkation line by the Italians. These territories must now be given additional protection by the Croatian armed forces. Since for the time being there is a lack of adequate troop protection in these territories, the retreating insurgents will look for a new refuge here and form new centers of unrest.

At present there are the following chief centers of unrest:

- (1) Kozara and Prozara.
- (2) Grmec Mountains.
- (3) Northern part of Hercegovina.
- (4) Papuk and Psunje Mountains.
- (5) Fruska Gora.

* * * * *

4. *Eastern Bosnia*—The area was pacified. Relatively slight disturbances of the calm by attacks on villages could be eliminated. As a result of the retreat of the Italians south of Sarajevo, the enemy forces who were pinned down up to now have been freed. Quite recently enemy pressure has become noticeable near Trnovo and Igman-Planina. Minor engagements took place. Arbitrary procedure of Ustasha units (shootings, destruction, looting) created unrest among the population. The incidents were stopped by the intervention of German troops.

5. *Western Bosnia*—The enemy in Kozara and Prozara-Planina is surrounded. Attempts to break out failed. The surrounded enemy group is apparently under the superior command of insurgents whose headquarters are apparently in the Grmec Mountains. It can be clearly seen that the enemy is trying to relieve the surrounded troops, as relatively strong enemy groups are moving toward the Grmec Mountains from a southwestern and southeastern direction.

An intensification of the insurgent situation is to be noted in the area north of the Sava. Enemy troops are becoming more active in the Papuk-Psunje Mountains, which constitutes a serious threat to the Agram [Zagreb]-Belgrade main line. Several acts of sabotage are to be noted on the railroad between Novska and Nova Gradiska.

* * * * *

[Signed] BADER
Lieutenant General, Artillery
[Illegible initials]

Copy

Commanding General and Commander in Serbia
Operations Section No. 4151/42 Secret

[Handwritten] Enclosure 58

Headquarters, 20 July 1942

Subject: Situation report for the period of 11-20 July [19] 42

2 enclosures (only to Armed Forces Commander Southeast)

To Armed Forces Commander Southeast

[Stamp] Secret

I. Enemy Situation

1. *General*—In *Serbia* the activity of the Communist movement has generally undergone a further weakening. The comparatively small bands appearing in the most widely different places in the country, as well as the attacks and acts of sabotage committed, have no very great significance.

On the other hand, *Croatia*, as before, still represents a Communist area of revolt. After the defeat of the enemy in the Kozara-Prozara Pl. [Planina] the following areas still appear as chief centers of unrest:

- (1) Syrmia.
- (2) Papuk and Psunje Pl. and mountainous terrain northwest of there.
- (3) Samarica.
- (4) *Grnec Mountains* (headquarters and assembly point here).
- (5) Northern part of Hercegovina.

2. *Serbian area*—Just as before, the Draja Mihailovic organization is at work. In recruitment of followers a certain completion of the organization appears to have been reached. Equipment and armament might be described, as before, as inadequate. Recruitment extends to all classes of the population,

even to the loyalist Chetnik and Ljotic units. The over-all impression remains that a general national insurrection in Serbia is not imminent in the *immediate future*.

* * * * *

FOR THE COMMANDING GENERAL AND COMMANDER IN
SERBIA

The Chief of Staff [Illegible initials]

[Signed] GEITNER

Colonel, GSC

PARTIAL TRANSLATION OF DOCUMENT NOKW-1156
PROSECUTION EXHIBIT 229

EXTRACTS FROM REPORT OF COMMANDING GENERAL SERBIA,
30 OCTOBER 1942, CONCERNING TITO MOVEMENT

Commanding General and Commander in Serbia

Ic-No. 4177/42 Secret

[Handwritten] Enclosure 22

Local Headquarters, 30 October 1942

*The Communist Insurrection Movement in the Area of
Former Yugoslavia*

* * * * *

3. *Leadership*—The supreme leader of the Communists of Yugoslavia is "Tito." He is probably a Croat or a Slovene by origin. He is alleged to have participated in the Spanish Civil War. Up to now, no details could be ascertained regarding his person [personal data]. Headquarters are situated in Mliniste in the Klekovac Mountains (23 km. southwest of Kljuc). "Tito" considers economic cooperation of the partisans—as equal partners with Germany—as absolutely possible also in the Yugoslav area.

* * * * *

5. *Strength*—Reports available estimate the total number of Communist insurgents to be 28,000 to 30,000 men, 60 percent of which are armed. Only a minor part can be considered convinced Communists. The masses are composed of farmers and workers who were misled by propaganda and/or fled into the woods for fear of reprisal and extermination measures.

Active participation of women and girls as nurses and as couriers is common practice in all units.

* * * * *

7. *Organization*—The basic unit of the armed Communist groups is the peoples' liberation partisan unit [Abteilung] which corresponds approximately to a battalion (frequently also to a regiment) and which is organized in companies, platoons, and squads.

When the movement grew, it became necessary to organize brigades which were assembled according to ancestral origin, such as Serbian, Bosnian, and Hercegovinian brigades. A further step was the organization of the proletarian brigades which were to accentuate symbolically the part played by the workers in combat. The assault brigades represented a specialization which was due to the acceptance of selected fighters and choice equipment.

In the 1st unit [Abteilung] of the staff for the Bosnian Krajina even a youth battalion has been found to exist.

A political commissar is assigned to the leader in all of the units, down to company level.

Rank insignia—All are worn on the upper part of the left sleeve. Commandant of the zone of operation—like his staff officers, an open chevron with the point on top and the red star below; unit commander [Abteilungs Kommandeur]—1 red star, two vertical stripes below; battalion commander—1 red star, 1 vertical stripe below; company commander—3 red stars; platoon leader—2 red stars; squad leader—1 red star; unit [Abteilung] political commissar—1 red star, hammer and sickle in gold superimposed, 2 vertical stripes below; battalion political commissar—1 red star, hammer and sickle in gold superimposed, 1 vertical stripe below; company political commissar—1 red star, hammer and sickle in gold superimposed.

All wear the Soviet star on their hats.

* * * * *

8. *Method of combat*—In combat, the insurgents apply the principles of guerrilla warfare as made available to the troops as early as fall 1941. (Commander, command staff section Ia/F 13 September 1941.)

However, as can logically be expected, the development of the movement has brought along a change in combat method. One can differentiate three variations.

a. The ambush of small bands with the purpose of acquiring weapons, ammunition, and equipment to equip new members.

b. The open attack of medium size bands with the purpose of annihilating the legal armed forces, having for a secondary aim the acquisition of loot.

c. The conquest of strategically important localities in such numbers as to make possible a total occupation of the territory desired.

If a large size band is scattered, the subleaders [Unterfuehrer] return to the methods of guerrilla warfare.

The attack on morally or materially inferior enemies is considered customary. The bands evade superior forces because intelligence service supply them in time with the information necessary for an estimate of the situation. If a band is surrounded, it scatters according to orders and attempts individually under the protection of the night to leave the encircled area. During the day, all means of camouflage are used like digging in, covering with foliage, climbing up trees, etc. The treatment of prisoners differs. Frequently it is based on propaganda reasons and is carried out in such a manner that the prisoners are not shot to death but are released after having been robbed of everything. If the leadership considers it practical, exchange is also suggested. Officers were shot to death in almost every case.

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PARTIAL TRANSLATION OF DOCUMENT NOKW-1806
PROSECUTION EXHIBIT 539

EXTRACTS FROM REPORT BY THE HIGH COMMAND OF THE ARMY,
9 FEBRUARY 1943, CONCERNING CHETNIK (MIHAILOVIC)
MOVEMENT

Headquarters, 9 February 1943

High Command of the Army
General Staff of the Army
Department Foreign Armies East (III)
No. 100/43 Top Secret

70 copies—2d copy

[Stamp]

Commander in Chief Southeast (Army Group E)
Department Ic/Counterintelligence Officer
No. 446 Top Secret, 1 March 1943
Enclosures: [10]
[Office sections and initials illegible]

Croatia-Serbia

The Draja Mihailovic movement as of 1 February 1943*

BY ORDER:

[Signed] GEHLEN

* Chetnik movement, led by Draja Mihailovic.

The present report issued in limited distribution may not be forwarded to other offices.

[Stamp] to No. 256/43 Top Secret, Commander in Chief South-east (Army Group E) Army Report.

* * * * *

A. General Information

1. *Development*—Among the various insurgent movements which increasingly cause trouble in the area of the former Yugoslav state, the movement of Draja Mihailovic stands in first place with regard to leadership, armament, organization, and activity.

It is composed of the following groups:

- a. "Chetnik-units".
- b. "Followers of D.M."

In the former Yugoslavia the "Chetniks" were a reliable voluntary combat organization which, however, was organized by the state and supported with arms and money. At the beginning of the war they were organized as shock (Jurisni) battalions for the carrying out of special tasks. Immediately after the capitulation of the Yugoslavian Army most of these Chetniks grouped together in greater Serbian combat units under the leadership of their officers, thus forming the foundation of the D.M. movement.

In order to be able to work unmolestedly in the scope of their over-all organization they camouflage themselves in *Serbia* under the cover of "Chetnik units loyal to the government," in *Montenegro* as "National Militia," in *Dalmatia* as "anti-Communists," and in *Bosnia* as "loyal Chetnik Units."

The followers of D.M. come from all classes of the population and at present comprise about 80 percent of the Serbian people. Hoping for the liberation from the "alien yoke" and for a better new order and an economical and social new balance, their number is continuously increasing.

2. *Aims of the movement*—The aim of the D.M. movement is the creation of a greater Serbian state which is to comprise former Yugoslavia as well as the frontier regions of Hungary, Albania, and Bulgaria under the leadership of King Peter II from the House of Karadjordje.

The D.M. movement, the attitude of which is more Greater Serbian Nationalistic than Yugoslav, conceives as its primary task the liberation of the Serbian people.

The future state shall therefore be governed by Serbian leaders only. To all other peoples, being "minorities", rising to leading positions in the new state is to be made impossible.

3. *The personality of Draja Mihailovic*—Draja Mihailovic was born in 1893, as the son of a Serbian officer in Cacak. His ancestors were Serbian peasants. Shortly after he had joined the Serbian Army the Balkan Wars began, in the course of which he was twice decorated and rose to the rank of second lieutenant. On 1 September 1918, he was promoted to lieutenant and, holding that rank, took part in combat at the Salonika front. After having been wounded he was decorated for his courage by the King with the order of the "White Eagle."

He was taken over into the Yugoslav Army, graduated from the War Academy, and was then employed alternately in offices of the general staff and with the troops.

As Military Attaché in Prague and Sofia he was able to gain a good insight into the political relations in the Balkans.

In 1937, Draja Mihailovic was relieved as colonel in the general staff. The reason for this was presumably his continuous differences of opinion with his superiors and his morbid ambition and self-willedness.

Soon after the breaking up of Yugoslavia he tried to take into his own hands the fate of his people.

As a fanatic fighter for the Greater Serbia idea and an enthusiastic follower of the Royal House he began to build in western Serbia a *movement* which today extends over all of *Serbia, Bosnia, Dalmatia*, as well as into the frontier areas of *Hungary, Rumania, and Bulgaria*.

The *center* of the movement is located in *Montenegro*. There, Draja Mihailovic believes himself to be out of danger of being caught by the German occupation troops.

In January 1942, the Yugoslav Government in exile appointed Draja Mihailovic, *General of the Army*, and at the same time he was appointed "Commander in Chief of the Yugoslav Home Army"; a short time afterwards he was appointed *Minister of War*.

On account of his absolute, *undisputed* position as *military leader*, the large majority of the Serbian people also look toward him as the coming *political leader* of the new Yugoslavia.

B. *Political Relations*

1. *Political organization of the D.M. movement*—In order to group all forces in the Yugoslav area, the movement as ascertained up to now is territorially divided into the following regions: Belgrade, western Serbia, northwestern Serbia, central Serbia, northeastern Serbia, southern Serbia, The Kopaonik-Mountains, southern Bosnia, central Bosnia, and northern Bosnia.

Each region is under the orders of a "*regional commander*".

He supervises within his region the entire political and military organization and propaganda. At the time of the "general revolt" he is responsible for the quick reestablishing of peace and order.

The regions are subdivided according to their size into *districts*. The *district commanders* have in their areas essentially the same tasks as the regional commanders. In addition, at the time of the general revolt they are commissioned to take over the offices of heads of community.

The political organization of the regions Dalmatia, Slovenia, Montenegro, Syrmia, Backa, and Banate is not completely known at present.

In the *area of old Serbia* the "*Organization Staff Serbia*" is responsible for all political measures. At the time of the general revolt it is to take over the provisional duties of the government after having abolished the present government. The *chief* is Brigadier General *Trifunovic*.

For *Bulgaria* a *special staff* was created under the leadership of Professor Trklja. Its task consists of recruiting the Bulgarian population for the D.M. movement.

2. *Relation to the Yugoslav Government*—Draja Mihailovic depends only partially on the Yugoslav Government in exile in London. Therefore, as a rule, he takes the decisive political and military measures on his own initiative.

3. *Relation to the Allies*—*England* aids the movement by supporting it with funds, war materials, and by sending officers and men. For this reason Draja Mihailovic approves of the relation of his government to England. He is, however, opposed to English attempts to gain stronger political influence on the movement.

The relations with *Russia* are at present characterized by the combating of Communist bands. Draja Mihailovic, however, regards this conflict as an *internal Yugoslav affair* and he himself strives to achieve good relations with the Soviet Russian Government. Therein he is supported by the efforts of the Yugoslav Government in exile in London.

At the time of the general revolt, therefore, one must count on large parts of the Communist bands joining Draja Mihailovic.

4. *Relations with the occupying powers*—*Germany* is considered to be the main adversary. Her occupation troops must, as the "occupiers," be destroyed. In order to avoid measures of reprisal against the Serbian population, however, Draja Mihailovic always warns against premature single operations.

The *Serbian Government*, headed by General Nedic, is consid-

ered traitorous toward the Serbian people. The removal of this government is, therefore, one of the first demands.

The *Italian forces of occupation* tolerate the D.M. movement or even support it. Often, Chetnik units are employed by the Italians for combating Communists.

The Bulgarian troops of occupation are also considered to be "occupiers." Increasing attempts to destroy their morale by planned inflammatory propaganda become apparent.

C. *Military Organization*

1. *Over-all organization of the armed D.M. units*—Within the D.M. movement there are armed units organized militarily which form the "Yugoslav Home Army."

This has at present a strength of about 150,000 men in the entire Yugoslav area and is composed as follows:

- a. High Command of the Yugoslav Home Army.
- b. Higher commanders of insurgents.
- c. Corps of insurgents.
- d. Brigades of insurgents.
- e. Mobile brigades.
- f. Other units.

To a) D.M. being the Chief of the *High Command of the Yugoslav Home Army is the Commander in Chief of the Yugoslav Home Army*. He has unlimited authority over all armed units of the movement, appoints all commanders, and is the supreme judiciary. He orders the establishing of new units and negotiates with foreign countries. He gives the signal for the "general revolt."

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7. *Sabotage and espionage*—*Sabotage* is essentially concerned with the destruction of installations important to communications. In order to carry out this sabotage, "the main staff for railway sabotage" was created in Belgrade in the summer of 1942 with its subordinate regional railway staffs 1, 2, 3, and 4. The persons who execute the tasks are Serbian railway employees who are aided by so-called Trojkas ("groups of three").

A further task of the main staff for railway sabotage consists of observing all military transport movements of the occupying troops.

* * * * *

E. *Final Conclusions*

By the creation of the D.M. movement an organization has been formed which—based on the fanatic will of every individual—may gain, as a revolutionary movement, considerable political

and military importance in critical situations in the Balkans. The combatants' excellent knowledge of the country and the positive attitude of the majority of the Serbian population favor the movement.

The *fighting value* of the D.M. movement does not correspond to that of a modern unit. The reason for this lies in their inadequate leadership, armament, and equipment.

The *leaders* are young and have little military training. They have no experience in commanding large units.

The *armament* is insufficient except for rifles. Heavy infantry weapons and artillery exist only in small numbers, antitank and antiaircraft weapons are almost completely lacking.

In its *present composition* the D.M. movement is inferior to the occupying powers if the latter employ sufficient forces.

In order to *suppress successfully* a revolt started suddenly and at the right moment, supplementary forces in addition to the present occupation forces will be necessary.

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TRANSLATION OF DOCUMENT NOKW-382
PROSECUTION EXHIBIT 263

ORDER OF COMMANDING GENERAL SERBIA, 28 FEBRUARY 1943,
CONCERNING REPRISAL MEASURES AND REDUCING
REPRISAL RATIOS

[Handwritten] Enclosure 96

Headquarters, 28 February 1943

[Stamp] Secret

The Commanding General and the Commander in Serbia

Section Ia No. 652/43 Secret

Subject: Reprisal by taking human life

In combating the insurgent movements in Serbia, the increasing importance of a uniform and clear procedure with regard to the severest measure—the taking of human life—makes it necessary that a new and comprehensive summary of the orders in effect in this field be issued.

All officers and heads of offices who participate in the carrying out of reprisal measures are charged by me with the duty of observing carefully the following regulations:

I. *In What Cases are Reprisal Measures Applicable*

1. *Security of personnel*—Reprisal measures will be applied in the case of any attack directed against the person or the life of—

a. A national or ethnic German (armed forces, armed forces employee, or German civilian).

b. A member of the Bulgarian occupation corps.

c. A person in the service of the occupying powers regardless of his nationality.

d. A member of the Serbian Government or a high Serbian official (district supervisor, mayor), officers of the Serbian State Guard, a member of the Serbian Volunteer Corps, etc.

However, reprisal measures shall only result if—

a. The perpetrators cannot be apprehended within 48 hours.

b. The attack on the protected person was based on political reasons.

c. The attack resulted in a wounding or killing. Killing is presumed if a kidnapped person has not returned after a certain period.

Whether or not reprisal measures will be taken where members of the occupying powers or of the Serbian armed units were killed or wounded during *combat action*, depends upon whether these deaths or wounds resulted from an enemy *attack*, or in the course of our *own* operations (for instance, searches [raids], or arrests).

In general reprisal measures will not be taken in the latter case.

2. *Security of installations*—Reprisal measures also will be taken in the event of any attack against installations important to the war effort, in particular against the means of communication, transport and roads, communications installations, industrial installations, and supply installations, provided that—(a) damage has been done, and (b) the perpetrators cannot be apprehended within 48 hours.

II. *Reprisal Quotas*

Until further notice the following quotas shall apply—unless in individual cases another number is ordered:

1. For 1 German killed, or 1 Bulgarian killed—50 hostages are to be executed.

For 1 German wounded, or 1 Bulgarian wounded—25 hostages are to be executed.

2. For the killing of one person in the category listed in I, 1c and d, *Security of Personnel*—10 hostages are to be executed.

For 1 person wounded—5 hostages are to be executed.

3. For any attack against installations to be protected according to I2, up to 100 hostages may be shot to death, according to the seriousness of the case.

In less serious cases it will be sufficient to make reprisal through imposing collective punishments (burning down of houses, money fines, penal guards, arrests, etc.).

III. *What Persons Are to Be Used for Reprisal Executions*

1. The confidence in the justice of the occupying power is shaken and the loyal part of the population too is driven into the woods by the procedure of arbitrary arrests of persons in reprisal after an attack or an act of sabotage near the locality where the incident occurred. This form of carrying out reprisal measures is, therefore, forbidden.

If, however, an on the spot investigation reveals—on the part of certain persons—cooperation with or intentionally passive behavior toward the culprits, those persons are to be executed first as *bandit helpers*. The proclamation is to point out expressly their complicity.

2. If such accomplices cannot be found, one must fall back on persons who are to be considered *coresponsible*, although they may not have any connection with the particular incident. Primarily those persons are coresponsible who openly sympathize with *Draja Mihailovic* or with *communism*.

3. The following are *not* to be used for reprisal measures:

a. Persons who have demonstrated by their behavior that they oppose the aims of the insurgents, or persons who belong to the categories to be protected, as for instance, officials. Exceptions may be made for special reasons by the commanding general and commander.

b. Women and youths under 16. These may be shot to death only as perpetrators or *bandit helpers*.

4. Generally the *Commander of the Security Police* will furnish persons suitable for reprisal measures, in accordance with the above points, from the circle of *suspected* persons delivered over to him in accordance with Ia No. 509/42 Top Secret, 4 November 1942, from the routine operations of the military and of the police, in so far as these are not to be released as innocent or transported for free or compulsory labor (hostages).

5. These hostages are to be collected in *hostage camps* by districts. An order will be issued simultaneously regarding the direction of the hostage camps. A sufficient supply is currently to be kept available in the camps.

If in certain cases suitable hostages are not available or the available hostages are insufficient, the number needed is to be

taken either from a neighboring camp or from the collecting camp in Belgrade.

6. In the event that special actions for the procuring of hostages should be necessary, suspected persons shown in the reviewed lists of the Serbian district supervisor are to be taken first. (See Ia No. 184/43, 4 February 1943.) The commanders of the administrative area headquarters [Feldkommandanten] with the concurrence of the commanding general and commander (section Ia) will order such operations.

7. In the individual cases hostages are to be selected from those available who are connected by blood or political group with the circle presumed to be guilty. With the enmity existing at present between the two insurgent groups it would be more an inducement than a deterrent for the perpetrators, if Communist party members were killed for attacks carried out by D.M. followers and vice versa. The individual selection of hostages consequently depends on the political adherence of the perpetrators. If this cannot be determined, Communists and D.M. followers are to be used in equal numbers for reprisal measures. If possible, persons provided for the execution should come from the neighborhood of the culprits or from the locality where the incident occurred.

IV. *Which Authorities Are Authorized to Carry Out Reprisal Measures*

1. The introduction of reprisal measures is the task of the *commanders of the administrative area headquarters*. These commanders, after hearing the interested parties, will decide whether the conditions for the taking of reprisal measures are present in the specific case. If so, the commander of the administrative area headquarters will submit to the commanding general and commander an application for the taking of reprisal measures. The application must contain a short description of the incident, losses or damages suffered, political origin of the culprits, number of hostages provided for execution.

2. *The commanding general and commander will decide* on the carrying out of the execution applied for by letter or teletype.

3. The commander of the administrative area headquarters orders the *district commander* [Kreiskommandant] in whose area the action took place or which is the home of the culprits to carry out the reprisal measures. After contacting the SD branch office concerned and getting the opinion of the competent Serbian district supervisor, the district commander will suggest to the administrative area headquarters commander persons suitable for the execution in accordance with III, paragraph 7.

4. The district commander issues the necessary instructions for the *carrying out of the execution*. Military and police units are to comply with this request to hold executions. Generally, losses of the military will be retaliated for by the military. The police will furnish the execution squad in reprisal actions for their losses and, furthermore, in reprisal actions for all attacks on nonsoldiers and installations under protection.

5. In general, the executions of hostages will take place in remote localities without participation of the population. There must be no furnishing of Serbian martyrs. The interment must be sufficiently deep. A list of the names of the people killed must be forwarded via the district headquarters to the administrative area headquarters which will furnish death certificates on special application.

6. The district commander responsible for carrying out the reprisal measures will immediately report the execution to the administrative area commander. The latter will arrange publication and will inform the commanding general and commander in Serbia (section Ia) by teletype of the carrying out of the execution. A file copy of the publication is to be sent in later.

V. *Publication of Reprisal Measures*

Since the reprisal measure represents not only a punishment for crimes committed but is to serve primarily as a horrifying example and a deterrent to further crimes, every reprisal measure must be published. Reprisal measures must be made public in such a way that they reach the culprits and circles close to them. The proclamation must emphasize the infamy of the deed and the complicity of those executed. Persons executed must not be described then as "persons" but as Communists, D.M. followers, bandit helpers, etc. Publications are to be signed "Commander of Administrative Area Headquarters."

VI. *The Taking of Hostages and Reprisal Prisoners*

1. All the reprisal prisoners in the camps of the district headquarters are to be considered *hostages*. The names of the camp inmates, therefore, are to be published in the area of the headquarters for the population, with the threat that these inmates will have to pay with their lives for specified disturbances affecting the public order in accordance with section I. If in individual cases a military unit requires hostages, these are to be taken generally from the camps of the local district commander.

2. As far as persons are detained as *hostages* by subordinate units and offices by reason of orders issued previously, the chiefs of the offices in agreement with the SD will decide, in accordance

with section III, paragraph 1, which persons are appropriate as hostages and are to be transferred to hostage camps. There will no longer be an exchange of these persons as before. *All other persons are to be released.*

[Marginal note] T. carrying out of this order is to be reported by 20 March 1943.

3. If arrests of persons as hostages become necessary for the prevention of anticipated conspiracies or attacks in certain individual cases, procedure will be according to [section] III, paragraph 6. In the execution of reprisal detainees as hostages as far as jurisdiction and procedure is concerned, section IV is to be applied.

VII. *Validity of Orders*

In cases of reprisals procedure is to be according to this order immediately after the time of receipt of this order and not later than 5 March 1943.

The following orders are rescinded:

1. Military Commander in Serbia, Administrative Staff, Diary No. 144/41 Secret, VII dated 17 July 1941, section II, (paragraph 4; section IV, paragraph 3).

2. All orders comprised in the summary Plenipotentiary Commanding General in Serbia Ic No. 759/42 Secret, dated 2 February 1942.

3. Plenipotentiary Commanding General in Serbia—Administrative Staff/Headquarters Staff Ia Diary No. 197/42 Secret, dated 20 February 1942.

4. Commanding General and Commander in Serbia, Administrative Staff /Ic, Diary No. 532/42 Secret, dated 21 April 1942.

5. Commanding General and Commander in Serbia, Administration Staff /Ic, Diary No. 861/42 Secret, dated 14 November 1942.

6. Commanding General and Commander in Serbia, Section Ia, No. 5993/42 Secret, dated 22 November 1942.

7. Commanding General and Commander in Serbia, Ia No. 6090/42 Secret, dated 1 December 1942.

[Illegible initial]

[Signed] BADER

Distribution:

704th Jaeger Division 3 x [3 copies]

F. Kdtren. [Administrative Area Headquarters]

K. Kdtren. [District Headquarters]

DVO Bulgarian Occupation Corps [German Liaison Officer with Bulgarian Occupation Corps]

Higher SS and Police Leader
Commander of the Regular Police
Commander of the Security Police
Bw. [Bv.] d. AA. [Plenipotentiary of the Foreign Office]
Organization Todt
Senior Signal Officer
O. Qu.
Ic
War Diary

PARTIAL TRANSLATION OF DOCUMENT NOKW-380
PROSECUTION EXHIBIT 283

EXTRACTS OF REPORT FROM COMMANDING GENERAL SERBIA TO
COMMANDER IN CHIEF SOUTHEAST, 18 JUNE 1943,
CONCERNING EXECUTION OF HOSTAGES

* * * * *

Enclosure [Illegible]

18 June 1943

To Commander in Chief Southeast

Urgent

For information: Commander of the German Troops in Croatia
German Plenipotentiary General in Croatia
Daily Report of 18 June 1943

* * * * *

1st Royal Bulgarian Occupation Corps—

* * * * *

4. Three hundred and fifty Communists shot to death in reprisal for the murder of three German customs officials and surprise attack on a Bulgarian leave train (see daily reports of 16 and 18 May). Fifty D.M. hostages shot for the murder of an RSK man.

* * * * *

Commanding General and Commander in Serbia, Ia

[Signature] BODE

Colonel

[Initial] B

TRANSLATION OF DOCUMENT NOKW-155
PROSECUTION EXHIBIT 306

ORDER OF THE COMMANDER IN CHIEF SOUTHEAST,
10 AUGUST 1943, CONCERNING DEPORTATION OF PRISONERS
AND ENEMY DESERTERS, AND REPRISAL AND EVACUATION
MEASURES

Copy

Secret

[Handwritten] 111g

Headquarters, 10 August 1943

The Commander in Chief Southeast,
simultaneously Acting Commanding
General of Army Group E

IaF, No. 604/43 Secret

Order

For Treatment of Prisoners and Deserters in Bandit Fighting,
Reprisal and Evacuation Measures

I. Treatment of prisoners and deserters, execution of revenge measures, and evacuations are not matters of administration but rather measures of *combat* and/or of *combat* preparation and of security.

II. The Fuehrer order concerning the importation of human material [Menschenmaterial] into the Reich to ensure the necessary supply of coal (IaF, No. 120/43 Secret of 27 July 1943) is authoritative for the treatment of prisoners; accordingly, all captured bandits are to be deported to the Reich by way of the prisoner collecting points.

III. Orders regarding this matter are in detail as follows:

1. Captured *bandit members* are to be deported to the prisoner collecting points; the commanders are to examine whether the previously erected prisoner collecting points are sufficient. Further transport from the collecting points into the Reich is to take place according to separate order of the Oberquartiermeister.

An *exception* to this regulation is possible only if the combat situation does not permit a deportation.

The seizure of individual bandits for intelligence missions (counterintelligence units, counterintelligence offices, SD, Secret Field Police [military]) is still necessary.

2. *Deserters* are also regarded as "prisoners." Considering the good results experienced in Russia when deserters were accorded better treatment, through propaganda, etc., *shooting* of deserters must be discontinued.

Directives concerning deserter propaganda proceed through the Commander in Chief Southeast, section Ic/counterintelligence officer.

3. As already ordered in the directive of the Commander in Chief Southeast, Ia/Id No. 566/43 Secret of 14 July 1943, *reprisal measures* are to be executed as heretofore with most severe means, if an inimical attitude is discernible in the population.

In territories occupied by the bandits, in which surprise attacks have been carried out, the arrest of hostages from *all* strata of the population remains a successful means of intimidation.

Furthermore, it may also be necessary to seize the entire male population, insofar as it does not have to be shot or hanged on account of participation in or support of the bandits, and insofar as it is incapable of work, and bring it to the prisoner collecting points for further transport into the Reich.

Surprise attacks on German soldiers, damage to German property, must be retaliated in every case with shooting or hanging of hostages, destruction of the surrounding localities, etc. Only then will the population announce to the German offices the collecting points of the bandits, in order to remain protected from reprisal measures.

Reprisal measures are to be ordered by the *division commanders* and/or independent regimental commanders in order to avoid encroachments on subordinate offices and individual soldiers, and to prevent a false, unjust treatment of the population.

4. In the territories especially valuable to the conduct of battle, the male inhabitants between 15-60 are to be evacuated. They are to be collected together in guarded labor camps and/or insofar as they are capable of working, to be transported into the Reich. Evacuations must be carried out decisively in order to prevent a premature escape of the population.

The territories to be evacuated are the strips of coast especially suitable for landings, areas of important pass heights and pass lanes, strips of terrain along especially dangerous railway line stretches, etc. The evacuations completed are to be reported through the commanders to the Commander in Chief Southeast.

5. The order for the treatment of bandits hitherto authoritative—Supplements to Armed Forces Commander Southeast Ia,

No. 2868/42 Top Secret of 28 October 1942, to the Fuehrer order re combating of so-called commando operations—is herewith rescinded.

Signed: LOEHR

General

Certified true copy:

[Illegible signature]

First Lieutenant

TRANSLATION OF DOCUMENT NOKW-159
PROSECUTION EXHIBIT 417

ORDER OF MILITARY COMMANDER SOUTHEAST TO HIGHER SS AND POLICE LEADER, 23 OCTOBER 1943, DIRECTING REPRISAL EXECUTIONS; REPORT OF MILITARY COMMANDER SOUTHEAST TO 809TH ADMINISTRATIVE AREA HEADQUARTERS, 26 NOVEMBER 1943, CONCERNING EXECUTIONS

Headquarters, 23 October 1943

[Handwritten] Supplement 110

Military Commander Southeast
Section Ia/No. 246/43

To the Higher SS and Police Leader

For information: 809th Administrative Area Headquarters; German Liaison Staff with the 1st Royal Bulgarian Occupation Corps

1. As revenge for the surprise attack on the cattle purchasing detachment at Sljivar (6 km. SW of Zajecar) by a D.M. and a Communist band, through which 8 German, Bulgarian armed forces and police members were killed, 8 German and Bulgarian armed forces members wounded, and from which 2 German Military Policemen are missing, 100 D.M. reprisal prisoners and 300 Communist reprisal prisoners are to be shot under consideration of the reprisal measures which have already taken place consisting of burning down of houses and the losses which the bandits suffered in this operation.

2. As revenge for the surprise attack on the collecting detachment of the 8th Auxiliary Police Battalion on 6 October 1943, at Jelasnica by a D.M. band, during the course of which 3 auxiliary policemen were killed, 8 heavily wounded and 9 slightly wounded, 100 D.M. reprisal prisoners are to be shot.

The Higher SS and Police Leader is charged with carrying out the execution. It is to take place in the Zajecar district.

In the publication of the reprisal measures relating to 1, reference is to be made to the horrible treatment of the wounded who fell into the hands of the bandits and the mutilation of the corpses; in the proclamation concerning 2, it is to be expressed that the reprisal quota would have been considerably higher if the wounded had not been decently treated.

Enclosure 92

[Stamp] Secret

26 November 1943

To 809th Administrative Area Headquarters

As revenge for the surprise attack on the cattle purchasing detachment at Sljivar, 100 D.M. followers and 200 Communists were shot on 29 October 1943, in Belgrade.

As revenge for the surprise attack on the collecting detachment of the 8th Auxiliary Police Battalion at Jelasnica, 100 D.M. followers were shot on 29 October 1943.

The reprisal measures are to be published in the Zajecar district. In the publication reference is to be made expressly to the horrible treatment of the wounded who fell into the hands of the bandits and the mutilation of the dead in case 1.

An enclosure copy is to be sent here.

Military Commander Southeast

Ia No. 1858/43 Secret

PARTIAL TRANSLATION OF DOCUMENT NOKW-1246
PROSECUTION EXHIBIT 472

EXTRACTS FROM WAR DIARY NO. 3, LXVIII ARMY CORPS,
CONCERNING OPERATIONS IN PELOPONNESUS, GREECE,
28 NOVEMBER-14 DECEMBER 1943

War Diary No. 3, LXVIII Army Corps, started 1 July 1943, concluded 31 December 1943.

LXVIII Army Corps was subordinate
1-27 July 1943, to Army Group E;
28 July-9 September 1943, to the 11th Italian Army;
9 September-4 October 1943, to Army [Armeegruppe] Southern Greece;
5 October-31 December 1943, to Army Group E.

The war diary was kept 1 July-31 December 1943 by Captain (Cavalry) Sinapius.

* * * * *

28 November 1943—In Old-Corinth, the reinforced 117th Signal Battalion carried out a mopping up operation in the course of which 67 hostages were seized and arms and propaganda material secured.

* * * * *

4 December 1943—In Aighion, 50 hostages shot to death as reprisal measure for attack on truck on 2 December.

5 December 1943—50 hostages hanged at the railroad station of Andritsa as reprisal measure for attack on 1 December.

* * * * *

7 December 1943

* * * * *

Twenty-five hostages shot to death in Gythion as reprisal measure for attack by bandits on 3 December west of Gythion.

* * * * *

8 December 1943—Operation "Kalavriitha". The combat groups advanced concentrically on Kalavriitha (targets of the day about 10 kilometers around Kalavriitha). According to statements of 2 men who escaped from the 5th Company of the 749th Light Regiment, which had been annihilated near Kalavriitha on 19 October the captured company commander, Captain Schober, and 78 men are alleged to have been shot on 7 December, in the mountains East of Kalavriitha. To prevent the bands from escaping toward the east, the 3d Battalion of the 22d Air Force Light Regiment of Corinth is committed for the area, 25 kilometers southeast of Kalavriitha.

* * * * *

9 December 1943—Combat Group Lieutenant Colonel Woelfinger reaches Kalavriitha without contact with the enemy. Combat Group Captain (Cavalry) Gnass thrusting ahead to the West up to Tripotamia.

* * * * *

10 December 1943—Operation "Kalavriitha". A reconnaissance patrol of platoon strength of the reinforced company of the 965th Fortress Regiment, makes contact with the enemy (10 kilometers south of Liwia). Own losses, 10 dead, 11 wounded.

Continued march of combat group Lieutenant Colonel Woelfinger to Tripotamia without contact with the enemy.

11 December 1943—Operation "Kalavriitha". In reprisal for the 78 murdered soldiers of the 5th Company of the 749th Light

Regiment, nine villages in the area of "Kalavriitha" destroyed up to now, 142 members of the male village population shot to death.

* * * * *

12 December 1943—Operation "Kalavriitha" concluded without any notable success except for the continuation of reprisal measures. It again has been demonstrated that an insufficiently mobile Light Regiment in the mountains is insufficient for the execution of a large scale operation (encirclement of bands).

* * * * *

13 December 1943—During the course at additional reprisal measures, Kalavriitha entirely destroyed, three more villages burned down, and 511 male inhabitants shot to death.

Seventy corpses of the murdered soldiers of the 5th Company of the 749th Light Regiment were found in Masi (10 kilometers southeast of Kalavriitha).

* * * * *

14 December 1943—During the continuation of the reprisal measures in the area of Kalavriitha, Mazeika and two monasteries were destroyed. The combat groups are marching back to their garrisons. During the course of the reprisal measures a total of 24 villages and 3 monasteries were destroyed; 696 Greeks shot to death.

* * * * *

TRANSLATION OF DOCUMENT NOKW-154
PROSECUTION EXHIBIT 424

ORDER OF MILITARY COMMANDER SOUTHEAST, 1 JANUARY 1944,
CONCERNING COMPETENCY FOR ORDERING REPRISAL MEASURES

[Stamp] Secret

Military Commander Southeast
Section Ia No. 58/44 Secret

[Handwritten] War Diary
Headquarters, 1 January 1944

Secret

[Handwritten] Enclosure 1

Subject: Reprisal measures

Reference: Commander in Chief Southeast (Army Group F) Section Ia/F No. 296/43 Secret, 22 December 1943

Supplementing letter Commander in Chief Southeast (Army Group F) Ia/F 296 dated 22 December 1943, the following is ordered with regard to *Serbia*:

1. *The commanders of the administrative area headquarters are competent to order reprisals, and can assign their execution to the competent commanders of the district headquarters. For special cases the military commander reserves to himself the right to issue orders for reprisal measures.*

2. *Before a reprisal measure is ordered, approval must be obtained through teletype from the Military Commander Southeast. The request must contain brief description of facts; losses, as well as damage, which have occurred; political affiliation of the perpetrators; type and extent of reprisal measures intended.*

3. *Persons or homes suitable for the execution of reprisal measures are to be determined after prior contact with the competent SD and counter intelligence detachments has been made. The Serbian district administrators are to be given a hearing.*

4. *Troops and police have to comply with requests to carry out reprisal measures. Generally, losses suffered by the troops will be revenged by them. The police will provide an execution detachment to avenge its own losses and, in addition, all attacks on protected nonmilitary persons and objects.*

5. *The execution of reprisal measures is to be reported in the daily reports. Copy of the public notice to be signed, "The Commander of the Administrative Area Headquarters," is to be forwarded subsequently.*

6. *The arrest of hostages to prevent expected outrages or attacks will be ordered by the commander of the administrative area headquarters with approval of the Military Commander Southeast.*

For further procedure paragraph 2 applies.

7. *Participation by the Serbian Government and administration in the execution of reprisal measures and the employment of armed Serbian formations may take place upon their request.*

8. *The orders of the commanding general and commander in Serbia Ia No. 652/43 Secret, items 1-3, dated 28 February 1943, 29 May and 31 July 1943, are rescinded.*

Current reprisal procedures not corresponding to this order are to be discontinued.

Signed: FELBER

Certified:

[Illegible signature]

First Lieutenant

Distribution:

Down to battalion and district headquarters

PARTIAL TRANSLATION OF DOCUMENT NOKW-46
PROSECUTION EXHIBIT 482

EXTRACTS FROM REPORT OF SPECIAL PLENIPOTENTIARY SOUTHEAS
CONCERNING "THE BLOOD BATH OF KLISSURA" (GREECE),
15 MAY 1944, VIA FOREIGN OFFICE TO COMMANDER IN CHIEF
SOUTHEAST FOR INVESTIGATION

* * * * *

Top Secret [Stamp]
[Handwritten] VAA—To OKW

* * */Foreign Group
1264/44 Top Secret, Foreign II A 3

Command Post, 25 May 1944

3 copies—2d copy

[Stamp]

Commander in Chief Southeast 2100
(Army Group F) Group Ic/AO
No. 4450 Secret—26 May 1944—Enclosure * * *
Ic 03 05 07 D Ic/L for special missions
Counterintelligence Officer AI AII AIII St.P G.F.P.

[Handwritten] Commander

[Illegible initial]

[Illegible initial]

[Stamp]

Commander in Chief Southeast
(Army Group F) Central Office
Arrived: 26 May 1944
No. 647/44 Top Secret
Enclosure Section Ic

To Chief Armed Forces Operations Staff
Via Liaison Officer, Foreign Group

Copy

The Foreign Office forwards the following telegraph report from
the Special Plenipotentiary Southeast, Envoy Neubacher, under
Pol I M 1138 Top Secret, dated 20 May 1944. The report is
dated 15 May. Rapid investigation and information as to its
outcome is requested.

Commander in Chief Southeast with the request for speedy
investigation and report of the results.

BY ORDER:

[Illegible signature]

Subject: "The Blood Bath of Klissura"

According to the reports previously submitted to me on 5 April, 215 inhabitants of the village Klissura in the area of Salonika, mostly women, children and old men, were killed and 27 people wounded. This allegedly was done by order of the commander of an SS regiment from Salonika. This action constitutes a most serious infraction of an order on reprisal measures issued by the Commander in Chief Southeast, with my agreement, on the basis of the Fuehrer directive, dated 29 October 1943.

Reports available up to now show that among the dead were 9 babies less than 1 year old; 29 children from 1 to 5; 39 old people between 60 and 90.

The competent military authorities are investigating this—on the basis of the present report—senseless and irresponsible excess.

The preliminary report of our consulate general indicates to me that German trucks were shot at by partisans at a distance of about 2½ kilometers from the village on 4 April. No losses occurred. Two German motorcyclists were allegedly killed later by hand grenades thrown by an Italian of the same group of partisans at the same spot. The motorcycles are said to have been taken to Klissura. As happens daily in numerous villages, partisans had been quartered over night in the village itself. Partisans surrounded the village and forbade the inhabitants to leave the village and to use the pasture. After the last partisans withdrew on 5 April at about 1400 hours, the adult men left the village, because repeatedly in northern Greece and elsewhere too it happened that our side proceeded with mass shootings of the male population after the partisans had left. The men went to a neighboring village to a monastery. Women, children, and old men were almost the only ones to remain. The slaughter of those who were left began approximately at 1600 hours, and allegedly was stopped later by intervention of an army officer. I do not know the number of houses burned down.

The village priest was shot with his wife on the street. The house of a Greek captain fighting on our side with a group fighting the partisans was burned. All the relatives of a tailor who had worked for many years for the consulate general in Salonika were killed.

* * * * *

In view of the necessity of accelerating the final action [for pacification] of the population* the political effects of such incidents are catastrophic. It is utter insanity to murder babies, children, women, and old men because heavily armed Red bandits

* In original document "die Schlussaktion in der Bevoelkerung vorwaertszutreiben."

billeted themselves overnight, by force, in their houses, and because they killed two German soldiers near the village. The political effect of this senseless blood bath doubtlessly by far exceeds the effect of all propaganda efforts in our fight against communism.

No matter what the final result of the investigation may be, the operation against Klissura represents a severe transgression of existing orders. The wonderful result of this heroic deed is that babies are dead. But the partisans continue to live and they will again find quarters by use of submachine guns in completely defenseless villages. It is a further fact that it is much more comfortable to shoot to death entirely harmless women, children, and old men than to pursue an armed band with a manly desire for vengeance and to kill them to the last man. The use of such methods must necessarily lead to the demoralization of a genuine combat morale.

I shall follow up this affair on the basis of the Fuehrer directive, dated 29 October 1943. The Reich Foreign Minister has been requested by me today, already, to inform the highest competent military authorities of my attitude and in the interest of our foreign policy in this area to ask for a most thorough investigation.

[Handwritten] N. has been informed that F. has asked for a very thorough investigation.

[Handwritten] We will most certainly do that!

C. Testimony of Defendants and Defense Witnesses

EXTRACTS FROM THE TESTIMONY OF DEFENDANT LIST*

DIRECT EXAMINATION

* * * * *

DR. LATERNSEK (counsel for the defendant List): Which order arrived from the OKW during the time General Boehme was appointed?

DEFENDANT LIST: At this time the order from the OKW of 16 September [1941] was received which asked us to adopt the most severe measures and requested us at the same time to have a certain ratio of the shooting of hostages.

Q. What is the date of this order?

A. 16 September.

* The complete testimony is recorded in mimeographed transcript, 16-19, 22-23 September 1947, and 13, 22 January 1948; pp. 3148-3464, 8824-8858, and 9484-9493.

DR. LATERNSEER: Your Honor, this is Document NOKW-258, Prosecution Exhibit 53,* volume II, page 67 of the English text, and in the German text, volume II, page 52.

Did you at that time get to know of this order?

DEFENDANT LIST: Yes.

Q. Do you know whether orders of the OKW were examined before they were sent out?

A. That I don't know, but I assumed it. In any case, I considered orders and directives issued by the OKW to be legal.

Q. What was your personal attitude to this order?

A. I rejected this order for purely humane reasons.

Q. Did you undertake to take any steps in regard to this order?

A. In my preliminary examination I stated that during that time I protested very energetically against an order received from the OKW. I did this by protesting to the Ia, who was my deputy at that time. For a long time I did not know and could not explain to myself against which order I protested. Knowing the facts now I must assume with certainty that it must have been the order of the 16 September, because apparently no other order was received from the OKW during those days.

Q. In what manner did you protest against this order?

A. I think I protested to the deputy chief in a very clear manner and I ordered him to bring this, my opinion, to the notice of the OKW.

Q. Who was deputy at that time?

A. That was Colonel Kuechler at that time.

Q. Did he do that?

A. Yes. He did it.

Q. What did he report to you about it?

A. The protest in connection with this was rejected.

Q. Why did you not resign from your office then?

A. Resignation of an officer in wartime does not exist, or did not exist; in fact, Hitler had forbidden it, and he had expressly said that it was he who decided when a general or an officer was to resign.

Q. In what manner was this order received by your office?

A. It was received in written form.

Q. In several copies?

A. It was received with subsidiary copies.

Q. What do you mean by subsidiary copies?

A. That means the superior office sends along to this office all the copies which are to be sent to all the subordinate offices.

Q. What happened to these subsidiary copies?

A. These subsidiary copies were passed on.

* Part of this document is reproduced in section B.

- Q. Was anything added to this order when it was passed on?
- A. No.
- Q. Was the transmission signed?
- A. Yes.
- Q. By whom?
- A. By the deputy chief.
- Q. What would you say as to how the command in the southeast was designated by Hitler and OKW in general?
- A. It was repeatedly called weak.
- Q. This order, [Doc. NOKW-258, Pros.] Exhibit No. 53 of 16 September, had been issued. What did you do?
- A. In the beginning of October I issued a teletype, dated 4 October.
- Q. May I point out to the Court that the teletype of 4 October is Document NOKW-203, Prosecution Exhibit 70,* which in the English document book 2 is on page 141, and in the German document book it is on page 108. To whom did you address this teletype of 4 October?
- A. To the Plenipotentiary Commanding General in Serbia.
- Q. Who else did you address it to?
- A. No one else.
- Q. Why not to other officers?
- A. That wasn't necessary because the Plenipotentiary Commanding General was in Serbia and he alone was the person responsible in Serbia for the issuing of the orders for the crushing of the Serbian movement, and he possessed executive power in these respects.
- Q. Did you assume that this office then informed all the other offices?
- A. That was their task; they had to do that.
- Q. Under point 2 of this order you ordered, and I quote: "Men in the insurgent territories who were not encountered in battle are to be examined," and *b*, "if they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the armed forces in any way, they are to be held in a collecting camp. They are to serve as hostages in the event that bandits appear or if anything against the armed forces is undertaken in the territory of their home localities, and in such cases, they are to be shot." What is your present attitude to the order which I have just read?
- A. I am of the opinion that under the conditions existing at that time it was militarily necessary, and that it was admissible under international law.
- Q. Why didn't you order any ratios?

* This document is reproduced in section B.

A. Because to me it seemed difficult to fix ratios; the retaliation measures or reprisal measures should generally adapt themselves to the facts of the case.

Q. Who may order reprisals?

A. Every commander from divisional commander upwards.

Q. Where was that laid down?

A. In the ten commandments.

Q. Which ten commandments do you mean?

A. These which every soldier had to carry, or was supposed to carry.

Q. What were the contents, quite briefly?

A. Essentially the provisions of the Hague Convention.

Q. And where were those ten commandments for the soldiers contained?

A. In his pay-book.

* * * * *

Q. What was the actual purpose of [Doc. NOKW-203, Pros.] Exhibit 70, that is, of the teletype of 4 October.

A. The actual purpose was to create orderly conditions and at the same time to mitigate the decree of the OKW of 16 September and to bring about milder retaliatory measures.

* * * * *

EXTRACTS FROM TESTIMONY OF DEFENDANT FOERTSCH*

DIRECT EXAMINATION

* * * * *

DR. RAUSCHENBACH (counsel for the defendant Foertsch): Witness, I shall now turn again to your actual activity in the Southeast. What was the task of the army in the Southeast?

DEFENDANT FOERTSCH: When I became Chief of Staff of the 12th Army the campaign was concluded and only the conquest of Crete was still to be expected. For this purpose the 12th Army had merely to perform auxiliary services through reinforcements, supplies, and, too, by making available the 5th Mountain Division. The task of the army was at that time to occupy the areas which had been assigned to the German troops for occupation and to start with the preparation for the preventing of an invasion.

Q. What was the significance of this task within the framework of the general war events?

* The complete testimony is recorded in the mimeographed transcript pages 9-10, 13-17, 20-21 October 1947, pp. 4044-4699.

A. Seen on a large scale the Southeast meant three things. First of all, the large southern flank of the Russian theater of war, secondly, the route to Africa for supplies and reinforcements and, thirdly, the air bases for the eastern Mediterranean area.

Q. And what was the main prerequisite for the fulfilling of these tasks?

A. The main prerequisite for the fulfillment of these tasks was peace and quiet in the interior of this area.

Q. And how did one attempt to achieve that?

A. Through most extensive consideration of the interests and needs of the population; certainly not, as I occasionally heard, through hatred or vengeance.

Q. What difficulties did the government face in their endeavor for peace and quiet?

A. The difficulties were mainly, during the first time established, in two things. Firstly, in my opinion, unfortunate policy regarding the Southeast, and secondly, in the flare-up and increasing of the insurgent movements in the individual districts.

Q. What especially provoked these insurgent movements?

A. For this fact there were several reasons in existence. There was the previously mentioned, rather unfortunate policy, then the contrast in the ethnic groups in this area, and finally the help and support from the outside which incited these movements.

Q. And what did you regard as the unfortunate policy in that area?

A. I can only state here my own personal attitude which I had at that time. I considered the dividing up of Yugoslavia immediately after the campaign an unfortunate solution and, even if one undertook such a subdivision, I considered the frontier between Croatia and Serbia a specially poor solution. Besides, it seemed to me that the political supremacy which one had attributed to Italy made the general conditions even more difficult. And, finally, according to my personal opinion the filling of the posts of delegates and envoys in that area was not particularly well chosen, with one exception, and that is Envoy Altenburg in Athens, which I consider proper and adequate.

Q. The help and support of the bands from the outside—could that be felt from the very beginning?

A. Yes. In any case very clearly when the Russian campaign had started.

Q. And as a consequence was it mainly and essentially a Communist influence?

A. Essentially, yes, but there were additional motives—the already mentioned contrast of the ethnic groups in this area, and

also purely nationalistic motives. There were also the unavoidable economic difficulties which were the result of the war.

Q. Witness, the witnesses whose affidavits I have presented here, and also the prosecution, consider you, in a certain respect, as an expert on the Balkans. How long were you in the Balkans?

A. From 6 April 1941, that is as chief of staff as of 10 May, until 4 March 1944.

Q. In connection with this I would like to ask you to give us quite briefly just as an over-all picture of the development of these insurgent movements during these 3 years—just an outline of the main points.

A. I can, of course, only do it in broad outlines because I have no documentary information available now. I would like to point out expressly that it is quite possible that I make errors, especially concerning chronological sequence. But if I picture to myself today the course of events in the various districts, I have the following picture. In Serbia the illegal warfare against the German armed forces started with individual sabotage actions, small band operations with participation of large circles of the population. At that time the Communist and Nationalistic elements were intermingled. In the further course of events, especially in Serbia, the Nationalistic movement, characterized by Mihailovic, more or less absorbed the Communist movement, partly through active fighting on the part of Mihailovic and his people, and partly because, according to my experience, the Serbian peasant does not off-hand feel inclined toward communism. Therefore, Tito never played a particularly important part in Serbia. The fighting of the Mihailovic movement and the bands always existing next to it did not show a uniform increase but rather occurred in waves. These ups and downs were for one reason evoked by the more active combating on the part of the German armed forces, and on the other hand by the various influences of the forces outside the southeast area. Until finally Mihailovic lost ground because the Allied support was taken away from him, and until finally, out of his basic opposition to the Communist idea, he attempted to attach himself more and more to the German armed forces. According to my picture, a totally different development took place regarding the insurgent movement at Croatia. There were different conditions prevailing there. The contrasts were strongly interwoven, as the witness Dr. Ibbeken described them here; there was a certain rejection of Mihailovic and his system by the population and above all there were Italian occupation methods. All these things combined to create in Croatia the soil which the tendency originated at Moscow needed. So we see in Croatia in contrast to Serbia—

in the time during which I could observe—a steady increase of unrest.

Not in a fashion that one could, let us say, observe a definite increase in the power of the leading man, Tito, over the population, but rather in the streaming of all elements of unrest in the whole southeastern area towards this Croatian chaos. It is typical that the first reasonably well organized band came to Croatia from Montenegro, and the same influx came from Albania and to a small extent from Serbia.

In Greece the situation again was completely different. Immediately after the campaign, compared with other districts, there was peace there. In my opinion the inconsiderate Italian occupation created the basis of the discontent. It was also striking that in northern Greece, in the areas which are again being talked about today, the Communist movement tried to gain ground. They didn't succeed at that time, so that in Greece up till about the beginning or the middle of 1943, the situation—always compared with the situation in Serbia and Croatia—was comparatively orderly and quiet.

It showed quite clearly here that the flaring up of the unrest was in connection with events outside of the area, in Africa, in Italy, in Russia. So that just for the Greek area that factor applies which in my opinion is significant for the judgment of the whole southeastern area. The conditions of the total events together with the inner and outer inciting forces for the insurrection were the decisive factors and any real initiative of the German military leadership was left no room. In Bulgaria too, and especially in the old Bulgarian area, that is in the Bulgarian sovereignty, bands formed which quite obviously were influenced by Moscow, which however did not reach a larger stage of development for specific reason.

Q. How then, did the military leadership in the Southeast try to cope with the situation?

A. The military leadership in the Southeast, for a period which I can judge, has always endeavored to use as first and foremost means the strengthening of its own troops which actually would have been sufficient for an occupation of a quiet country. This reinforcement was intended to achieve two aims—first of all, to nip the insurgent movements in the bud and not to let them grow, and secondly, in the area which had been cleared and mopped up, to establish a net of troops as closely woven as possible which would, as much as possible, have prevented a re-flaring up of this insurgent movement.

Q. Of what nature were the counterforces?

A. The nature of the counterforces was characterized by indi-

vidual sabotage acts, band warfare of a small and larger extent, and both mentioned factors and methods found support in the population, at least in large parts of the population.

Q. Did you consider that illegal, that is to say in violation of the laws of war?

A. Yes.

Q. Did you ever doubt this, your opinion?

A. No, never.

Q. And why not?

A. To me it was always clear, and it has always remained clear, that the illegality of all these actions could never be doubted for two essential reasons—firstly, Yugoslavia and the Greek armies had capitulated. Secondly, the countries were properly occupied. Therefore, every armed action irrespective of what kind was a breach of the capitulation conditions and thus a violation of the duties of the population of an occupied country.

Q. Was that the situation during the whole time while you were in the Balkans?

A. Yes. In my opinion, yes.

Q. And how about the Tito units? Would you regard those units as illegal too?

A. I would like to say the following in this connection. Apart from the two basic conditions which I have mentioned, the bands never fulfilled the four well-known provisions of the Hague Convention; i.e., unified leadership, recognizability from a distance, carrying of arms openly, and adherence to the usages of war. Also, the Tito units which were later on better organized intrinsically remained bands and were regarded as bands.

Q. Was the recognition of these units as belligerent units ever considered?

A. Yes. It was considered. It was considered comparatively early. By request of General Loehr, on the occasion of a visit to the OKW at the end of December 1942, I mentioned this problem. At the same time, however, I would like to add the following which seems rather important to me. First, they remained always considerations and motions of the highest military leadership in the Southeast addressed to the OKW. I would like to put it this way; it was a dutiful deliberation within our staff. The subordinate commands and units could not have any choice in this question at all. To them, as long as there was no other decision, the illegality of the bands could not be doubted. The other factor which seems important to me is the following: These deliberations and these presentations to superior headquarters were always based on reasons of expediency and suitability. We never had any doubt that a legal or international

claim of this so-called enemy of ours could possibly exist. The considerations of expediency and suitability were based on the following ideas. We believed that through such a recognition—at least in certain areas—one could possibly prevent the opponents from using their methods which were incomprehensible to the German soldiers and which could hardly be exceeded in their cruelty. And secondly, we wanted to better the fate of those German soldiers who had fallen into the hands of bands. This consideration was an egotistical one. We believed that in this manner we would be esteemed higher in our own OKW if this, for the German troops, very difficult fight—with respect to decorations and assignments mentioned in OKW reports, etc.—could be put on an equal basis with fights in other theaters of war.

Q. Did these representations to the OKW meet with success?

A. No. These repeated representations did not have any success.

Q. Who had to decide on the question whether these bandit groups were to be regarded as belligerents or not?

A. Such a decision, in my opinion, could only be made by the supreme military and political authority of the German war machine, certainly not the Commander in Chief Southeast.

* * * * *

Q. Well now, something else, Witness, did you ever think during that period about the effect which it would have if, because of the insurrection movement, the army did not hold the position in the Southeast?

A. Those were our daily worries. We realized completely that on the whole, even at the end of the actual fighting, the importance of the southeastern theater of war had remained the same as before, as I said recently, as the large southern flank for the Russian theater of war, as a road to Africa, and as an airbase for the air operations in the eastern Mediterranean.

Q. And then what did you think was necessary in order to have the situation in the Balkans endangered by the insurgents; you already briefly referred to this before on Friday?

A. The Armed Forces Commander Southeast was principally of the opinion that the combating of the insurgents should, if possible, be carried out at once by military means.

Q. Did you think it also possible that by increasing the troops, reprisal measures would be quite superfluous?

A. No. It wasn't as simple as that. The reprisal measures remained dependent entirely on the attitude of the population. By increasing the troops we wanted to insure that the insurgents

would be crushed from the very beginning, and we also wanted to achieve by this that the mopped up and pacified districts could be occupied as far as possible. We could then hope that the population would not be so easy to win for illegal actions, and then, seeing their peaceful attitude, the occupation troops would no longer be forced to take reprisal measures.

Q. And did one take reprisal measures because one had too few troops?

A. No. I just said that the reprisal measures depended alone on the attitude of the population, but even if there had been more troops, individual sabotage acts or other senseless actions of an incited population could possibly have occurred which demanded reprisal measures.

Q. And then do I assume correctly from this that you are of the opinion that retaliation measures under certain circumstances are unavoidable with no regard as to the equipment and strength of the troops?

A. Yes. That is correct. That was my opinion. And it is substantiated by two facts, which, however, do not concern the southeast area; first of all by the fact that in May 1945 in Berlin retaliation measures were threatened in case of attacks on Russian soldiers, and where it is stated that apart from the perpetrators, as a rule, 50 Nazis will have to pay with their lives for the attack on one Russian soldier, and another case I know is that in the agreement between the Commander in Chief of the Allied Forces, General Eisenhower, and Marshal Badoglio at the end of September 1943, there was one provision which stated that the Allies reserved themselves the right, if the agreement was violated, to carry out special measures among other things, occupation of other territories, but also punishment, for instance, punitive actions carried out by aircraft, and other measures. And I think that both occupation troops, the Russians in Berlin in 1945, as well as the Allies in 1943 in Italy, were not weak as regards their numerical strength.

Q. Do you know whether the measures threatened by the Americans and by the Russians were carried out?

A. I hope that it was not necessary, and I think that the population of these two civilized nations had enough understanding to realize their duty towards the occupation powers not to cause the respective commanders in chief as much trouble as the population in the Southeast caused us.

Q. Now, I come back to the measures that you took to combat the insurgents, which you thought were correct. We talked already about the military fighting and the strengthening of the occupation to combat the insurgents; in the political and eco-

conomic sphere, did you see any possibilities there to quell the insurgents?

A. Yes. The armed forces commander and later on the Commander in Chief Southeast frequently in memoranda and reports tried to transform the preconditions which partly were responsible for the development of the restlessness among the population. He made proposals for the adjustment of frontiers. He frequently attempted to mitigate the inner political conditions in Croatia, and to give the newly created Serbia clarity with regard to its political future. Later on we proposed that Montenegro should be incorporated into Serbia. And here the very intensive fighting against individual diplomats, especially against Envoy Kasche in Zagreb [Agram], should be mentioned. Economically, I would like to state the following: The attempts of the High Command in the Southeast [were] to leave as many of the products in the land, to exercise a little pressure in the restoration and modernization of the factories and mines, and to give as many workers as possible wages and food. Then there were the permanent efforts to improve the railroad situation. Propaganda measures also interested us very much, and this, of course, was principally in the Southeast to get rid of the centralized ideas which they had in Berlin where it was thought that the whole of Europe could be worked from one single propaganda drum beat. We were of the opinion that here the possibilities of the area had to be taken into account and of course these are the examples for such action.

Q. And were all these possibilities within your sphere of power?

A. No, unfortunately not. They were essentially political decisions which we could not make ourselves. We could only request them.

Q. And now within your small possibilities did you try to make things easier in the country, economically?

A. As far as we could do it ourselves, of course we did it.

Q. We now come back to the retaliation measures. Witness, in the period about which we are speaking, that is the autumn of 1941, were definite quotas already ordered for retaliation measures, and by whom?

A. No. Before 16 September no ratios were ordered.

Q. And what did you think about the fixing of definite ratios?

A. My personal opinion was the following: It might be expedient for definite districts and for limited periods that such ratios should be fixed principally as a warning for the population, but as I have already stated, it is necessary that every individual retalia-

tion measure should be checked according to the circumstances and a decision taken corresponding to the case.

Q. And did your commanders in chief order definite ratios.

A. No. As long as I was chief of staff in the Southeast, my commanders in chief never ordered definite ratios.

Q. Witness, in military language at that time, what was understood by the term "Communists"?

A. Communist partisans.

Q. And how was this interpretation arrived at?

A. At that time we knew about a directive of the Communist Party in Serbia for guerrilla fighting; this directive contained measures and provisions for the members of the Communist Party in Serbia for such band fighting. (*List 202, List Ex. 46.*)¹

Q. Witness, it is reported in many reports that Jews were shot as hostages; what considerations were taken into account here for the fact that Jews were especially considered for hostages?

A. I remember that from the reports, principally in Serbia, it was frequently seen that Jewish circles were behind the insurgent movement through intellectual support, financial support, and other kinds of help.

Q. In the Southeast, was there a Jewish extermination program?

A. I never heard about such a program.

* * * * *

Q. Now, did one have no misgivings in the office of the Armed Forces Commander Southeast concerning the execution of such orders? Just in this particular case a large number of people had to give their lives.

A. We had thoughts of that nature at a prior time—extensive thoughts—and I think that I already said quite a lot about the treatment of the basic question when I talked about my discussion with Keitel, etc.

Q. The number is 21, as can be seen from Document NOKW-192, Prosecution Exhibit 78.² That is Boehme's order. What did the men think about that order?

A. During that time I, myself, did not lead any units, but I do not believe that I am wrong if, from discussions with troop commanders of all ranks and all ages, I still have the impression today that the men themselves demanded energetic measures against this insurgent pest.

Q. Could you give an explanation for that attitude of the troops?

¹ Parts of this document are reproduced in sections B and IV C and D.

² Document is reproduced in section B.

A. Such an explanation is very simple in my opinion. A military unit that has occupational tasks and sees its military tasks in the preparation of a prevention of an invasion, and an occupation which wants to live in peace with the population and above all a military unit which consists of men of older ages, as was the case at that time in Serbia, and they were more prepared for a peaceful life of occupation than for any other kind of fight, such a military unit demands from its superiors an intervention against surprise attacks, ambushes, and illegal actions of all kinds for their own protection. And this is done from a healthy attitude, such as soldiers of every nation would have.

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TRANSLATION OF DOCUMENT LIST 27c
LIST DEFENSE EXHIBIT 49

AFFIDAVIT OF THEODOR JESTRABEK, 11 AUGUST 1947, CONCERNING
THE KILLING OF GERMAN SOLDIERS BY PARTISANS

AFFIDAVIT

I, Theodor Jestrabek, Landshut, Bavaria, Papiererstrasse 2, have been duly warned that a false affidavit on my part renders me liable to punishment.

I declare in lieu of an oath that my statement conforms to the truth and was made in order to be submitted as evidence to the Military Tribunal at the Palace of Justice, Nuernberg, Germany.

After the conclusion of the Greek campaign the [headquarters] staff of the 12th Army was stationed at Kyphisia near Athens. I was the officer in charge of ration supplies for this staff; in the same capacity I had already been a member of this staff since 1939, holding the rank of reserve captain at disposal [d. R.z.V.]

In September 1941, three soldiers of my group, namely Pfc. Strelka, Pfc. Glaser (driver), both from Vienna, and Pfc. Wagner from the Sudetenland, were dispatched on a truck from Athens to Belgrade with the order to receive rations for the staff of the 12th Army and to bring them to Athens.

The truck with the three soldiers never returned. After searches lasting months and covering all district and garrison headquarters concerned, my organization received, in the middle of 1942 at Salonika where the staff had meanwhile been transferred, a report from the Kragujevac district headquarters, stating:

“Having been loaded according to orders in Belgrade, the truck with the above named three soldiers left Belgrade in

September 1941 for Kragujevac. Owing to the already existing danger from partisans the truck joined a convoy of sick soldiers. In the vicinity of Kragujevac the convoy was raided by a column of partisans, part of it was separated from the rest, and according to a report of eyewitnesses, who were able to escape during the fighting, altogether 21 men, including my three soldiers, were overcome, taken prisoner by the partisans and carried away. After weeks of wandering, about 20 men, including a first lieutenant (medical corps) and my three men, were finally stripped to their shirts, had to dig their own graves, and were shot dead by the partisans. One of the German prisoners succeeded in escaping just before the execution. The data furnished by him to headquarters enabled a German detachment later to find the place of the execution and the graves, to identify the corpses beyond doubt and to bury them in the heroes' cemetery near Kragujevac."

I still remember these events well, because in my capacity as their former superior I had to report to the next of kin of the killed men. I had two photographs of each grave. I attached one of each to my letters of condolence, the rest I kept in memory of the soldiers.

[Signed] THEODOR JESTRABEK

TRANSLATION OF DOCUMENT LANZ 36
LANZ DEFENSE EXHIBIT 41

AFFIDAVIT OF KLAUS GOERNANDT, 15 SEPTEMBER 1947,
CONCERNING ACTIONS OF GREEK "INSURGENT" UNITS

AFFIDAVIT

I declare the following on oath for submission to Military Tribunal V in Nuernberg, and have been duly warned that I would render myself liable to punishment if I make a false affidavit.

I. *Ad Personam*—My name is Klaus Goernandt. I was born on 20 April 1914 in Berlin, am now living in Internment Camp 74, Building 11-50, as prisoner number 211, in Ludwigsburg (Wuerttemberg) after being released in Kaiserswerth near Duesseldorf, Clemensplatz 10.

II. *Ad Rem*—The following statement refers to my official position as supply officer of the 104th Light Division from February until June 1944, as Quartiermeister of the 22d Mountain Army Corps from June until the beginning of August 1944, and as a battalion commander in the Delvine/Sarande sector (southern Albania) from August until October 1944. The following details

on the general situation in Greece became known to me from orders of corps headquarters, daily reports from subordinate units, daily reports from the corps and Army Group E, and from conferences on my own staff as well as with the chiefs of staff of Army Groups E and F:

1. *The insurgent Greek units* were divided into two bitterly hostile camps, both of which, however, were trained and supplied by the Allied side; the Nationalist group of General Zervas and the Communist group of the Eam-Elas. Each had its own sphere of influence, which—with the exception of the previously mentioned German supply lines which crossed them—they had completely under their control and organized according to their own judgment. General Zervas was roughly in control of the Igoumenitsa [Goumenitsa] Ioannina-Arta-Preveza area with the supply port of Parga. The rest of the corps area was in Communist hands.

Over a fairly long period of time agreements existed with General Zervas, according to which no hostile actions were to be resumed between him and German troops. He broke this agreement without any provocation by the Germans around June 1944 in the form of bloody raids.

The Communists attacked German bases and columns without interruption. Focal points of their activity were the Korca area and Lake Prespa [Prespansko], the Greek-Albanian border territory, the Metsovo highway, the pass between Arta and Amfilochia [Amphilokhia], as well as the area around Lake Agrinion.

2. *The mode of fighting and organization of the insurgents* were such that they conscripted the civilian population in the areas under their control and mobilized them for their own purposes. The male population was regularly conscripted for combat service whether willing or not. Those who were not capable of bearing arms had to serve as team drivers, scouts, etc. The enemy staffs and supply camps were located in mountain villages. A well developed telephone system quickly reported every German movement from the outlying observation network to central headquarters and enabled them to take countermeasures at the right time. It was possible to establish the fact that all manpower within the insurgent territory was conscripted for the conduct of the war. Hardly any distinction could be made between combatants and noncombatants, since *the combatants lacked any standard uniform and, as has been proved, even women bore arms.* The above description refers to the Communist areas. After the capture of a village defended by the insurgents a kind of *community diary* was picked up as booty by our troops around June 1944 about 20 kilometers from Ioannina which showed beyond

a doubt how the entire population was conscripted *by force* in spite of strenuous opposition, and had to perform armed service and take part in the fighting. The population, which was generally quiet and peace loving, was pressed into the battle by force and had to build up their village into a stronghold against the Germans. For our troops the situation was conditioned by the fact that every Greek settlement away from the supply roads was just the same as the enemy's main line of resistance. It was suicide to approach them. Even if the civilian population acted under compulsion, nevertheless they obeyed and served the insurgents by treachery or active fighting. The insurgents were in a position at any time to send women, children, shepherds, etc., into the vicinity of German bases without attracting attention, who would report opportunities for raids. From their villages, which were constantly being mentioned in our agents' reports as bandit nests, they would then break out with superior force by surprise, frequently annihilate the base garrisons, and then return to their camps. But in most cases we lacked the men and necessary means, as mentioned above, to be able to carry out energetic and successful countermeasures.

3. *As the result of these methods of fighting used by the enemy* there were considerable German losses. Our losses for quite short periods of time often exceeded, for example, the figures now being given in the press on the British losses in Palestine in the last few years. The army was bitter because it had to fight in the dark against an enemy who claimed the rights of a noncombatant in civilian clothes when the situation became critical.

Headquarters were alarmed because closing off the roads meant starvation and the nonaccomplishment of our combat missions. In many cases, therefore, they had to insist on the evacuation of villages which were located near the roads, and had frequently been proved to have been the starting points for enemy raids. However, I emphasize that such acts of destruction were not carried out during the time I was in western Greece, as far as I know. But I knew the background story of many destroyed villages. Most of them were connected with the deaths of many German soldiers. In order to interrupt the enemy's activity in a way that would be at all effective, headquarters endeavored to break into the organizational centers of the resistance with stronger forces and to destroy the insurgent units' means of livelihood there. This meant carrying off or destroying enemy supply stores, destroying their communications network, destroying the principal bandit nests, etc. For this purpose special forces had to be requested as each case came up, since our own troops were not enough. Such major operations were carried out by calling

in the 1st (Mountain) Division. For the civilian population this type of warfare waged by the insurgents meant that they had to live *within the main line of resistance* and take upon themselves all the sacrifices which life in the immediate combat zone requires.

(1) *As example of raids which took place in the corps area I shall cite the following for the period from February to October 1944:*

a. The narrow gauge railroad between Mesolongion and Agrinion used by our own troops going on leave and for transporting supplies, which could also be used for civilian purposes, was shot at a number of times, two serious raids, as far as I remember, in February and April 1944. In connection with this a fairly large number of Germans was killed (I think I can recall 15 and 12), destruction of the locomotives, and several civilians killed. The train was packed with civilians.

b. Near Mesolongion, around June 1944, a German battery chief did not return from a short walk in the vicinity of his battery position.

c. Around May 1944, I myself was shot at with mortar fire in the Agrinion hospital, which was situated away from any military objectives.

d. Around July 1944, a veterinary company of the 104th Light Division was attacked by night in Amfilochia and annihilated. I recall *about 60 dead men having been found.*

e. An almost uninterrupted series of attacks on the pass between Amfilochia and Arta. Here my own car was twice burned out. Considerable losses. Twice after such attacks I saw burning Greek civilian trucks which had nothing to do with the German armed forces.

f. The Regimental commander of the 1st (Mountain) Division was shot dead from ambush in the autumn of 1943 between Arta and Ioannina.

g. Annihilation of nearly the whole motor transport company of the 104th Light Division by units of General Zervas on the road between Ioannina and Arta around June 1944.

h. Annihilation of German convoys by units of General Zervas around June 1944 on the Ioannina-Igoumenitsa road. Numerous killed. Even an ambulance was also hit during the fighting.

i. Repetition of a similar attack not far from Igmunenitza. Again, considerable losses. Corps veterinary [chief veterinary officer] killed there. Time: about June-July 1944.

j. A number of serious raids on the Ioannina-Trikalla road. Among them, several members of divisional staff of the 8th SS Panzer Division were killed in the immediate vicinity of Ioannina around July 1944.

k. Uninterrupted raids, both small and large, on the Ioannina-Florina road.

l. Around July 1944, an attack on telephone operators in the Delvine area (southern Albania). Eight killed.

m. Around June 1944, raid on a German unit of platoon strength south of Lake Vutrinto with high casualties.

These examples have remained fixed in my memory. They could be extended at will if written records were available.

(2) *I cite the following as examples of violations of international law:*

a. While on reconnaissance near Delvine (southern Albania) I surprised some armed enemy observers behind a rock disguised as shepherds (without flocks) and without any insignia resembling a uniform, and took them prisoners. Time: August 1944.

b. A fishing boat with about 15 convalescents and men on leave from my battalion was wrecked on the way to the base on the open coast north of Sarande. The crew fell into the hands of partisans and were shot after a summary court martial as a reprisal measure, as was unanimously reported by civilians who had escaped. Time: September 1944.

c. Well-directed fire by an English battery on my positions in Delvine, as well as reports picked up by an observer, gave me reason to suspect that the fire was being directed from Delvine itself. Climbing by surprise up a high projection rock directly on the edge of the town elicited brief machine gun fire and then the flight of several civilians who had taken up a position on the rock. Time: about September 1944.

d. A group of my battalion which was fired upon on open terrain between Delvine and Sarande immediately attacked the gun position. Result: fleeing civilians, one Italian machine gun, and a basket of live chickens found in the gun position. Time: September 1944.

I only remember these examples because they are from my own experience. Similar reports were frequently sent in by the army, but I have forgotten the details.

Ludwigsburg, 15 September 1947

[Signed] KLAUS GOERNANDT

AFFIDAVIT OF KARLHEINZ BENSCH, 3 OCTOBER 1947, CONCERNING
PARTISAN FIGHTING METHODS IN GREECE AND SERBIA

AFFIDAVIT

Having been duly warned that I will render myself liable to punishment if I give a false affidavit, I make the following statement in lieu of oath, to be submitted to Military Tribunal V in Nuernberg.

I. My name is Karlheinz Bensch. I was born on 4 June 1923 in Berlin, at present residing at 129 Allacher Strasse in Munich 54. I am a German citizen.

II. The following statements refer to my official position as a platoon leader, or commander of a light company in the 1st Battalion of the 734th Light Regiment (104th Light Division) which during the period from winter 1943-44 until the end of the war was committed in the fight against bands in Greece and other Balkan countries.

The way of fighting shown by the partisans in Greece and Serbia was in most cases treacherous and often cruel. In this connection I give the following examples:

1. On 6 June 1944, the supply column of the 1st Battalion of the 734th Regiment, moving through the "fields" at the northern edge of the Metsovonbasin (town of Metsovon in Pindus), was attacked from ambush; the drivers were massacred or kidnapped.

2. During the summer of 1944, the base "Waldhaus," located in wooded terrain (east of Sigos Pass) and its forces—members of the Penal Platoon Metsovon—who were working, partly unarmed, on the road or in the forest were again and again attacked in the same manner.

3. Usually the attackers could not be recognized as such since they wore civilian clothes in most cases. I have noticed this, for instance, to be a fact with all dead left behind by the enemy around Christmas 1944, in the course of a relief operation in the area south of Sarajevo. Parts of isolated units attempted at this occasion to pass through the German units as civilians, in which they actually succeeded too often.

4. Attacks and surprise attacks were not only directed against German troops but also against native units and civilians. This was reported in April 1944, among others, by residents of Korca in Albania, who were deserters from Communist Greek units from a town about 12 km. southwest of Metsovon—I do not remember the name any longer—who in July 1944 had been com-

mitted against a group of national units (Zervas); the same information was given to me by several Chetniks from the towns located between Sarajevo and Trnovo in December 1944.

5. Following the restoration of communications to several encircled German units in the area between the Sava and Drina Rivers (near Bijeljina) in February 1945, I saw the corpses of killed German soldiers stripped of their clothing.

6. The attacks by the insurgents were in the same manner directed against objects which were of importance to the civilian population. Thus, dynamiting of bridges and demolition of telephone lines were repeatedly carried out in the summer of 1944 on the road Ioannina-Trikkala; the insurgents, following their occupation of the towns around Vovusa—which is located about 25 km. northwest of Metsovon—ordered the confiscation of all food supplies in August 1944; in September 1944 the entire cattle herds of the natives were driven away from the fields and the Bojassas Valley, and finally in August 1944—always in accordance with the reports of natives, some of whom I interrogated myself—the residents of the villages located a great distance from the German units between Krania and Grevention were forced to move out following the occupation of these villages by the insurgents.

7. A diary, found on 19 March 1944 near Lithinon in the Thyamis Valley, about 25 km. northwest of Ioannina, gives a clear description of a "partisan company," as the chronicler calls it, during the period from December 1943 until March 1944.

The company (or the battalion?) with its command post was in a major town west of the Sutista mountain (1300 m.) belonging to the mountain range bordering the Thyamis Valley to the west. I do not remember the name of the mountain range any longer. The towns of Jeromnimi, Lithinon, and Vasulopulon in the Thyamis Valley belonged to the company's scope of command. The chronicler describes the manner in which the natives, in some cases even emphatically, were called and trained for war service despite the lack of equipment and clothing. Furthermore, he speaks of political indoctrination and "that they were not quite convinced of it yet." Moreover he describes the first encounters with parts of a German battery which was in Sitsa on the eastern edge of the valley. I remember more precisely the description of a surprise attack on an automobile convoy carried out during the night of 8-9 March 1944 on the road Ioannina-Florina near Negrades. The diary ends with the day on which the German troops stormed Lithinon. I regret that I am unable to produce it since I lost it together with my knapsack in March 1945.

8. The following statements refer to the way of fighting of the Eam or Elas units which were Greek Communist bands.

The Eam or Elas units wore civilian clothes in most cases; only late in the summer of 1944 did I see that large parts of them were in uniform. Corresponding to their way of fighting they mostly carried their arms hidden. The tactics of the Eam or Elas units consisted almost exclusively of surprise attacks; I have rarely experienced an open attack (Kalantini, 20 February 1944). If they unexpectedly encountered strong resistance or were attacked themselves, they retreated and avoided open fight taking with them the killed and wounded.

The Eam or Elas units have, to my knowledge, attacked or defended towns for military reasons. Thus, the towns of Nea Kutsuphiliani and Metsovon, inhabited by German soldiers and natives, were attacked in June 1944 and on 9 September 1944, respectively.

The units of the insurgents only partly complied with the laws of warfare; this, however, was not the case during the above-mentioned attack on Metsovon in the course of which the attack was mainly concentrated on the main first-aid station located in the town. The location of the main first-aid station was evidently known to them in view of the direction of the attack. The Elas units also carried out reprisal measures. I know of the arrests of natives as well as confiscation and removal of the entire possessions from people who resided near my base in the Pindus and came into contact with German soldiers regularly (according to the reports of a person who escaped a few days later).

To my knowledge, an exchange of prisoners did not take place. I herewith confirm that the preceding statements are correct.
Munich, 3 October 1947

[Signed] KARLHEINZ BENSCH

EXTRACT FROM TESTIMONY OF DEFENSE WITNESS
DR. RUDOLF IBBEKEN*

DIRECT EXAMINATION

DR. LATERNSEER (counsel for the defendant List): Will you tell the Tribunal your full name?

WITNESS IBBEKEN: Dr. Rudolf Ibbeken.

Q. Witness, will you please pause before answering the question until the question has been translated, and then I will ask you to talk into the microphone. Will you please spell your name?

A. The full name?

* The complete testimony is recorded in the mimeographed transcript, 6, 7 October 1947, pp. 3761-3836.

Q. Only the surname.

A. I-b-b-e-k-e-n.

Q. When were you born?

A. On 23 July 1902.

Q. And where?

A. In Schleswig.

Q. What are you by profession?

A. Historian.

Q. What were you as historian?

A. Academical lecturer at the University of Berlin for modern and ancient history.

Q. And what are you now?

A. I am in charge of an institute for tuberculosis in Hanover.

Q. Why did you change your profession?

A. After the collapse, I took up connections with the universities of Berlin and Goettingen and connections which today still are in existence, but at the present time I do not want to return to my old profession because the subject of modern and middle history, on account of the German collapse, needs a reconsideration and review on the part of a German historian.

Q. Witness, I ask you to talk a little slower. What were you during the war?

A. During the war, I was an officer with the rank of second and first lieutenant of the reserve and I was employed to begin with in France and subsequently in Russia.

Q. Up to what time were you employed as officer?

A. In Russia until 20 April 1942.

Q. And up until what date were you in frontline service?

A. Until the date mentioned.

Q. And why after that were you no longer at the front?

A. On that date, I was wounded by shrapnel, and I lost the eyesight of the right eye, and therefore I was no longer fit for front service.

Q. You lost the sight of the right eye?

A. Yes, my right eye.

Q. What did you do then? After you were wounded during the war?

A. After I had been cured, I was appointed by Military District III to give lectures to the troops within the frame work of the troop welfare program.

Q. On what subject did you give lectures?

A. The lectures were based on the knowledge of history and dealt with the basic features of the German and European history of the 19th and 20th century.

Q. How long were you in that job?

A. Until the end of the year 1943.

Q. And why did you not continue that activity?

A. In summer 1943, I gave a lecture in Bonn on the basis of which a Party procedure on the part of the then Reich Organization Leader Ley was started against me. It was, however, stopped by the Wehrmacht; and in a second clash at the end of 1943 with the office of Rosenberg there was a sharp difference of opinion on the basis of which I was declared as politically intolerable and unreliable and removed from my office.

Q. Who intervened on your behalf?

A. The chief of staff in Military District Headquarters III, Berlin. That was Brigadier General von Ross who was informed of my lecturing activity and about my clashes with the Party, and I assume that he took my part and placed me under the protection of the Wehrmacht. He contacted the staff of the Commander in Chief Southeast, and with the help of the chiefs of staff, General Foertsch and General Winter, he achieved my transfer to the Balkans.

Q. What was then, subsequent to that, your activity during the war?

A. Within the staff and by the staff of the Commander in Chief Southeast, I was commissioned to develop an objective history of the military historical conditions in southeast Europe during the years 1941 until that time. That is 1944-45.

Q. Did you go to the Balkans for this purpose?

A. Yes.

Q. When did you arrive there?

A. At the beginning of the year 1944.

Q. To whom did you report?

A. I reported to General Winter, and in order to get more closely acquainted with my commission I was sent to the Ic [intelligence officer] Lieutenant Colonel von Harling—

Q. What was your commission?

A. My commission was to describe, on the basis of all the files and material available to the 12th Army and Army Groups E and F, the developments from the year 1941, up to the time of the end of the war, and to base this on historical facts in order to enable the responsible military authorities to hold such a description against any distorted descriptions—based on tendencies—regarding this period.

Q. What was put at your disposal for this activity?

A. The files and documents of the 12th Army, of Army Groups E and F, as far as they were still available with the staff, and as far as they had already been sent to the army archives in Liegnitz.

Q. You already mentioned previously one of the purposes of

your activity. That is, a historical description without any bias. What additional purpose did your commission have?

A. The Ic, Lieutenant Colonel von Harling, and—during a discussion—General Foertsch and General Winter also supported this idea; and they connected with my commission the intention to create a kind of manual; and this manual was supposed to serve the commanders who were acting in that area and to give them an insight, I might say, into the completely abnormal conditions in the Balkans which were difficult to see through by a commander, a commander who came from a completely different area to the Balkans.

Q. In what manner did you acquaint yourself with the conditions in the Balkans?

A. I gained and collected local knowledge by staying in Crete, in Athens, in Salonika, in Belgrade, in Zagreb, in the area of Brod and Sarajevo, just to mention the most important ones.

Q. For this activity, did you bring with you historical knowledge of the Balkans?

A. My general training in the field of history, of course, had already at an earlier date acquainted me with problems prevailing in the Balkans, but I do admit that general book knowledge and purely scientific knowledge about the Balkans is inadequate in order to gauge what went on in that area and what opposing forces there were in that area.

Q. What were your first findings during the course of your work?

A. I believe that the first thing I learned was that I found myself confronted with a mix-up of forces which was hard to see through and it took a great amount of study to see the historical origin of this existing condition.

Q. What problems and conflicts were apparent in the Balkans during the occupation time?

A. The number of simultaneously existing conflicts in the Balkans is so large that I cannot say for certain that I am really naming all the conflicts in full, and I therefore limit myself to the most important tendencies within the area in order to at least consider those factors which confronted the German occupation force. I am asking now to be allowed to proceed geographically; so that, to begin with, I shall just go around the German occupation area, and then right diagonally through it.

I shall begin with the region roughly around Zagreb [Agram]. There we have the first great political difference—that is with Hungary and Italy at the flanks; but we also find the decisive contrast Zagreb, Belgrade that is—Croats against Serbs. Then we go down along the Dalmatian coast and we find the century-

old problem continuing into the present times—that is Italy and the Dalmatian coast, the nucleus Trieste. Further south, we find Albania which is the battleground of attempts of Italy to take influence, attempts of Greece and England to take influence; and further south yet, towards Greece, we have the sphere of influence of England in contrast to Italy. Then we will turn around to Salonika and we find the complicated sphere of influence of the Bulgarian tendencies—that is, the Russian tendencies backing them.

And in the nucleus itself, I only recall to you the aliveness of Macedonian nationalism and I shall recall to you the border area between a Greek and Bulgarian conflict for the influence in the area Salonika-Aegean; and now we shall close the ring in pointing out the taking of influence of Bulgaria in the Serbian area which again led to a splitting of even the lowest classes of the country because the sympathies of the population here as in all other areas mentioned were unstable and followed whatever influences were prevailing on the part of the major powers.

I will show you this rough description of the conflicts in the Serbian area and in the southeastern area generally. I shall now turn to a picture of the Serb-Croat area; we see there a further mass of conflicts which only make it understandable that down there it was not a question of one conflict concerning the population on the one side and German armed forces on the other side, but that instead, within that one war, I might almost say, there was an enormous number of individual little wars within the country and I shall now mention these factors.

Q. Witness, before you mention these factors, I again have to ask you to make your sentences shorter. Now will you please continue?

A. Perhaps the most bloody conflict which existed in the country itself was the one between the Serbs and Croats, borne by the two organizations of the Ustasha on the part of the Croats and the Chetniks on the part of the Serbs. Simultaneously there was the fight of the Chetniks against the Italians. Simultaneously there was the fight of the Chetniks against the Moslems, and at the same time a fight by the Albanians against the Montenegro-Serbians. I believe with this figure of the existing conflicts, I have described roughly what forces there were pro and con in that area, but I have only shown up those larger groups which bore a name.

It is a significant factor of the conditions in the Serbian area during the time of the occupation that the so-called partisan activity was by no means bound to any groups and organizations which can be named, but it was a typical factor of the partisan

activity that they existed independent of organizations, independent of any order, that they were in a position to appear at numerous spots in the country just because there was no organizational leadership and that fact made it nearly impossible for the occupation powers to get hold of them.

Q. Witness, you were just talking about the partisan movement. We will later come to certain details. I had just asked you what problems and conflicts prevailed in the Balkans. You named first of all the conflict between the Serbs and the Croats.

I now ask you to tell us some more problems and conflicts, and after you name them we shall try to come to some details. What further problems were there in the Balkans?

A. Apart from the natural difference between a country and a foreign occupation force, and apart from the natural contrast between the Serbs and the Croats, which I have already mentioned, I can further name the conflicts which arose from these spheres of influence of the great powers, but in order to understand conditions in the Balkan area, it is in my opinion of decisive importance that one realize that all the acute indifferences had a deep historical root.

I am talking about the struggle between the Greek Orthodox sphere of religion and the Roman Catholic one. This area is the sphere of the clash between east and western Europe, and this clash is not merely a matter of the intelligentsia but in a rather peculiar manner this clash leads—I might almost say—to the development of the character of the men in the Balkans because to have the Greek Orthodox faith is almost the same as to be a national Serb. Religious belief got completely tied up with political national conviction and out of this religious root comes in the whole struggle of the Serb nationalism, the incredibly strong fanaticism.

Quite similar is the case of the Croats who as Roman Catholics also feel politically segregated as well as religiously segregated. These historical causes which have an effect on the individual person in the Balkans had also gained strong political weight through the fact that with the Greek Orthodox faith the feeling of a pan-Slavic connection had for centuries gradually developed like a mass of larvae from southeast to northeast and has pushed forward and, politically seen, developed the difference between Zagreb and Belgrade during the course of the centuries. This extremely increased controversy prevailed just at the moment when the German occupation force was in that area and through the fact that Yugoslavia as a state was defeated and through the fact that the majority of the weight was transferred to Zagreb; the national pride of the Serbs was severely hit—from

a certain point of view, historically seen, rightly so, because for centuries the Nationalistic Serbs have shown themselves to be politically more gifted than the Croats who did not understand during the course of the last few centuries how to create a real state. Now, however, at the time when the German occupation power was in that area through the preference of Zagreb and through the instrument of the Ustasha which was available there, the political-religious contrast to the Serbs was sharpened so much that a defeating or an abolishing of these conflicts—I don't want to make any judgment here, I am not justified in that—constituted a conflict for the German armed forces.

Q. What national-political problems existed in the Balkans?

A. If the religious-political contrasts of the Balkan area at that time had been restricted to the territorially limited areas, then the conflict would not have been so sharp. The danger is to be seen in the fact that the hostile parts of the Serbian population lived mixed up and were forced to live that way. I ask you to allow me to make a comparison. If one took a handful of salt and mixed it with a handful of sugar and then tried to separate the two things again, it is just as impossible to do that as it is to disentangle the mixed-up parts of the population on the Serbian-Croatian map.

Q. Witness, if I have understood you correctly, there was the difference on the one hand of the population and on the other hand the occupation powers; then the religious problems, Greek Orthodox and Roman Catholic; the Serbs confronting the Croats; then the different spheres of influence of the great powers which met there. Now, what could be especially felt at that time during the occupation?

A. The decisive influences in the whole sector were without question the successes of the Tito organization. Here, too, one could make a false conclusion if at first glance one regarded the successes of this organization as the success of a Communist revolution. Long dealings with, and our knowledge of, all the notes about the Tito organization must lead to the conviction that here we are probably first faced with a sentimental love upon the part of the Slav nations to Mother Russia. At the moment it doesn't matter whether it is Communistic or anything else. The decisive factor was the feeling of common sentiment towards that great Russia that was now also a belligerent power and was able to fill the Slav nations with hopes.

Q. Witness, all the things which you have mentioned here, if I understood you correctly, were the main problems which confronted the occupation forces.

A. I believe that I have named them as completely as possible.

Q. You mentioned first of all the relationship between the population and the occupation forces. How was that relationship in Serbia?

A. I can testify less about the relationship regarding the lower troops in the country because I didn't come to the Balkans until later, but from my knowledge of the files I ascertained a very impressive fact—a fact which impressed me deeply at that time—and that is that during the early period there was a kind of expectant and not really hostile attitude on the part of the Serbs towards the occupation force and that as a second phase, I might say roughly about 2 months after the end of the campaign, the German leadership in the Balkan area suffered almost a shock when suddenly and not recognizable in its connections on numerous isolated spots in the country there seemed to be an insurrection and revolutionary movement which, however, in the beginning only found its expression in individual, little enterprises by small bands. I believe at that time Field Marshal List was the person who as the first in a discussion ascertained that that couldn't possibly be unorganized activity; behind all that there had to be a central leadership. Actually, such a central leadership, as far as I remember, at the earliest, 6 months after the end of the campaign, was found and was more clearly recognizable in the person of Mihailovic. However, one did see that the numerous individual partisans gradually joined into smaller units although it was not possible to connect all these little organizations to a central leadership. I especially mention in this connection that Mihailovic did not succeed to the very last day in establishing real discipline among his followers. Instead, in addition to the many little wars mentioned within the country, there were struggles of the leaders of bands against their alleged leader. In order to clarify this, my statement, may I emphasize that this bad cooperation between the bands was the consequence of the character of the Balkan people. They are all individualists and they are gifted. All these band leaders were led and guided by the idea, eventually, to be the leader. Everybody had their own policy, and it was the great achievement of Tito to be the first to create a real comprehensive organization on the background of this half-Slav, half-Communist ideology.

Q. What were the methods of these bands?

MR. FENSTERMACHER: Your Honor, please, I object to the question. I don't think this man has been qualified to know what the methods of the bands were. I think he is testifying to certain conclusions which he draws from the documents he has read and not to anything he himself knows personally.

PRESIDING JUDGE CARTER: I suppose he ought to state the basis of his information.

DR. LATERNSEER: That would have been the next question, Your Honor.

Witness, I have asked you about the methods of the bands, and will you now, please, name them to the Tribunal, and at the same time tell the Tribunal where you gathered your knowledge?

WITNESS IBBEKEN: At the beginning of my examination I stated that I had seen the records of the 12th Army and of Army Groups E and F, and that to my knowledge these documents form the bulk of all the available material in the headquarters of the army and the army groups, and that these documents also form the basis of my testimony.

DR. LATERNSEER: Now, on the basis of these files what did you personally ascertain about the methods of the bands?

MR. FENSTERMACHER: I object to the question. I don't believe this man is competent to testify to the questions he is being asked. He is asked to state his conclusions from certain material which he has read.

PRESIDING JUDGE CARTER: I think we had a similar situation when the Greek correspondent testified. He gathered information in the same manner and testified to it here.*

MR. FENSTERMACHER: If you please, Your Honor, that man went back and forth and participated in battles, fired guns, and was an assistant to the commander in chief, and participated in what he testified to. He had personal knowledge of the jump to which he testified.

PRESIDING JUDGE CARTER: I think that is true to part of his testimony but not to the whole of it. I think the testimony will be admitted for what it is worth.

DR. LATERNSEER: Witness, I had asked you about the methods, did you yourself look at any documents which might have shown the methods of the bands, above all did you see pictures, did you read reports; will you tell us something briefly about all this?

WITNESS IBBEKEN: In the documentary material mentioned, there are numerous reports about the methods of fighting of the partisans in such an abundance that somebody who for a year and a half studies these figures, for the period from 1941 to 1944, at least gains a file knowledge of these facts, and beyond that I can only personally state that to land with an airplane in the occupational area Zagreb would generally be in this way: As soon as one wanted to alight from the plane there would be machine

* Judge Carter refers to the prosecution witness Costas Triandaphylidis, a Greek newspaperman, who testified concerning the conduct of the partisan units serving under Colonel Zervas and of the Edes organization. His testimony may be found in the mimeographed transcript, 15-18, 20 August 1947; pp. 2071-2175 and 2339-2352.

guns from the partisans all around, and they would shoot until German anti-aircraft guns quieted these guns, and then one would land.

Q. Did that happen to you personally?

A. Yes. And from personal knowledge I could personally say that during the time when I was in the Balkans, and repeatedly after I went home to the Reich to work in the archives, it was the regular situation that in each leave train a combat force was formed in order not to be surprised during sleep by partisan attacks. Those were matters of course to us.

Q. Witness, did you see pictures, photographs, which showed mutilated German soldiers?

A. The documentary material mentioned contained a considerable number of photographs which showed mutilations. The photographs which I remember concerned first of all atrocities between the fighting parties of the population, that is, Ustasha against the Serbs, and the Serbs against the Moslems. The pictures were submitted so often down there that finally one just pushed them aside, because they are not a very pleasant sight, but there is one detail I want to mention. Among the documentary material of the staff of the division stationed in Sarajevo in 1942—these must be pictures which were submitted to the division judge—these pictures showed murdered women who were murdered by driving long wooden sticks into their genitals. Then there were numerous other pictures, and I ask not to have to testify about these, because I cannot give their sources exactly.

Q. Witness, we strayed from the actual subject. I had asked you about the actual relation between the occupation powers in Serbia and the population; what was the attitude of the officers, as far as you knew them, towards the Serbs?

A. I knew the officers of the staff of the Commander in Chief Southeast, and I was mainly interested in the political problems of the area. It was the constantly expressed opinion of these officers that the Serbs were the most remarkable and most gifted elements in that area and nobody really trusted them very far.

Q. What now were the relations between the occupation power and the population in Croatia?

A. This relation was completely different from a political and military point of view. It had to be different because Croatia was an independent state where the German armed forces, to put it quite briefly, had nothing to say. In Croatia, under the head of the state, the Poglavnik, who had come [back] from Italian immigration [exile]—

Q. What does the word "Poglavnik" mean?

A. It means head of state, leader.

Q. Who was it at that time?

A. It was Pavelic.

Q. Will you spell the name?

A. P-a-v-e-l-i-c.

Q. Now, will you please continue in the description of the relationship toward the population?

A. There was no considerable relationship with the population, not to the same extent as in Serbia. Croatia was an independent state. It was not exposed to the hands of the German armed forces; instead, it was exposed to the hands of the Ustasha.

Q. What kind of an organization do we have in the case of the Ustasha?

A. The Ustasha is in its nucleus, a body guard of the Poglavnik; let us say, a Fascist military organization which has half the character of a police unit, too.

Q. Was the Ustasha the only Croat bearer of arms?

A. No.

Q. Who else carried weapons there?

A. The Croats tried in the Domobrans to establish a kind of armed force, without the comparison really being exact in detail, one might compare the relationship between the Domobrans and the Ustasha as the relationship between the SS and the armed forces in Germany. I don't know whether I may say that just as there was a continued difference between the SS and the armed forces, there was a continued difference between the Ustasha and the Domobrans.

Q. To whom were the Domobrans subordinate?

A. The Domobrans were subordinated to the Croat Ministry of War. But to this problem of the Domobrans I wanted to make a decisive statement; they supplied the partisans with weapons.

Q. How?

A. In going over to the partisans almost like regiments with their leaders, and their guns were fired against us.

Q. And that applies to Croatia, what you said just now?

A. I beg your pardon, I said almost like regiments, in order to be absolutely based on the material available to me, certainly in the size of battalions.

Q. Now, what you have stated about Domobrans and Ustasha applies to the sphere of the state of Croatia?

A. Yes.

Q. Now, about the Ustasha, to whom were they subordinate?

A. To the Poglavnik.

Q. And what were the methods of these Ustasha, and whom did the Ustasha fight?

MR. FENSTERMACHER: I wish to object to the question as not being covered by the indictment, and there is no charge at all brought by the prosecution as regard the activities of the Ustasha. I object to the question on the grounds that it is irrelevant and immaterial.

DR. LATERNER: Your Honor, the defense maintains the point of view that the conditions in the Balkans are of decisive importance, because these conditions explain the measures which had to be, or which were, ordered by the military authorities; the total conditions which the prosecution describes as though they were normal European conditions. I have the duty, as defense counsel with the means at my disposal, to prove to the Tribunal how the conditions in the Balkans actually were at that time, and the Ustasha belongs to the whole problem.

PRESIDING JUDGE CARTER: The objection will be overruled.

DR. LATERNER: Thank you.

Witness, I asked you about the Ustasha, and I had asked you what method they used and whom they fought. Will you be brief and clear on this subject?

WITNESS IBBEKEN: The main opponents of the Ustasha were the Serbs. The struggle of the Ustasha against the Chetniks was the struggle of the Fascist Croats against the National-minded Serbs, and finally, the struggle of the Ustasha against the Chetniks was the struggle of the Orthodox against the Catholics.

Q. What methods did the Ustasha apply?

A. Balkan methods, partisan methods.

Q. What do you mean by that?

A. Although they were an organized unit, they did not refrain from committing cruelties, cruelties which became known to us of the unorganized partisan groups. Through this, they made extreme difficulties for the German occupation, because, after all, the Ustasha was the instrument of the Croat Government, recognized by us, and of course all of the things which were committed by the Ustasha were put to our account as the political supporters of Croatia.

Q. Do you know whether the armed forces authorities tried to intervene against the Ustasha methods when they became known, or whether they tried to cause the Croat Government to take influence on the Ustasha?

A. I refer to the extensive correspondence between General Glaise-Horstenau, and the Commander in Chief Southeast, which dealt with all of the Croat problems and with all Ustasha problems. These reports by General Glaise-Horstenau were one continuous complaint, and one continuous begging to free the German

armed forces of the Ustasha and I know that the endeavors for a restriction of the influence of the Ustasha went right up to the highest German authorities on the part of the commanders in chief in the Southeast.

I believe that one of the representations to Hitler personally via the Reich Government was sabotaged by the Foreign Minister Ribbentrop, and never reached the Fuehrer Headquarters; the reason for this may well be that the German clinging to the Croat position in the whole area was first of all the result of the political tendencies of Foreign Minister Ribbentrop, and he and the SA envoy, Kasche, supported this Croat Fascist system, partly to the disgust of the armed forces.

Q. Witness, you have now shown us the relationship between the armed forces and the Serbs, and between the armed forces and the Croats; and you have already mentioned the difference, the contrast between the Serbs on the one hand and the Croats on the other hand. Of what kind were the differences between the Serbs and the Croats, and how did they affect the conditions at the time of the occupation?

A. Most sharply in the fact that the occupation power had no uniform tendency and directness when fighting the partisans, because the fighting activities in the total area were not clear cut and directed merely against the occupation forces from the opponents, but because there was fighting everywhere.

Q. How then, Witness, did the differences between Croats and Serbs show up; what was the consequence? How, for instance, were the Serbs treated in Croatia; and the other way around, how were the Croats treated in Serbia?

A. I believe one must not separate Croatia and Serbia thus sharply. Of course it was impossible for the Serbs to have a politically leading position in Croatia and Serbia; on the other hand there was a German occupation area. I am not quite clear about the meaning of the question which was put to me.

Q. I wanted to know the consequences of the differences between the Croats and the Serbs in the occupational area. For instance, during the occupation time did the Serbs remain in Croatia, and what measures would the Croats take against the Serbs, and the other way around?

A. During the course of the fights between the Croats and the Serbs, and the Ustasha and Chetniks, and later during the course of fights between Tito and Chetniks, and Tito and Ustasha, there were movements of the population which were quite considerable. Whole parts of the country were thrown into unrest; later they were torn away with the streams of partisans in the course of big military operations, so that one can well say that this inner

struggle between Croats and Serbs at least furthered the dissolution of the whole social structure of the country considerably.

Q. The Serbs and Croats speak the same language?

A. There is a strong difference in dialect, not a basically different language, but there is a very great difficulty arising from the fact that the Serbs use Cyrillian handwriting, and the Croats the Latin handwriting.

Q. You have already mentioned the Moslems during your examination. What was the relation of the Moslems to the National Serbs?

A. One does not have to see a very great difference in the contrast between the Orthodox and Catholics on the one side, and the contrast between Orthodox and Moslems on the other hand. In both cases, the confessional, the religious contrast, has taken on a political nature and thus found its effect in the Balkan political differences.

If, on the basis of my documentary knowledge, I should draw conclusions, I would say that probably the most cruel thing which occurred in this Slav brother warfare was that it was carried out at the expense of the Moslems.

Q. Witness, you further mentioned the various spheres of influence of the great powers in the Balkans. I am not asking you now for political opinions. I am merely putting the question in order to establish a dividing effect on the population caused by these spheres of influence. How, as an occupation power, did one regard these spheres of influence?

A. The occupational power, through the existence of spheres of influence of the great powers on these areas, was confronted with the fact that the population of this area was now split into even more parties, even more than it had already been split into, on the basis of their own inner conflicts and of the differences to the occupation power, because traditionally, the sympathies of the Greeks are with Great Britain; that is caused through the old Mediterranean interests, but from the frontier, via Bulgaria, the stream of the Russian influence in the Communistic form penetrates, but that is by no means a free stream. I am talking of the time of the occupation. In this movement there is a new factor. While there is still a struggle between these English and Russian attempts of influence, right in the middle there is the old historical attempt of an independent nation, Macedonia. One more conflict is added. The influence of Italy by way of Trieste—Dalmatian Coast, Albania, made life difficult for the German armed forces—more difficult probably than any other factor caused by the great powers in those days. This influence played

in the immediate military operations, where this influence led to catastrophe.

Q. Witness, I would like to ask you what political interest existed on the part of the Germans during the time of the occupation?

A. The German interest in the Serb-Croat area, or rather in the whole area of southeastern Europe, consisted first of all in the maintenance of the lines of communication between Zagreb and Salonika up to Crete. There was further a strong political interest regarding the war in the country, and the real political interest was restricted and was comparatively small, because the political prestige of Italy had been fixed in the course of German policy. Only one direct political interest was essential and has to be named, this is the fact that Germany, in spite of allowing the Italians to retain prestige, still made a strong distinction between Italy and Hungary, and thus at least secured the political entrance into that area.

Q. Witness, what effects were caused by the various spheres of influence on the population of the Balkans?

A. This question I would like to answer by saying that the area, as I stated yesterday, was inhabited by a great number of various groups and political tendencies. All these tendencies conflicting with each other had, of course, the one tendency to find support and help from the outside in order to gain advantage over the opponent in this manner politically, as well as regards supply of ammunitions, etc. As a consequence we find in all these groups and tendencies the inclination to lean on the great power which is geographically closest, and thus to gain for their own fight and for their fight against the occupation powers certain advantages. As a consequence the answer of this question would again include a circle around the whole southeastern area, which I drew yesterday, and we would find that from Serbia, at least during the first years of the occupation, there was a strong tendency to keep contact away from Russia on the part of Mihailovic, as the representative of Serbia. We could, at first, clearly see a tendency to lean on England. The Tito movement again severed connections and leans on Russia. The Greek insurgents were divided in their political tendencies. The National Greeks looked for support in England, and the Communist bands again leaned on the eastern influence. The whole tendency goes towards making the influences of the great powers useful to them and thus leads politically and also practically to a splitting up of the whole Balkan area.

Q. In other words then Witness, in these spheres of influence,

did that result in a further division of the population in political and other matters?

A. Yes.

Q. And now briefly turn to the partisan activities. How was it possible in the Balkans that such a strong partisan activity managed to exist; how do you explain that on the basis of the experiences which you gained there?

A. The ethnic explanation for the strong appearance of partisans in the Balkans again demanded action, and here again we have a struggle of political wills which was fed by religious sources, and therefore took on an enormously ethnic character. The distinction of the partisan groups, the fact that the partisans acted on their own initiative without any orders, the fact that they turned out of the smallest villages, out of every isolated hut, can be explained by the national character. The Balkans, especially the central area, the Serb-Croat area, partly until today lives in the concept of a patriarchal order. By this I mean the family is the political sphere, where the man lives and thinks. The smallest cells are the most important center to the simple man in the street. The head of the family to him is the most important authority he knows. An order by the head of the family or by the head of a clan of about 50 to 100 people is almost sacred. Such a head of a clan only has to say one word, like for instance, "Tomorrow morning on the first motor car that passes at a certain spot, stones shall be thrown," and that would be sufficient for this thing to be carried out on the next day. And through the fact that orders are observed within a very small circle it becomes possible that on numerous spots in the country there are simultaneously attacks on the German troops, which are disastrous. The partisans of the Balkans spring from a population used to living with the idea of blood revenge. The history of the Balkans during the last 500 to 600 years can almost be regarded as a history of vendetta and party struggle. But the large scale point of view which makes up the history of a country or a state played a smaller part, and just because these smaller parts refused to become states only through the fact that they split up among themselves. There is only one exception from this partisan activity, and I might almost say activity without order, and that is Tito's Communist movement. That was something absolutely new in the Balkan area. The fact that Tito's partisans, for the first time, achieved a large scale movement seemed significant to us, and that he overcame these divisions and combined these numerous individual ideas under one leadership. In spite of this feat in which Tito succeeded, and which gave the partisans a slightly changed character, it did not

mean a decreasing of the conflicts in the Balkans, but only a sharpening. The stronger Tito's partisans became, the more embittered the struggle became on the part of his people against the Chetniks, Ustashas, and against the German armed forces.

Q. Witness, how about the training of the population as *francs-tireurs*?

A. This training is the product of centuries. The individual partisans did not really need any training any longer. Partisan activity is something of a tradition. It originated from a time when these—historically viewed—unfortunate people were kept in slavery over centuries by the Turks. It goes back to times when the so-called Heiduck [Haiduk] formed itself, and this tradition is alive, in folk songs, in legends about heroes, in literature, and in the whole political idea of the Balkan people.

Q. Witness, what you just said about the training, or one might call it preparedness, to be *francs-tireurs* on the part of the population—is that merely your opinion, or is this a scientific opinion and a scientifically recognized opinion?

A. This statement, as all statements of mine, is based on two factors. Not on my personal opinion, but first of all on the thousands of documents which I described initially in my examination, and secondly, on scientific knowledge. I mention only a few names where all the characteristics which I mentioned might be examined and found. There is, for instance, the research of Milkovic.

MR. FENSTERMACHER: I object to the second part of the witness' answer. I don't think he has been qualified as an expert on scientific opinions with respect to the Balkan people. I think he may testify to what he knows as a result of examining the documents, but not otherwise.

PRESIDING JUDGE CARTER: I think perhaps we should have some limitation on the examination, Dr. Laternser. Objection sustained.

DR. LATERNSER: Yes.

Let us then drop this particular point, Witness, and we will talk about something else. Maybe we can touch what we have already talked about again by the answering of one question. Was the partisan activity a result only of the existence of the German occupation power, or did the preparedness of the population for such activities play an important part?

WITNESS IBBEKEN: Certainly, every country is pushed through a war into conditions which loosen up the generally existing order, and such a loosened-up condition provided in the Balkans an immediate occasion, or rather was used as an occasion, to release all the various conflicts among the population.

Q. Witness, how did it happen that partisan activity took place on such a large scale basis; what were the reasons for this?

A. In order to be a partisan, weapons are needed. The man in the Balkans is used to having his own weapons, firearms, and bayonets. The partisans in the Balkans would not think—if there is a poster to deliver up all arms—they would not think of really giving them up. At that moment they only think of how to hide their weapons even better. As a consequence, especially immediately after a campaign in which the Yugoslav Army capitulated, a great number of arms were dispersed over the country, and it was a trivial thing for the population to hide these arms in this area in the Balkans. It was feasible to do that every day, and thus the guerrilla fighting started.

Q. Do you know anything about the extent of the supply of the population in the area on the part of the Allies?

A. The files are full of reports about dropping of weapons by planes.

Q. When was that dropping of weapons done, during the day or during the night?

A. Without being able to answer this question exhaustively, I am just giving some answers from memory from the file notes which I read; I would say that weapons were most frequently dropped during the night in the small localities marked by lights. I have retained this impression because I memorized these remarks best.

Q. Where did these supplies come from?

A. As far as I know the German armed forces themselves did not know that.

Q. Do you know whether the supply was effected by Russia too?

A. I cannot make any statements about that.

Q. Witness, what then was the consequence of these lively Balkan activities; the consequences regarding the occupation powers?

A. The troops were desperate. At least during their first experience they felt helpless when confronted with this opponent.

Q. What opportunities were there for capturing the partisans?

A. First of all for geographical reasons, for instance five partisans fought in a mountain area making an attack on a column—

(Recess)

Q. Shortly before the recess, I had asked you what possibilities there were for the seizing of the perpetrators.

A. The geographical conditions were the worst possible, an attack by a very small partisan group, by three, five, or eight men in this mountain area demanded employment of troops of a much larger number. If mountain infantry really reached the

suspected spot, then the knowledge of the locality on the part of the partisans and also their support by the population made it almost impossible to catch the actual perpetrators.

Q. Can you give a practical example and describe to us that which characterized the particular surprise attacks, which were almost every day routine?

A. A typical surprise attack was the dynamiting of bridges, rocks were dynamited and sent hurling down to the streets. One has to take into consideration that there were only very few highways in that area and how blasted sections were sufficient to delay any larger countermeasures for a long period; sometimes it was made impossible for a number of days.

Q. What did the troops expect?

A. Insofar as you mean by troops the common soldier, the ordinary guard or a small command post of 10 men or even a company, I would say that these people lived in constant fear of threat from ambush, and I can really only answer that question on the basis of discussions with officers from the Staff Southeast. These people again and again expressed the feeling, "just give us anything so we can fight this menace." Because normal military measures were not able to cope with this abnormal situation on the enemy's side, or at least were not able to cope adequately with it.

Q. What attempts were made by the occupation forces in order to pacify the Balkan area?

A. To begin with I have to point to large numbers of individual operations by which it was attempted to fight the respective partisan attacks which I have already briefly described and what difficulties had to be met. Besides, large military operations were attempted and it was also intended on the basis of negotiations to achieve the pacifications of at least certain sectors. These negotiations were not only based on the request of the German armed forces but the opponents had the same desire, and that applies especially to the Chetnik leaders. This desire on the part of the Chetnik leaders to enter into negotiations with German authorities was certainly not based on any special love for the Germans, but rather on an emergency situation in which the Chetniks found themselves, because they were simultaneously fighting the Communists, and in order not to have to fight on two fronts they often tried to at least arrive at a compromise, a healthy compromise with the German armed forces. That one could not put any faith in their proposal for negotiations is obvious, because one had to expect at the moment when the third opponent would withdraw to other areas, at the time when the Chetniks were ready to negotiate, they would have an immediate

opportunity to attack the German soldier from ambush. A further factor which made the Chetnik negotiations more difficult can be found in the fact that the individual band leaders were not completely authorized by Mihailovic to negotiate with the German armed forces. Mihailovic, which can be seen from the radio addresses which were listened to by the German Intelligence Service, gave very ambiguous directives to his subleaders. To judge whether Mihailovic really meant it, if he admitted negotiations in individual cases would be difficult, but regarding the total impression of these negotiations one can say that all these negotiations with the Chetniks because of the behaviour of the Chetniks, did by no means represent a guarantee for the German armed forces that after a few weeks the negotiator of today would not be an opponent of tomorrow.

Q. Now, Witness, what was the relation to Nedic, who as we know was at that time the head of the Serb Government?

A. Nedic and his system constituted the most essential attempt on the part of the German armed forces authorities to achieve the ends without military operations, without harsh measures, but instead to build up a system of administration, of pacification, and thus to establish law and order. The favorable opinion, which existed in the staff of the Commander in Chief Southeast, regarding the Serbs played an important part. There was a certain antagonism against the Poglavnik, and I mentioned the Ustasha yesterday. I don't think I am wrong if I say that the Nedic system had for the Commander in Chief Southeast the importance of being a stable factor in this mixture of conflicting forces of the southeastern area. Therefore, one gave the Prime Minister Nedic his own ministry; it can be said that the occupying forces influenced this government, and that was in the nature of things, but there were certain attempts to give Nedic the possibility—to give Nedic Serbian forces in order to build up an administrative machine in order to keep the Serbian area peaceful and pacified.

Q. What was the success of these endeavors regarding the partisan activities?

A. There was a considerable pacification and a considerable decreasing of the partisan danger and it did not result from the Nedic system. The police force which was put at Nedic's disposal was most unreliable and pacification of the country in spite of this strong endeavor to build up its own national administration, at least in the long run, was not achieved.

Q. And what was the result of this fact for the occupation forces?

A. The occupation forces, because of the possibility of the

seemingly increased dispersal of the partisan units over the whole country, were forced to plan large military operations.

Q. What was the course then of the large scale military operations which you have just mentioned frequently?

A. A short answer to this question will have to be restricted to the total measures of these operations. I assume that you did not mean the question in this way, that I should describe military operations.

Q. No, but tell us what importance these operations had for the situation of the partisan activities?

A. The employment of German troops against larger partisan units normally had the result that these partisans were compressed to narrower sectors and in the course of planned military actions their entire destruction would have been possible, if not one factor almost automatically had to be admitted in all these military operations. It was the task of the Italian troops to cooperate with the Germans and to cooperate together with them. Especially in the western sectors they had to achieve a certain restriction of the area. It was tragic for almost all large scale operations that the Germans managed to compress the partisans in a comparatively small area as they managed to catch them, but the Italians at the last moment opened the net and the partisans could thus break through. There was no entire mopping-up achieved of the fighting area, but all it meant was the fighting area was transferred to another district, the troops lost men and one had to attack yet another partisan unit.

Q. Dr. Ibbeken, we have now come to the end. All I want to ask you now is, what were the aims in combating the partisans?

A. The aim of every fighting activity of the German occupation forces was the securing of the supply lines, the pacification of the country merely in order to be able to make use of the war potentialities of the country. The aim of the military leadership was to guarantee the mere existence of the troops in such an area interspersed by partisans. Orders and measures had the aim to give the military units the impression that they were not exposed to the enemy helplessly, but that they had means to defend their own lives in this area and that they could fulfill their larger military tasks.

Q. At that time did you hear anything about the existence of a tendency to exterminate them?

A. The question is a very strange and surprising one to me because we have talked here about measures of military necessity, and I wouldn't know how, in an area which one intends to secure and use economically, one can plan in such an area an extermination. I don't see the motive for that.

Q. Did you at that time hear anything about an extermination tendency towards the population, as is now being maintained?

A. In the 1½ years of my activity with the Commander in Chief Southeast, I ascertained almost scientifically how one can secure and keep order in such an area, how one can bring order into the chaos which existed there. The word "extermination" was never mentioned and the thought never entered anybody's mind.

DR. LATERNER: Thank you. I have no further questions.*

* * * * *

* In addition to Dr. Ibbeken, the defense called another expert witness on Balkan history, Dr. Georg Stadtmueller. Dr. Stadtmueller acted as an interpreter for the defendant Felmy in Greece during the war. He testified mainly concerning Greek history and "band" warfare in Greece. His testimony may be found in the mimeographed transcript, 9, 10 December 1947, pp. 7420-7480.

VI. TREATMENT OF CAPTURED MEMBERS OF THE ITALIAN ARMY

A. Introduction

The charges of the indictment concerning the treatment of captured members of the Italian Army are contained in count three (pars. 11 and 12*i* through *l*). A number of contemporaneous documents dealing with this subject have been compiled chronologically below (sec. B). These documents are followed by extracts from the direct examination of the defendant Lanz and an affidavit by the defense affiant von Loeben (sec. C). This defense evidence deals particularly with the execution of the Italian General, Gandin, and some of his subordinates. Some of the measures taken against members of the Italian Army after the surrender of Italy to the Allies were taken pursuant to what the Germans called operation "Verrat" [treason].

B. Contemporaneous Documents

PARTIAL TRANSLATION OF DOCUMENT NOKW-898
PROSECUTION EXHIBIT 317

KEITEL ORDER, 9 SEPTEMBER 1943, CONCERNING TREATMENT
OF ITALIAN SOLDIERS

[Stamp] Top Secret

[Handwritten]

New procedure in taking *Italian* prisoners of war

9 September 1943

2 copies—1st copy

Administration [Crossed out in original]

Qu 2

10 Sept

[Illegible initials]

Armed Forces Operations Staff/Quartiermeister 2 (S)

36/60

Priority—Teletype

To:

1. Army Group B
2. Commander in Chief Southeast

3. Commander in Chief West
4. Chief of Army Armament and Commander of the Replacement Army
5. General Staff of the Army, Generalquartiermeister
6. Commander in Chief of the Air Force, Air Force Operations Staff
7. High Command of the Navy, Naval Operations Staff
8. General Armed Forces Office, Chief of Prisoner of War Affairs
9. Foreign Office, Attention—Ambassador Ritter
10. Foreign Counterintelligence Office
11. Plenipotentiary General for Labor Allocation
12. Reich Leader SS and Chief of the German Police

Subject: Further treatment of Italian soldiers under German jurisdiction

Italian soldiers who do not wish to continue fighting on the German side are to be disarmed and considered prisoners of war. They are to be taken over at first by the OKW/Chief of Prisoner of War Affairs. In cooperation with the Plenipotentiary General for Labor Allocation, the skilled workers among the prisoners of war taken over are to be selected for the armament economy and are to be put at the disposal of the Plenipotentiary General for Labor Allocation. Further, in cooperation with the Reich Leader SS, the fascists still among the prisoners of war are to be selected and handed over to the above. All other prisoners of war are to be at the disposal of the General Staff of the Army, Generalquartiermeister, and of the Commander in Chief of the Air Force, Generalquartiermeister, in the proportion of 7 to 1 as workers for the construction of the East Wall.

The selection ordered has to be carried out as soon as the prisoners of war are taken over, so that the camps will be freed for new prisoners of war as quickly as possible.

The Chief of Prisoner of War Affairs will report the total number and their distribution to me every fifth day from 15 September onward.

Should the guards at the disposal of the OKW Chief of Prisoner of War Affairs be insufficient for the task, the Chief of Army Armament and Commander of the Replacement Army is to help out on guarding with persons who have recovered from their wounds or sicknesses, etc.

The transfer of English and American prisoners of war from Italy is to precede the transfer of Italian prisoners of war.

[Signed] KEITEL

OKW/Armed Forces Operational Staff
Quartiermeister 2 (S)

No. 005117/43 Top Secret

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-1403
PROSECUTION EXHIBIT 319

EXTRACTS FROM ORDER AND TELETYPE FROM XV MOUNTAIN CORPS
TO SUBORDINATE UNITS, 11-12 SEPTEMBER 1943, CONCERNING
DISARMAMENT AND EVACUATION OF ITALIAN TROOPS

[Stamp] Top Secret

[Stamp]

Corps Headquarters, XV Mountain Corps
Quartiermeister No. 321/43, Top Secret

Corps Headquarters, XV Mountain Corps
Ia 769/43, Top Secret

Local Headquarters, 11 September [19] 43

17 copies—10th copy

Subject: Carrying out disarmament of Italians

* * * * *

2. As a matter of principle the Italians are to be requested to turn over immediately all their heavy weapons. If attempts are made to delay, ruthless measures are to be applied with employment of dive bombers. If the occasion warrants it, the Italians may retain their small weapons temporarily as protection against bands.

* * * * *

9. Basic principle—Any open or attempted resistance is to be broken by applying severe methods. Disciplined leadership of return march by the Italians themselves, according to directives of the division, is the prerequisite for regular rations, otherwise there is danger that they may starve to death.

* * * * *

[Illegible initial]
[Signed] LUETERS

* * * * *

[Stamp] Top Secret

[Initial] T 12/9

Copy of Teletype
Teletype

To:
SS-Division
114th Light Division

For information: 373d (Croatian) Infantry Division

No shipping space available for evacuation of Italians and supply via sea route. The Italian units in the area Split-Zara are to be ordered to Bihac via land route immediately under the responsible leadership of their commanders and their headquarters authorities pursuant to Corps Headquarters Ia/Quartiermeister No. 769/43 Top Secret of 11 September. Severest compulsory measures as well as reprisal measures are to be applied in the event of refusal (shooting to death).

* * * * *

114th Light Division and SS Division are requested to report their intention immediately with time table and security precautions (for instance, commitment of tanks).

XV Mountain Corps, Ia No. 770/43 Top Secret 12 September 1943

Certified true copy:

[Illegible signature]

Captain, Cavalry

PARTIAL TRANSLATION OF DOCUMENT NOKW-916
PROSECUTION EXHIBIT 223

EXTRACTS FROM BASIC ORDER, 15 SEPTEMBER 1943, SIGNED BY
KEITEL, CONCERNING TREATMENT OF MEMBERS
OF ITALIAN ARMY

Supreme Command Armed Forces
No. 005282/43 Top Secret, Armed Forces Operational Staff/
Quartiermeister 2 (S)

Fuehrer Headquarters, 15 Sept 1943

[Stamp]

Top Secret

55 copies—
copy

[Handwritten] Quartiermeister 2 (S)

[Illegible initial] 16

9

*Basic policy concerning the treatment of soldiers of the
Italian armed forces and of the militia*

All previously issued orders concerning the treatment of soldiers of the Italian armed forces and of the militia are hereby rescinded and the following is ordered:

I. *Basic principle*—Italian soldiers must declare unequivocally whether they desire to continue fighting on our side or whether they wish to participate in the breach of faith of the Badoglio government. *Whosoever is not for us is against us and consequently he becomes a prisoner of war.* (Irrespective of any German citations of war he may have received.)

II. One must distinguish three classes of Italian soldiers, including the militia—

1. Italian soldiers faithful to the alliance who—

a. Wish to continue armed combat on our side.

b. Wish to be employed in the order and security service, in the supply organization of the armed forces units or with the navy or the ground forces of the air force without, however, actively participating in combat.

2. Italian soldiers who do not wish to assist us in any way.

3. Italian soldiers who have resisted either actively or passively or who have allied themselves with the enemy or with bands.

* * * * *

To 2 above (Italian soldiers who do not wish to assist us in any way). Italian soldiers who do not wish to be available to continue fighting on the German side are to be disarmed and are prisoners of war. The OKW/Chief of Prisoner of War Affairs will take them over first. Regarding their sifting and distribution for purposes of war economy, there is a special directive in agreement with the Reich Minister for War Production and Armament and with the Plenipotentiary for Labor Allocation.

To 3 above (Italian soldiers who have resisted either actively or passively, etc.) Italian soldiers having actively or passively resisted German measures or having allied themselves with the enemy or with bands are also prisoners of war. The following directives which are more severe apply to them:

a. By order of the Fuehrer, the following procedure is to be applied to all Italian troop units who have let their arms fall into the hands of insurgents or in any way made common cause with the insurgents:

(1) The officers are to be shot to death by summary courts martial.

(2) Noncommissioned officers and men are to be transferred to the east for labor employment via General Armed Forces Office/Chief Prisoner of War Affairs, and made available to the Army General Staff/Generalquartiermeister, if possible avoiding transit through the Reich.

b. An ultimatum with a short time limit is to be sent to Italian

troops or other armed units still offering resistance at this time. This ultimatum is to make it clear that the Italian commanders responsible for the resistance will be shot as *francs-tireurs* unless they have ordered their troops to surrender their arms to the German units before the time limit expires.

III. *Sifting*—The following is ordered in order to relieve transportation: Army Group B, CinC West and CinC Southeast are to classify and to retain immediately.

1. Italian units continuing the fight on our side.

2. Individual Italian soldiers willing to continue on the German side and who may be organized into new Italian militia units or who may be employed as Italian voluntary helpers in German troop units.

3. All Italian soldiers who are ethnic Germans. They are to be collected at a camp to be installed in South Tyrol by Army Group B for the purpose of later recruitment for the German armed forces and Waffen SS.

4. Units and troops as well as individual Italian soldiers that are in the air force or navy in the Reich, in the area of operations or in the occupied territory, will remain available for the air force and navy and are to be treated according to the foregoing policies.

5. All other officers and men are to be evacuated to the Reich in so far as Special Directive II, 3, comment to 3, is not applicable.

6. CinC South will transfer *all* Italian soldiers to Army Group B, excepting Italian voluntary helpers. Army Group B is charged with the immediate transfer of prisoner of war transports of CinC South to the Reich.

7. All Fascists (i.e., members of the Fascist party) who wish to cooperate further are at the disposal of the Reich Leader SS at his request.

IV. *Treatment of officers and higher staffs*—Officers and higher staffs who have declared their willingness to be committed on our side according to II, 1 *a* and *b* or according to their special qualifications but for whom there is no use at present are to be kept in honorary confinement by the army group in their corresponding areas. Proper billets (for instance in hotels to be requisitioned) are to be secured. Until further notice they are to be informed that because of the restless attitude of the population and for their own interests they will be granted no release for home even though it may be within the area of German authority.

Chief OKW

[Signed] KEITEL

Distribution:

[Not listed in original document]

PARTIAL TRANSLATION OF DOCUMENT NOKW-1354
PROSECUTION EXHIBIT 447

EXTRACTS OF DAILY REPORTS FROM COMMANDER IN CHIEF
SOUTHEAST, 19-28 SEPTEMBER 1943, TO OPERATIONS
SECTION, OKH

* * * * *

To:

High Command of the Army
Army General Staff/Operations Section

Secret Daily Report from Commander in Chief Southeast for
19 September 1943

* * * * *

Chief Administration Area Headquarters Salonika—

Engagement between our own reconnaissance and bands north
of Elasson. The attitude of the disarmed Italians has stiffened.
Several mutineers were shot.

* * * * *

[Stamp]

Army General Staff, Operations Section
Received—24 September 1943
No. 10229/43 Secret

* * * * *

Secret

Daily Report from Commander in Chief Southeast for
23 September 1943

XXII Mountain Corps—

Final mopping up at Cephalonia is under way. General Gandin
and his staff were captured. [Crossed out] Special treatment
[Sonderbehandlung] in compliance with Fuehrer order.

* * * * *

Commander in Chief Southeast (Army Group F), Ia, No.
2741/43 Secret, dated 23 September 1943.

[Stamp]

Army General Staff, Operations Section
Received—27 September 1943
No.—10354/43 Secret

* * * * *

Secret

Daily report from Commander in Chief Southeast
(Army Group F) for 26 September 1943.

* * * * *
XXII Mountain Corps—

Corfu is firmly in our hands except for the mopping up operation necessary in the northern sector. Mopping up operation proceeding on the Island of Ithaca (east of Cephalonia).

Enemy ammunition depot destroyed south of Korca, 50 bandits shot.

* * * * *
Commander in Chief Southeast (Army Group F), Ia No. 2789/43 Secret, dated 26 September 1943.

[Stamp]

Army General Staff, Operations Section
Received—28 September 1943
No.—10384/43 Secret

* * * * *
Secret

Daily Report from Commander in Chief Southeast for
27 September 1943

* * * * *
XXII Mountain Corps—

Cleaning up operations as well as transporting Italians away from Corfu is proceeding. The commandant of the island was shot.

* * * * *
Commander in Chief Southeast (Army Group F), Ia No. 2803/43 Secret, dated 27 September 1943.

[Stamp]

Army General Staff, Operations Section
Received—29 September 1943
No.—10422/43 Secret

Secret

* * * * *
Daily Report from Commander in Chief Southeast
(Army Group F) for 28 September 1943

* * * * *

XV Mountain Corps—
SS Division Prinz Eugen—
Survey on Split—

* * * * *

At Split 300 Italian officers and 9,000 men of the "Bergamo" Division were taken prisoners. Treatment in compliance with Fuehrer order has been initiated.

* * * * *

Serbia—Draja Mihailovic bands active southeastern Serbia. During our own operations 34 Draja Mihailovic bandits were captured, 280 suspected followers of Draja Mihailovic were arrested—[Crossed out] 10 Draja Mihailovic followers shot in retaliation.

* * * * *

Commander in Chief Southeast (Army Group F) Ia No. 2824/43 Secret, dated 28 September 1943.

* * * * *

PARTIAL TRANSLATION OF DOCUMENT NOKW-865
PROSECUTION EXHIBIT 452

EXTRACTS FROM MESSAGES AND ORDER OF 1ST MOUNTAIN
DIVISION, 18-24 SEPTEMBER 1943, PERTAINING TO
OPERATION "VERRAT" [TREASON]

[Stamp] *Secret*

24 September 1943
1130 hours

595

Radio Message—Priority

To Division Commander

The Corps informs—"By order of higher authority, no prisoners are to be taken during operation" "Verrat" [treason].

1st Mountain Division
Ia No. 1231/43 Secret
[Illegible initial]

[Handwritten] 1747

Teletype Priority to Quartiermeister (1735)

24 September 43
1700 hrs
[Handwritten] Secret

[Stamp] *Secret*

To:

1. *99th Light Mountain Regiment.*
2. *For information: Division Commander, Igumenica [Goumenitsa] Extra copy—Ib, IVb.*
1. For operation "Verrat" there will be brought up to Igumenica on 24 September evening—1 Company of 2d Regiment Brandenburg (South Tyroleans in Italian uniform and with Italian arms).

* * * * *

1st Mountain Division/Ia
No. 1232/43 Secret
[Illegible initial]

[Handwritten] Ordered—24 September
(1745) Baumeister IHV Quartiermeister XEIREI Ki

[Handwritten] War Diary

Division Command Post, 18 Sept 1943
1400 hours

1st Mountain Division
Ia No. 1195/43 Secret

[Stamp] *Secret*

Use care while telephoning—The enemy is listening

Divisional Order

For Operation "Verrat"

(No. 50)

(Map 1:100,000)

1. In the pursuance of treason, the like of which history has never seen, which the Italian Government has committed against Germany the Italian commander of Corfu decided to stop the occupation of the Island Corfu by German troops by force of arms. Since 13 September German planes flying over the island, and on 13 September the Combat Group Dodel, which had put to sea for the occupation of the island, have been fired upon.

Thereby the garrison of the Island of Corfu, which consists mainly of the 18th Italian Infantry Regiment, has joined hands with cowardly treason, and even beyond that, has gone over to the side of our enemy in open combat. Details of the garrison—see sketch. (Changes in the garrison are possible and probable).

* * * * *

[Signed] VON STETTNER

PARTIAL TRANSLATION OF DOCUMENT NOKW-830
PROSECUTION EXHIBIT 326

EXTRACTS FROM WAR DIARY OF XV MOUNTAIN CORPS,
26 OCTOBER TO 31 DECEMBER 1943, REGARDING
SHOOTINGS OF ITALIAN OFFICERS

War Diary No. -----

Corps Headquarters XV Mountain Corps [Stamp]

Ia

(Command authority, unit)

Started—26 August 1943; concluded—31 December 1943

* * * * *

27 September 1943, Banja Luka—0700 hours SS Division and 92d Motorized Regiment *approached Split*.

0800 hours *reached* northern edge of *Split*.

0900 hours city and port of Split occupied against local resistance. 202 Italian officers and 9,000 men captured.

Italian officers are to be shot to death according to Fuehrer orders.

Commanding General has caused investigation *to ascertain guilty officers*.

* * * * *

30 September 1943, Banja Luka—Three generals in Split shot to death by virtue of summary court martial.

* * * * *

1 October 1943, Banja Luka—45 additional guilty officers (Italian) shot to death by virtue of summary court martial in Split.

* * * * *

C. Extracts from Testimony of Defendant Lanz*

DIRECT EXAMINATION

* * * * *

DR. SAUTER: Now, Witness, I come to the last individual count of the indictment, dated 12 May 1947, as far as this concerns you. It concerns the case of the Italian general, Gandin. With regard to this case, in order to refresh your memory, I will show you the report concerned.

* Complete testimony is recorded in mimeographed transcript, 19-21, 24-26 November and 1 December 1947, pp. 6820-6888.

This is the report, Document NOKW-1354, Prosecution Exhibit 447.* Have you got this report?

Now, please, would you state something about this incident?

DEFENDANT LANZ: This was at the conclusion of the fighting against the Italian division which was on the islands of Corfu and Cephalonia after the Italian capitulation.

Q. And when was this?

A. This was the second half of September 1943.

Q. And before this incident, had you had anything to do with the Italian capitulation?

A. Yes, my connection with the Italian capitulation was more or less accidental. This was while I was in Athens at the beginning of September 1943.

Q. That is before your arrival in the Epirus?

A. Yes, immediately before.

Q. And the negotiations at that time which you had to carry out in Athens—did they have anything immediately to do with the case of Gandin on Corfu and Cephalonia?

A. Yes, they were immediately connected.

Q. And what did you have to do at the beginning of September in Athens with the Italian capitulation? Witness, I am asking you this question because at that time, as you told us yesterday and the day before, you hadn't yet had anything to do. You hadn't been in action.

A. Well, it happened like this. On 8 September in the afternoon, I was in my billet in Athens and I heard by chance on the radio about the Italian capitulation. Thereupon, I asked the ADC [aide-de-camp] who was with me to ask the army group whether I had anything to do with this matter at all, and I think it was the chief of staff at that time who told me that it was possible that I would perhaps be entrusted with the carrying out of the countermeasures as planned in an order called "Achse" [Axis].

Q. Witness, and why were you entrusted with this? At that time, you hadn't yet been in action.

A. I asked myself that question too at the time, because in itself I had nothing at all to do with these things, and also at that time I expressly asked that if possible I would not be bothered with this matter. Thereupon, I was told that shortly I would be told something else about it.

Q. It still is not quite clear to me, General, why you concerned yourself with the matter at all. From my point of view one could perhaps say the matter didn't concern you at all. Why then did you concern yourself with the matter?

* Parts of this document are reproduced in section B.

A. As a precaution, I tried to find out whether this whole matter concerned me at all because, after all, this Italian capitulation altered the whole situation and I had to tell myself that in some way or other I would be concerned by this because I knew that the army group intended, if the Italians left, to intervene in my staff. Therefore, I was interested in it.

Q. And where were the other generals at that time, who had been in action, and why weren't they entrusted with this task?

A. If I was informed correctly, when the Italian delegation arrived, and this, of course, was counted upon, the German military commander was to carry out the necessary negotiations with the Italians; but just at that moment, on this day, that German commander was not in Athens—he was on an official trip somewhere—and the Commanding General of the LXIX Corps, stationed in Athens, was also not present there. I think he was in the Peloponnesus, so I was the only one there. General Loehr, my commander in chief, then told me on the telephone that unfortunately he could not comply with my request and had to commission me, as the senior general in Athens at the moment, to take up negotiations with the Commander in Chief of the Italian 11th Army and to take to him the orders for the disarming and surrender of the Italians.

Q. How did you cope with this request from your commander in chief, General Loehr?

A. First of all I told the so-called German chief of staff [Stabschef] at that time, who was the liaison officer with the Italian High Command, to see me; also my own chief of staff; and I discussed the whole matter with them which had come so unexpectedly upon me. Thereupon, I asked the German generals who were in Athens at that time and also the admiral who was present to come to me, and I told them that the commander in chief had just given me the order to conduct the negotiations with the Italian Commander in Chief with regard to the disarming and the surrender and that I wanted to discuss this with the, that is, the gentlemen who were present then, and decide what was to be done. In addition, I wanted to get some information about the situation of the German troops and the Italian troops around Athens because these things were rather unknown to me. Up until then I had not had anything to do with them at all; until then I had been living as a kind of private individual in Athens.

Q. And then, after this discussion with the German officers in Athens, what picture did you get of the situation?

A. The impression I got was mainly that in Athens there were very few German troops and very many Italian troops. In any case, the ratio was approximately 1 to 5.

Q. Then what did you do in order to carry out the disarming and surrender of the Italian Army, which you had been ordered to do?

A. I based my hopes on the fact that I would be able to settle this matter peacefully with the Italian commander from the very beginning. I was determined that any kind of dispute or even fighting should be avoided. I told this to the army group too, and I told them that in any case I would try to do my very best to conduct this not very pleasant task in a friendly manner with the Italians and to bring it to a successful conclusion.

Q. Did you also make preparations in case the Italian commander in chief in Athens refused to surrender?

A. Of course we talked about that; that was fairly obvious; we did not know what his attitude was. It was a very vague and unclear situation—a very unpleasant situation. I ordered that all the German troops in and around Athens should be prepared to carry out further orders, and then I telephoned His Excellency Vecchiarelli, the commander of the Italians.

Q. And then you thereupon probably visited the Italian commander in Greece, Vecchiarelli, and then what happened?

A. I went to him with my chief [of staff]. The impression I received I can never forget. The Italian staff headquarters was strongly defended with barbed wire and fortifications, and machine guns and guards and a large number of officers were collected in front of the building and inside the building. They lived in the villa of the Greek Crown Prince. Of course, I was greeted by Vecchiarelli; I did not expect anything else. It was a rather cool reception. I gave him the order for complete disarming—all the weapons had to be given up and he had to surrender; and I asked him to capitulate to us.

Q. How did the Italian Commander in Chief behave in the face of this demand?

A. Of course he was rather shocked by this demand and he made objections to it; mainly, and I remember this, he said the complete disarming of his army would not be in agreement with the honor of his army and therefore I should refrain from this. He realized the situation and also realized that he had to surrender to us, but disarming would be too harsh. Thereupon, of course, followed a discussion and during the course of this discussion, after we had learned to know each other a bit, Vecchiarelli then suggested to me, on his own initiative, that he would go on fighting, on our side, and that, therefore, the disarming would be without point, that is, his surrender and his capitulation to us. He obligated himself to go on fighting as before, but on our side.

Q. But did the Italian Commander in Chief say anything, perhaps, about what would happen if this suggestion was not agreed with?

A. He mentioned, during the course of this discussion, that if I insisted on a complete disarming, then there would be a possibility that the Italians would oppose this and there would be fighting. He stressed again and again and asked that his soldiers be allowed to keep their guns.

Q. Then what was your reaction to this suggestion of the Italian Commander in Chief, Vecchiarelli?

A. The situation was, of course, not very simple for me. On the one hand I had my order to demand a capitulation of the Italians; on the other hand, Vecchiarelli made the proposal to me that he wanted to go on fighting, on our side; and I was in the middle. Just try to imagine the situation—everybody was standing around and waiting for something to happen. Since it was my determination to come to peaceful and friendly conclusions with the Italians, and at all costs to avoid fighting and hostilities with the Italians, I said to him—"Well, if my army group agrees to that, which, of course, I do not know beforehand, then, Your Excellency, I agree with your proposal, that is, that you go on fighting on our side". I was of the opinion that that actually was the best solution. Thereupon, the faces around me were rather relieved and Vecchiarelli, of course, was pleased about it. I was too, and in the conviction that right had been done, I took my leave. That was about half past 12 or 1 o'clock.

Q. When was that?

A. That was in the night, 8-9 September, about half past 12 or 1 o'clock.

Q. And then what happened further during this night? Did you report to the army group?

A. I then called up the army group, of course, and first of all told the chief of staff who was there and who came to the telephone, that I had done this and this. I did not know whether I was going to get praise or censure. He said that that was not the task I had been given. He did not think that the commander in chief would agree to my measures. Shortly afterwards, General Loehr came to the telephone and I reported to him. He rather attacked me and asked me very harshly how did I come to alter this order which had been given to me, to act on my own authority, and to oppose the order of the OKW. He could in no way agree to this. Then I answered that I had hoped that was the best way. That otherwise there was a danger there that fighting would take place with the Italians—there was a possibility; and I thought that I had done the best thing that could

possibly be done. My objections were without success and General Loehr was very harsh towards me and told me, "I order that the agreements which you have made should be rescinded at once, and that you carry out the orders I have given you, that is, the Italian 11th Army is to be immediately and completely disarmed and is to surrender to us". That was the essential point of what he said to me.

Q. So thereupon you received again the same task which you had received before. Then what did you think about this new commission? Did you want to carry it out or did you want to remain by your, let us call it, disobedience? What was your intention then?

A. First of all I was very angry, of course, over the fact that my good intentions had gone awry. Thereupon, I talked with the gentlemen and told them what the commander in chief had ordered me to do and told them that they must, of course, prepare now for fighting with the Italians, which was extremely undesirable, because of the population. I asked them about their opinions as to what one should do in such a situation but they did not know either what to say.

Q. Witness Lanz, you have just said that you talked about this to "the gentlemen". Were those the German generals present in your billet, whom you have mentioned before?

A. Yes; there was the German liaison officer with the Italian High Command and then there was my own chief of staff, who is now in Russia—I do not know whether he is living or not—and then there was the Commander of the 11th Air Force Division, General Drum. He had some of his own troops in and around Athens. Then there was a Brigadier General Holle; he was a commander of the air force which was in Athens; and then there was Rear Admiral Lange, who had the so-called naval force under him. I asked these men what was to be done; they shrugged their shoulders. At any rate we were clear then; and I was absolutely determined that fighting should not take place. This was an absolute impossibility.

Q. But General Lanz, in the face of the order of your commander in chief, after all, you had to do something. What did you do?

A. I then called up General Vecchiarelli again on the telephone.

Q. That was still at night?

A. Yes, that was around about 3 o'clock in the morning. There wasn't anything else to do. I went again with my chief [of staff] by car to the Italian headquarters. When I arrived there there was, of course, a great shock. General Vecchiarelli had already gone to bed and had to be called. Of course it was

terribly embarrassing for me. He himself did not speak very much German and everything had to be translated by an interpreter. General Vecchiarelli was, of course, terribly shocked that I had come back again. I told him that I regretted very much that I had to come back to him again but I had the strict and unavoidable order; that my commander in chief was not agreeable in any way to the preliminary agreement which I had made with him and he had definitely rejected it and had demanded that I should obtain the surrender and disarming of the 11th Italian Army; and this was the order which I had to bring him. I told him that I regretted very much that this had come about but there remained nothing else for me to do except transmit this order to him.

Q. What was the attitude taken by the Italian Commander in Chief, Vecchiarelli, towards this order which you had to give him on behalf of your commander in chief?

A. General Vecchiarelli said, first of all, that he was very sorry that the agreement we had made was ruled out and he objected again to the total disarming. He said it would be a dishonor for his troops to give up their arms. He could understand that the army had to surrender to us in the situation, but he really could not agree at all to the complete disarming. He then implied that if the complete disarming of his troops was ordered they probably would not obey an order of this kind and that there would be the possibility of fighting. I assured him that I wanted to do my very best.

Q. Perhaps you would begin the sentence again, Witness.

A. I told him that I certainly did not intend that fighting or hostilities should take place, and that I would do my best to avoid this. Then he kept on repeating his suggestion that his troops should be allowed to keep their guns so that the troops would not appear to be externally disarmed.

Q. Well, if I understand you correctly, Witness, during this second discussion General Vecchiarelli was in agreement with the surrender and the disarming, in principle, but he wanted this disarming to be carried out in a way which would be in conformity with the honor of the Italian Army. Did I understand you correctly?

A. Yes, that is a correct description. We then talked about the possibility which then remained in this situation, with respect to what we could do. Then I told him that for my part I would do my best to see that, for the moment at least, his troops retained their arms in order to allay his fear of the dishonoring of his troops, I told him, and I said that I would do my best, provided that he was in agreement that the 11th Army should

surrender to the German Army, and that if the heavy arms—the heavy machine guns etc.—were to be given up immediately, so that at least a part of the disarming order was carried out.

Q. So, General, you deviated again from the order of your commander in chief?

A. Yes, that's correct. But in this situation I thought—I might even say—that that was the most tactful and most clever thing I could do. I was forced to do this.

Q. And then, Witness Lanz, after you offered to the Italian Commander, Vecchiarelli, that, to begin with, his light arms should be left with the troops, what did General Vecchiarelli say? Did he accept this offer or did he reject it?

A. Well, of course, we talked about the situation, and the matter was very clear. Then he convinced himself that the measures which I had asked him to take in the matter then in existence were correct, and it was a sign of my good will; so he declared himself to be in agreement with it. That is, the army should surrender and that the heavy weapons should be given up, and that he would distribute the orders for this to his troops if the guns [rifles] could be kept. That was his request. Thereupon I told him that I would take notice of the fact that he was in agreement with the surrender and that the heavy weapons should be given up and that he should issue orders to that effect, and that I, for my part, would do my best to see that the rifles remained with the troops. That was the final result of our discussion. With this my task, that is the disarming had not been actually carried out, but the surrender had been completely carried out, and the Italian general was in agreement with this.

Q. But this mitigation of the conditions of the capitulation on your own initiative, with which you had agreed and which you had allowed General Vecchiarelli, did these things meet with the approval of your Commander in Chief, General Loehr?

A. I reported to the army group when I returned that I had now carried out the order, and that General Vecchiarelli had accepted the surrender and that he was in agreement with it, but he had urgently requested that, temporarily at least, the rifles should be kept; otherwise, his troops would feel that they had been dishonored. I said that I myself urgently requested that this suggestion should be complied with by the German High Command.

Q. And what did General Loehr say to that?

A. He was in agreement with that. He did not have anything against it; he agreed to it.

Q. And then subsequently, that is, now your task had been completed, did you have anything else to do with the question of the carrying out of the disarming?

A. The next morning, that is, after this very hectic night, at about 10 o'clock in the morning, General Felmy came to me in my billet and took over the measures to be carried out and, of course, I was very pleased that I was relieved of this unpleasant situation.

Q. And then did the Italian Commander in Chief, General Vecchiarelli, adhere to this agreement? In other words did he give the order to his troops for disarming and surrender?

A. I know only the following: that he had agreed with me that the disarming would be carried out. That's what I know. Therefore, I must assume that he issued the order because the troops would not give up their weapons by themselves. The disarming of the whole 11th Army was carried out on the Greek mainland during the next 14 days quite smoothly. I don't know of one single case in which there were any difficulties.

Q. You said, therefore, that the whole Italian 11th Army in Greece, under the command of General Vecchiarelli, as Commander in Chief, carried out the capitulation, the disarming, and the surrender without any great friction?

A. Even today I still don't know about any case in which resistance was shown. The whole Greek mainland did not resist at all or shoot within the sphere of my corps. This was, of course, with one exception. The people otherwise surrendered and gave up their arms. I have already described how the Italians were gathered together in collection centers. The Italians then marched in groups to the railroad station. Then they collected there. I don't know any case in which there was difficulty anywhere on the Greek mainland. No complications or difficulties were shown during this surrender.

Q. And in Ioannina, the capital of the Epirus where you went afterwards, the surrender of arms, on the whole, was carried out without friction. Is that correct?

A. I have already stated that the local corps staff there told me when I arrived that I was to remain there and that the disarming and surrender were to be carried out. This whole surrender and disarming was carried out completely and smoothly, and I don't know of one single case in which resistance occurred. The Italian corps headquarters had tried to get the people in Corfu and Cephalonia to be sensible about this. I will talk about this later. The Italian commander sent his own chief of staff in order to make Gandin surrender properly.

Q. And where was the one case in which there were difficulties, Witness?

A. Only with the one division which was on the islands of Corfu and Cephalonia.

Q. Corfu and Cephalonia. They are on the western coast of the Epirus. What was the situation on these two islands—Cephalonia and Corfu?

A. On those two islands there were troops of the Italian division which was under the command of General Gandin. This division, or rather parts of it, had refused to surrender and to give up their arms as they had been ordered to do by their own Italian superiors [officers].

Q. Can you tell us, Witness, how many German units, at that time, were stationed on those two islands and how large they were?

A. I'm in no position to give you an exact answer, but I can give you an approximate answer. To the best of my recollection there were, on the island of Cephalonia, one regimental staff and two so-called fortress battalions. The leader of the regiment was, at the same time, the German commander of the island. The Italian island commander was the commander of the Italian division. On Corfu there was approximately one-third of the Italian division of General Gandin. With respect to German troops there was one airfield command staff, consisting of about 100 members and, apart from that, there were a few naval engineers. Altogether there were very weak German forces there.

Q. The Italian fortress commander, you say, the commander of the island, was the commander of the division. That was the Italian general, Gandin, whose name has been repeatedly mentioned. Can you tell us the name of the German commander of the island?

A. First, that was Lieutenant Colonel Barge.

Q. Perhaps you would spell the name "Barge".

A. B-A-R-G-E. He is, at the moment, a British prisoner of war in Egypt.

Q. And do you know, General, in order to establish this right in the beginning, the name of General Gandin's division?

A. The division was called the "Division Acqui."

Q. I see. Perhaps you would spell it.

A. A-C-Q-U-I, Acqui.

Q. Perhaps you could, first of all, tell the Tribunal what conditions prevailed on the island of Cephalonia and what events took place. That was the island where General Gandin, himself, was stationed with the bulk of his division.

A. General Gandin was, at my request, asked by the German

island commander to surrender his arms and to capitulate, as was done everywhere. General Gandin refused to do that. Thereupon General Gandin also received from his 11th Italian Army the order to surrender his arms.

* * * * *

Q. Witness, how did things proceed on 13 September, which is the day from which the radio message just read from Barge is dated; did any fighting start then, or can you remember?

A. On 13 September the Italians opened hostilities against us very suddenly [which was] surprising to us, although not a single shot was fired before that. Two of our ships were shot at, and there were [personnel] wounded and killed, and the Italian batteries fired at the place, Lixuri, which is also shown on the map which is in the possession of the Tribunal. This place Lixuri [Lixourion], situated on a peninsula, was the headquarters of the German commander—

Q. Just a minute, General, the place Lixuri, as you can see, is situated along a bay on the Island Cephalonia, to the left on the bottom of the map next to the letter "A" of Cephalonia, this is the place, Lixuri, just mentioned by the defendant. You can continue now, General.

A. After our discussions in Cephalonia had, strangely enough, remained without any result and the Italians for some incomprehensible reason started open hostilities against us—this was the only such case in Greece—I flew by seaplane to Cephalonia.

Q. When was that?

A. On 13 September, toward noon.

Q. I see.

A. At that time I was of the optimistic opinion that I might succeed in achieving, in a discussion with General Gandin, an adequate solution of the affair. I could really see no reason why that should not be possible. There no longer could be any doubts that the 11th Italian Army had surrendered or troop units had surrendered. The Italian supreme command had agreed to this surrender, and had also addressed the order to General Gandin to surrender. I could, therefore, see no reason why the same thing should not apply for Cephalonia, and this is why I flew to Cephalonia with the intention to visit General Gandin and to talk to him. As my plane approached the town of Argostolion, which is also on the map—this is the capital of the island where General Gandin's staff was located—my plane was shot at. Therefore, it was not possible for me to land there. That is, I could not go down on the water. It was a seaplane. Consequently, I flew to the northern end of the large bay, about 5 kilometers distant

from Argostolion, and I landed there. From there I went to Lixuri to the German commander of the Island. When I arrived there I still saw the marks of grenades which had been caused just before that by the Italian artillery. I remember quite clearly one of these marks was on the building where the Italian island commander with his staff was quartered. I then asked Lieutenant Colonel Barge to inform me about the situation, because the whole situation was not quite clear to me. After he had informed me, I asked him whether I could in some way contact General Gandin. That, after all, had been the purpose of my trip, merely to discuss things with General Gandin. Barge told me that he had a telephone connection with Gandin. Then I asked him to put me into contact by telephone with Gandin.

Q. Can you perhaps tell us what kind of a telephone connection that was?

A. I believe it was a sea-cable between Argostolion and Lixuri.

Q. I see.

A. Yes, there was water between, of course.

Q. You reached General Gandin by telephone?

A. Yes, and I talked to General Gandin—

Q. Just a moment. Will you tell us as clearly and precisely as possible what was said during your telephone conversation with General Gandin?

A. Today, after 4 years, I cannot of course remember verbatim what was said, but I can still recall certain trends of thought. Substantially, I told General Gandin that I regretted not to be able to come to Argostolion, as I had intended to, because to my intense surprise I had been shot at while going there. Further, I told him that I was surprised that on that day, in the morning, he had opened fire against German troops and against Lixuri. I believe I said that I couldn't understand the meaning of such action. I then told him—I always mean along those lines—that it should be known to him that his army under General Vecchiarelli had capitulated and had surrendered its arms, and that he himself had received an order from the Italian Army to surrender his arms. I asked him why he didn't do that. Gandin replied, which I still remember, "the orders which I received were not clear". I believe that is the way he put it, his orders were not clear. He asked me, as I also remember, to give him a clear order, telling him what he was supposed to do. That is what he told me. I said to him—"You will immediately receive the order from me, but I would like to point out to you that if the orders which you have are not carried out you and those responsible for this fact will be taken to account in a very severe manner". That is what I particularly stressed. He gave me

to understand that if he received an order from me everything would be in order and that he would arrange for the necessary steps to be taken. That is in substance the course of my conversation with General Gandin.

Q. Witness, did you subsequently send such an order to General Gandin as you have said, an order such as he asked you to send?

A. Yes, on the very same table where I telephoned I, myself, wrote this order in my own handwriting and had this order transmitted by telephone to General Gandin. He received this order, and the text of this order is among the documents.

DR. SAUTER: May it please the Tribunal, we have no opportunity to prove through documents what General Lanz has said here because he and his officers lost all their documents and their baggage on the retreat. In spite of this we are still in a position to submit to you this order, thanks to the ruling of the Tribunal that the war diaries of the XXII Mountain Corps and General Lanz were to be brought here. In these war diaries we find this order, we managed to trace it there, and I am now in a position to submit this order in documentary form, which of course, is of great importance. That the order was not created now but in 1943 is quite obvious, because it came from Washington. This order can be found in document book 5 for Lanz on page 16. It is Document Lanz 166, Lanz Exhibit 64. This order, which is a part of the war diary of XXII Mountain Corps, General Lanz's corps, has the following text. I quote:

"13 September 1943, The Commanding General of the XXII Mountain Corps, To: The Commanding Officer of the Italian Division 'Acqui' i.e., Gandin.

"1. The Division Acqui is ordered, effective immediately, to surrender all weapons, except the officers' small arms, to the German commander of the island, Lieutenant Colonel Barge, as has already been done by all parts of the Italian VIII and XXVI Army Corps.

"2. If the weapons are not surrendered, the German armed forces will enforce this surrender.

"3. I hereby state that the division under your command, which fired at German troops and two German ships this morning at 0700 hours causing casualties of 5 killed and 8 wounded, has committed an open and unmistakable act of hostility".

The document is signed "Lanz, Lieutenant General, Mountain Troops."

Q. Witness, in consideration of the concluding sentence that Gandin's division had committed an act of hostility, I would

like to make an interpellation; do you know when the declaration of war of Italy to Germany was issued?

A. I gathered that from the documents that were given to us in Nuernberg. According to these, the declaration of war was issued on 13 October 1943.

Q. On the 13th?

A. On 13 October; that is what I understand.

Q. And we are here dealing with the date of 13 September?

A. Yes.

Q. At that time there was not yet a declaration of war from Italy to Germany, is that correct?

A. Yes, it is.

Q. Did you believe, General Lanz, that this order which General Gandin received from you on his request would once and for all straighten out this rather difficult situation?

A. At that time I was optimistic enough to believe that, especially after General Gandin had, as I have described, told me on the telephone that he would act in this way. He, himself, asked me to give him such an order. I had described the situation to him and now there could be no doubt about anything. He knew his army had surrendered. He had an order from his own army. He, furthermore, had an order from me. He knew my attitude that I wanted to deal with the situation without applying force, and he gave me to understand that everything would be in order. I flew back to Ioannina and told my officers that everything would be all right. I was firmly convinced that that was so.

Q. And that was on 13 September 1943?

A. Yes, it was.

Q. You flew back to Ioannina, and what did the Italian General Gandin do?

A. He contacted Lieutenant Colonel Barge and continued negotiations with him. If I recollect correctly, he agreed on a surrender of arms in three different stages. I believe on 14, 15, and 16 September; Lieutenant Colonel Barge reported this to me and asked me whether I would agree to this procedure. I did not want to start a dispute, and had Barge informed of my agreement to the procedure that General Gandin undertook his surrender in three stages. I said that I had to demand, however, that it be started on the very next day. If he agreed to do that, I would consent to the procedure and General Gandin was to be informed that his division, as well as all other Italian divisions, would be eventually transported to Italy. If he surrendered and delivered his arms, as was done by all others, nothing would happen to

him. That is what I asked to be told to him. All was bona fide, because I believed everything would be in order.

* * * * *

Q. General Lanz, how did the events on Cephalonia develop after this, did General Gandin keep his promise or did he not?

A. General Gandin, unfortunately, did not keep his promise. The arms were not surrendered. It was reported that a part of the Italian island occupation forces refused to surrender their weapons, and it was further reported that three Italian commanders, who wanted to give up their arms, were shot at by their own troops. Therefore, the situation was that a resistance group, or whatever you want to call it, was in existence in Cephalonia, which dominated the situation there and refused the delivering up of arms and retained their hostile attitude toward us.

After this report had been received, I had to make a decision. In the meantime, my superior agency had rather unpleasantly taken me to account and pressed me continuously to take action and kept after me as to what was the matter with Cephalonia and General Gandin, why this matter was not in order, why I did not take any steps against them, and why I did not take any decisive action. The army group in turn was being pressed by the OKW and in the final analysis by Hitler, himself. Thus, there was an increasing nervousness among all present because the affairs on the Island of Cephalonia and later Corfu could not be put in order, as expressed by the army group. In this matter I was more or less held as the responsible person who was too slack to put matters in order there. In actual fact, all I had tried was to endeavor in my negotiations with General Vecchiarelli to deal with the situation without any dispute or hostility.

I now had, whether I wanted to or not, to make a decision to take steps against the Italians in Cephalonia. I informed myself [from] among my staff, which of the troops were at my immediate disposal [and] whether there was sufficient shipping space to transport troops to Cephalonia. That was not very easy as the island is in the Adriatic Sea and there could be no doubt that the two fortress battalions and one company, which were also stationed on Cephalonia, would be suppressed by the Italians, and that was what almost happened. I therefore ordered the 1st Mountain Division to send two battalions, one mountain and one artillery battalion, and the 114th Rifle Division to send one rifle regiment immediately to the collecting point from where these troops were to be provisionally transported to Cephalonia.

That happened in due course. I reported to the army group, which in the meantime became rather unpleasant and unfriendly,

that the troops had been sent to Cephalonia and that as soon as they arrived there the Italian surrender of arms would be enforced.

Q. Did any fighting come about later and if so, who started the attack?

A. On the basis of the relation of strength, the Italians were the ones who attacked. The Italians first of all attacked our troops, the two fortress battalions stationed there. One battalion on the northern part of the island faced a very difficult position, so that for some time we thought that battalion was lost. At first, there was nothing I could do because I had no forces. When the troops, which I mentioned before, arrived on the island they landed on the southwest corner of the peninsula Lixuri. The Italian coastal batteries fired heavily at the landing troops and considerable losses were suffered. The area of the landing had to be transferred to another spot, but eventually we managed to land the troops. The troops were collected and were first of all committed, so as to relieve the Germans on the northern part of the island and to defeat the Italians who were there.

* * * * *

Q. Witness, when did you learn for the first time that General Gandin at the very last moment stated that he had been made many promises by a lieutenant colonel of the air force and what did you learn about this? Did you take General Gandin's statements seriously or, if not, what did you think about the whole thing?

A. I cannot remember the details of the Busch affair. I only recall the whole affair through reading the documents here. At the time, I had been under the impression that General Gandin tried to find a pretext not to surrender his arms. Even today, after examining the whole affair thoroughly, I feel inclined to still assume this attitude of Gandin's. He gave new reasons continuously in order not to surrender his arms, although he knew quite well what the situation was. His army had ordered the surrender, his army had surrendered, and I had issued an order to surrender his arms. He could not help being aware of these facts, but he always tried to find a reason not to have to surrender his arms. Eventually, he simply forced me to use force against him. Originally, I did not want to do that.

Q. Was the Island Cephalonia stormed by German troops after that?

A. I said that the German troops, one battalion, which on the north island was stuck there between rocks and the sea was relieved and the Italians were defeated. I, myself, later inspected

that area. That gave me the hope that the Italians would realize everything was quite senseless, which it was. When I flew to Cephalonia the second time I took leaflets along which were especially produced in Ioannina, many thousands of leaflets, in order to drop them over the Italian front and to try and make these people reasonable at the very last moment if possible. In the meantime, after 4 days, there had been an uncertain state of affairs; pressure was exerted by the army group and all of a sudden a Fuehrer order arrived—

Q. Just a moment, Witness. Perhaps before you come to that chapter you can tell us whether you, yourself, led the battle of Cephalonia or did you commission another officer to do that, and if so who was the officer who was in charge of this? I am asking you this question because it is a question which will play a part on later occasions.

A. I have mentioned that originally the German island commander, who was the commander of the two fortress batteries, Lieutenant Colonel Barge, had been the man in charge. Barge honestly tried to cope with General Gandin, but he did not succeed. I am sure it was not his fault that he could not deal with him. After the troops had to be sent to Cephalonia, which I have just described, a commander of these troops arrived with them, a Major von Hirschfeld. For tactical reasons among others, I appointed Major von Hirschfeld island commander of Cephalonia and Lieutenant Colonel Barge, after that time, only had the area of the peninsula Lixuri left to him. Later on, Barge left Cephalonia and was transferred because they were not satisfied with him because he did not take strong enough measures. He was later in Crete, where he was taken as a British prisoner of war. I believe he is in Egypt today.

* * * * *

Q. Witness, a few minutes ago you touched upon a subject with which I shall deal now. You said that during these days you received a Fuehrer order. What kind of an order was it?

A. During those days a Fuehrer order arrived. I can no longer say whether it was a teletype or a radio message. To the best of my recollection, it was a very short order which expressed that all Italians of Gandin's division were to be shot for mutiny. This is an order which, if not in the exact text, at least in substance, has been mentioned here by General Foertsch. This Fuehrer order put me into a very difficult conflict of loyalties. For me, I might almost say it was impossible to have all these Italians shot. It was not feasible. When I received the order, therefore, I refused in front of my officers to carry out such an

order. I was shocked by such a request. For at least 2 days I didn't quite know what I should really do.

* * * * *

Q. Witness Lanz, you have already talked about this Fuehrer order and about the fact that you opposed this Fuehrer order, perhaps you would like to tell us again what in the main, without quoting literally, was ordered in the Fuehrer order; who was to be shot according to the original Fuehrer order?

A. The Italians belonging to Gandin's division were to be shot as mutineers.

Q. Did I understand you correctly that the Fuehrer order stated originally that all Italians were to be shot?

A. Yes, to the best of my recollection.

Q. And you protested against this as you have told us and as also can be seen from the war diaries; how many Italians would have had to be shot, according to the Fuehrer order—how many approximately?

A. Well, I should estimate, in Cephalonia there were about 6,000 to 7,000.

Q. And you refused to do that?

A. Yes, I refused to do that.

Q. You repeatedly rejected it and refused to do it, as you said?

A. I can only say I refused to do it. I cannot confirm it in more detail, but in any case I refused to do it.

Q. I am only asking you if you did it repeatedly, because this can be seen from the document, which I have just read, and you could perhaps use this to aid your memory?

A. Yes, that resulted from my attitude.

Q. Witness, and then how did the matter go on?

A. I objected to this Fuehrer order, and I expressed the fact that I could not carry out this order. And then, as far as I remember, the decision came that the men could be spared but that only officers should be shot because of mutiny. I thought that this decision also went too far, and I expressed my point of view again that only the guilty should be punished and that some kind of a category should be fixed so that only the guilty came into the question. And, as far as I know, I didn't get any further decision from the OKW with regard to this renewed objection of mine.

Q. And then did you, yourself, again fly to Cephalonia?

A. Yes, on the 17th or 19th—at any rate about this time—I flew back again to Cephalonia in order to talk future steps over with the island commander there. In the meantime, as I have reported, the Italians in the northern part of the island had

been defeated, on the battle field, of course, and then I discussed with the island commander what had to be done tactically in case the Italians did not refrain from resistance. I brought the leaflets with me, and on my return flight I dropped them over the front myself. There was still a certain hope that the Italians would then stop fighting because this fighting was, in my opinion, quite senseless.

* * * * *

Q. Witness, did you talk with the new island commander, Major von Hirschfeld, also, about this order?

A. Yes, of course, I talked to him because I was caused a lot of trouble by this matter. The situation in which I found myself, at that time, was very soul torturing and difficult. As a result I did not only talk with the officers of my staff about it, but also with Major von Hirschfeld. I also told him that it was simply not possible to do anything of this kind, and Hirschfeld completely agreed with me. I said to him that I had objected to this order and I hoped that the objection could be sustained. I said that I would tell him what decision was reached about it, but I told him, at the same time, that as soon as possible he should check and investigate this Gandin affair and find the responsible people for this mutiny, and that they should be sentenced according to court martial. He agreed with this and said he would do his very best.

Q. And did your request to Major von Hirschfeld coincide with the second suggestion which you made to the army group, and to which you did not receive an order?

A. Of course it coincided with the application which I had made, namely, that the guilty people should be found and made responsible for the matter. I said that some category of men, fixed for some formal reason, should not be sentenced or shot.

Q. An intermediate question, Witness. You said, with regard to this second proposal, in which you suggested that only the guilty officers concerned in the mutiny should be shot—not a whole category—that you didn't get any answer to this. Did you find out why you didn't get any answer to this second suggestion?

A. I can't remember, but perhaps this suggestion didn't get through or wasn't passed on or got stuck somewhere.

Q. Therefore, you don't know whether this second proposal was passed on by the army group or whether it was rejected by Hitler? You don't know anything about this?

A. No.

Q. You said you didn't get any answer, if I understood you correctly. You then gave Major von Hirschfeld the direction

based on your second proposal. You dropped a large number of leaflets. The affiant Doeppenschmitt has confirmed that. Did these leaflets have any kind of an effect, and how did the situation on the island develop?

A. Unfortunately these leaflets had no effect at all, or perhaps I should say that they had the absolute opposite effect apparently, because it was reported, as far as I can remember, that new reserves from the southern part of the island were brought up to the front. That is, in order to continue the fighting, and the fighting was actually continued. Our expectation that the fighting would stop was not fulfilled.

* * * * *

Q. Well, General Lanz, how did the affairs continue. The order of the Italian general, Gandin, dated 20 September 1943?

A. On 20 September, after the hopelessness of our efforts became clear to us; we finally prepared ourselves for the attack, and on 21 September this attack started. As far as I can remember, it lasted about 1½ days. The tactical details are of no interest here. In any case, after rather difficult and violent fighting, we were successful in driving over the mountains into the southern part of the island, and when the town of Argostolion was reached, the Italians finally surrendered.

Q. With General Gandin?

A. Yes, also General Gandin.

* * * * *

Q. Witness, how often did you personally fly to Cephalonia because of this matter?

A. As far as I remember, I was there three times.

Q. Three times, personally?

A. Yes.

Q. And then what did Major von Hirschfeld tell you about the investigation of the Gandin affair, after you had entrusted him with this investigation?

A. Major von Hirschfeld reported to me that the resistance originated from Gandin, principally from the chief of staff and obviously with the agreement of General Gandin. A large number of officers had joined this resistance group.

Q. Did he report to you, as a result, whether individual officers or individual parts of troops of the Italians were in favor of the regular carrying out of the capitulation?

A. Well, this can already be seen from former reports which we have already discussed. It was also similar, as on Corfu, that there was a resistance group there which organized its resistance

despite all requests to stop fighting. In spite of the previous capitulation and orders which we sent them they did not stop their resistance but the fighting was continued to the uttermost. There can be no doubt that at this stage this was a completely irregular fight.

Q. Now, Witness, what was the task you gave Major von Hirschfeld with regard to the judicial settlement of the case of Gandin?

A. I have already stated that on my second visit to Cephalonia I said that the affair had to be investigated, and that the guilty people had to be sentenced according to a court martial. As far as I know, I repeated this commission again to Major von Hirschfeld when I was there the third time.

Q. And did the court martial sit in order to sentence the guilty officers?

A. I remember that when the sentence of the court martial was announced against the guilty men, General Gandin, as far as I remember, asked that he be allowed to speak either to Field Marshal Keitel or to General Jodl. He referred again to his connections which have already been mentioned. This, however, was turned down by the island commander, since General Gandin, by his whole conduct, had no right to do this; he had been given sufficient time.

Q. Witness, the prosecution maintains that all officers of the Gandin staff were shot. Is that correct?

A. I tried, in the files which were available to me, to find material to repute this assertion, but I could not find any figures. I, personally, can say that as far as I recall that is not correct. Gandin and his chief of staff and several officers were shot, but I do not know that all the officers were shot.

Q. You mean all the officers of the staff?

A. Yes. But unfortunately I could not find any proof of this.

Q. Even if you are not a legal man, can you give us some indication as to the basis, the paragraphs, or the point of view on which the sentencing of General Gandin and guilty officers was carried out? I mean, according to the court martial proceedings, of what had they made themselves guilty?

Q. Of course we thought a lot about these things at the time. The legal position, the position on which we based our assumptions was, as far as I remember, the following: After General Vecchiarelli's army had capitulated, the members of this army were therefore prisoners of war. Whether they wanted this or not was not important from the legal point of view. Well, then, if these prisoners of war, in spite of the orders which we sent to them, and in spite of the negotiations which were carried on

with them, and in spite of the summonses which were given to them, goodness knows that was done in this case, in spite of all this, continued their resistance with their weapons in their hands, then of course that is mutiny. If a prisoner of war fights with his weapon in his hand against the detaining power, in this case the German troops, then, of course, this is mutiny according to German conception, and probably also according to other conceptions.

Q. General, you have already said that only General Gandin and the guilty officers who had committed this mutiny or this revolt were sentenced and shot. What happened to the other officers?

A. Well, there were several thousand Italians on the island who actually, according to the order mentioned, were supposed to have been shot. The Italians were transported away in ships.

Q. With the officers?

A. Yes, of course. All the Italians who were taken prisoners, apart from the officers who were sentenced, were transported away as prisoners of war. As far as I know, first of all to Patras and then after that to Piraeus. As far as I remember, there were over 5,000.

Q. What were the German losses during this fighting which—you have just described to us—was caused by the Italians, I mean the German losses?

A. Of course I don't know the details any more. I could not say anything about this, unless I had not found an indication in the files. It said there were about 50 to 60 dead, about 150 wounded, and some missing, that is more than 200 losses.

Q. Witness, you told us before that General Gandin and those officers who acted together with him, according to your personal opinion as a soldier, not as a legal man, had made themselves guilty of mutiny or revolt. Are you convinced that this conception of law of yours was also shared by your superiors, not only by your collaborators but by your superiors, or did you, at that time or later on, hear any kind of counter opinion on the part of your superiors?

A. What I heard from my superior officers rather went along the lines which I have already stated today, that I did not intervene enough, that is, that I was much too lenient. Also among the superiors, the army group or the OKW, there was only the one idea—that the whole thing was a revolt or mutiny. All the orders which I received, or which I can remember, talked about the revolting Italians and of insurgents and similar things. The

opinion which I have mentioned here was, without doubt, fundamentally the same as that of my superior officers.

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TRANSLATION OF LANZ DOCUMENT 191
LANZ DEFENSE EXHIBIT 142

AFFIDAVIT OF WOLF CHRISTIAN VON LOEBEN, 7 NOVEMBER 1947

AFFIDAVIT

Having been reminded of the significance of an affidavit and of the consequences of a false affidavit made knowingly or negligently, I herewith declare upon oath the following for submission to Military Tribunal V.

1. *Ad Personam*: My name is Wolf Christian von Loeben; I was born on 26 January 1914 in Bautzen; I live in Bremen, Metzterstrasse 18, c/o Lange; and I am a German citizen.

2. *Ad Rem*: The following statements refer to my official position of operational staff officer (Ia) of the XXII Mountain Corps during the period from 24 August 1943 until 25 June 1944.

As to the events in Cephalonia, I make the following statement:

Owing to a case of papadaci-fever, I did not arrive from Athens at the Ioannina headquarters of the XXII Mountain Corps until 13 September 1943. At that time the situation in western Greece was about as follows:

The Italian forces in Epirus had complied with the orders given by the 8th Italian Army and the Italian corps headquarters and laid down arms, which was done without any incident. Solely, the Italian division "Acqui" under General Gandin, which was stationed on the isles of Corfu and Cephalonia, refused to surrender these islands to the German forces stationed there. General Lanz had left by plane for Cephalonia on the morning of 13 September in order to make arrangements for the surrender through a personal discussion with General Gandin.

Late in the afternoon of 13 September General Lanz returned from Cephalonia with the following result:

His plane, in the process of landing, had been fired upon by Italian troops and therefore been forced to land in another place. He had been able to speak to General Gandin on the telephone from the command post of the German island commander, Lieutenant Colonel Barge, at Lixuri.

General Gandin, who alleged not having received so far any clear orders, requested an order from General Lanz for the surrender of the island, which was thereupon given to him and with which he promised to comply. General Lanz was thoroughly com-

vinced that the surrender of the island would be effected without further incident and had given Lieutenant Colonel Barge directives accordingly.

Contrary to expectation, however, General Gandin did not accomplish the surrender of the island at the fixed time. He managed to put off the German island commander for a day or two by cleverly-conducted negotiations, finally declared that he no longer had his officers under control, and launched a sudden attack against the two German fortress battalions stationed on the island, placing them in an extremely difficult position.

About 15 September, after having discussed the matter with the chief of staff of the corps headquarters Colonel Dietel, General Lanz decided to land on Cephalonia, hastily assembled elements of the 1st Mountain Division and the 104th Light Division under the command of Major von Hirschfeld with the task to relieve the German garrison of the island, and to have the latter occupied by German forces. Upon landing on Cephalonia, Major von Hirschfeld was appointed German island commander and Lieutenant Colonel Barge was placed under his command. During the fighting, which resulted in heavy losses on both sides, the Italian forces offering resistance in the northern part of the island were defeated in the following days, without causing General Gandin's surrender. General Lanz after that went to Cephalonia again to initiate further measures. Since signal communications between the island (Major von Hirschfeld) and the mainland (corps headquarters) were extremely poor—there was but one radio at the disposal of the still inadequately organized corps headquarters—General Lanz left an officer of corps headquarters, Major Zeidler, on Cephalonia with the task to keep corps headquarters well informed about the happenings.

Shortly afterwards, the decisive attack on the southern part of the island began, which ended with the occupation of the capital Argostolion and the capture of General Gandin, his staff, and a large body of Italian troops. As far as I remember, General Gandin's chief of staff, who was the chief organizer of the fight against the German forces, was killed in the course of the last engagements.

During the days of the fighting, General Lanz had received by radio or teletype, via the army group, a "Fuehrer order" to the effect that all Italians on Cephalonia who had taken up arms against the German forces were to be shot. Telephone communications between the army group and corps headquarters were not yet existent at that time. General Lanz, who was greatly excited over this order, sent, as far as I remember, a teletype to the army group with the request to bring about at higher headquarters a

cancellation of this order, recommending that only the guilty persons should be held responsible. Thereupon, a new "Fuehrer order" was received, saying that all the Italian officers were to be shot. General Lanz, in my presence and in the face of the chief of staff, voiced his opinion on this in a very sharp form, and declared: "Being a decent soldier, I cannot be expected to carry out such an order. I shall not carry out this order".

After the fighting on Cephalonia had ended, General Lanz immediately left for Argostolion again, in order to discuss with Major von Hirschfeld the occupation of the island, as well as the concentration and the evacuation of the captured Italians. As far as I remember, he charged the commander of the 1st Mountain Division, General von Stettner and Major von Hirschfeld* with investigating the events at the Italian divisional staff. This investigation completed, General Gandin and several of his officers were shot according to martial law [standrechtlich erschossen].

I declare upon oath that the foregoing statements are correct.

[Signed] W. C. LOEBEN

Bremen, 7 November 1947

* The adjutant of Major von Hirschfeld, Kurt Hepp, gave an affidavit affirming many of the statements in this affidavit by von Loeben, which was offered in evidence as Document Lanz 194, Lanz Exhibit 181.

VII. DESTRUCTION IN AND EVACUATION OF FINMARK, NORWAY

A. Introduction

Count three of the indictment charged, among other things, the wanton destruction of property in Norway, Greece, Yugoslavia, and Albania, together with the maltreatment of the inhabitants of the areas affected. Paragraph 9a of the indictment charged that the defendant Rendulic issued an order (NOKW-086, Pros. Ex. 504) in October 1944 "for the complete destruction of all shelter and means of existence in, and the total evacuation of the entire civilian population of the northern Norwegian province of Finmark", and that this order was ruthlessly carried out for no compelling military reasons. This charge of the indictment against the defendant Rendulic was dismissed by the Tribunal, which stated: "It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made" (that is, "the defendant's decision to carry out the 'scorched earth' policy in Finmark as a precautionary measure against an attack by superior forces").

Below a number of the contemporaneous documents on this subject (sec. B) are followed by extracts from the testimony of the defendant Rendulic (sec. C).

B. Contemporaneous Documents

PARTIAL TRANSLATION OF DOCUMENT NOKW-1776
PROSECUTION EXHIBIT 500

EXTRACTS OF TELETYPE FROM FUEHRER HEADQUARTERS SIGNED
BY JODL TO 20TH MOUNTAIN ARMY, 4 OCTOBER 1944,
ORDERING EVACUATION OF NORTHERN NORWAY

[Stamp] Top Secret

Fuehrer Headquarters, 4 October 1944
17 copies—8th copy

Armed Forces Operations Staff Operations Section

[Stamp] Official

By officer only!

[Handwritten]

Quartiermeister 1

[Illegible initial] 6/10

Quartiermeister 1

(Transportation)

Quartiermeister 2

(Transportation) [Initials] Ku 7/10

Quartiermeister 3

Administration 1

[Illegible initial] 6/10

Priority—Teletype

To:

1. 20th Mountain Army
2. Armed Forces Commander Norway

* * * * *

6. Evacuation and destruction—All installations which might be of use to the enemy are to be destroyed thoroughly, particularly roads and railroad lines, port installations, airports, and other installations of the air force industrial plants, armed forces billets, and camps. All snow barriers on the through roads are to be burned in time!

Rations and other armed forces supplies are to be destroyed unless they can be transported.

The entire population of Norway capable of bearing arms is to be taken along as far as marches permit and to be turned over to the Reich Commissioner Norway for compulsory labor employment.

Finnish hostages are to be taken along as the situation requires.

* * * * *

BY ORDER:

Signed: JODL

OKW/Armed Forces Operations Staff
Operations Section Norway
77 3608/44, Top Secret, Official

* * * * *

TRANSLATION OF DOCUMENT NOKW-086
PROSECUTION EXHIBIT 504

TELETYPE FROM 20TH (MOUNTAIN) ARMY TO SUBORDINATE UNITS,
29 OCTOBER 1944, SIGNED BY THE DEFENDANT RENDULIC,
CONCERNING EVACUATION OF NORTHERN NORWAY

Top Secret [Stamp]

[Handwritten] Enclosure 6

TELETYPE

29 October 1944 [Illegible initial]

To:

1. Corps Headquarters XIX Mountain Corps, *Urgent* [KR]
 2. Corps Headquarters LXXI Infantry Corps, *Urgent* [KR]
- For information:
3. Corps Headquarters XXXVI Mountain Corps, *Urgent* [KR]

4. Reich Commissioner for Occupied Norwegian Territories, Oslo, *Urgent* [KR]
5. Corps Headquarters XVIII Mountain Corps, *Urgent* [KR]
6. Commanding General of the German Air Force in Finland, *Urgent* [KR]
7. Admiral Polar Coastal Area, *Urgent* [KR]
8. Armed Forces Commander Norway, *Urgent* [KR]
9. Naval High Command/1st Naval Operation Staff (Koralle), *Urgent* [KR]

Subject: Evacuation of north Norway.

1. Because of the lack of willingness of the northern Norwegian population to evacuate the country *voluntarily*, the Fuehrer has ordered the compulsory evacuation of the population east of the Lyngsfjord in the interest of the security of the population, which is to be preserved from bolshevism, and that all houses be burned down or be destroyed. It is the responsibility of the commander in chief of northern Finland that this order is carried out ruthlessly so that the Soviets, supported by dwelling places and a population which knows the country, will be prevented from following our withdrawal with strong forces. Pity for the civilian population is out of place.

2. The men will understand the measures to be taken if it is explained that the barbarian methods of the air war against the German homeland and its cultural places have brought a misery on our people surpassing by far that which will follow in the wake of the measures which must be taken now in northern Norway in order to prevent an early thrust by the Russians, according to plan.

3. "*The evacuation staff northern Norway*" subordinate to the Oberquartiermeister in his capacity as evacuation commissioner is formed as the competent authority.

Leader—Colonel Herrmann, Commanding Officer of the 310th Grenadier Regiment. Corps Headquarters, XXXVI Mountain Corps, is to detach Colonel Herrmann immediately to Army Oberquartiermeister. SS Obersturmbannfuhrer Neumann joins the evacuation staff as representative of the Reich Commissioner for Occupied Norwegian Territories.

4. The commanding generals of the XIX Mountain Corps and of the LXXI Infantry Corps are charged by me with the *responsibility for the carrying out of the evacuation*. Corps Headquarters, XIX Mountain Corps, will evacuate the territory east of the east coast [bank] of the Porsangenfjord (excluding the fjord). Corps Headquarters, LXXI Infantry Corps, will evacuate the area Porsangenfjord (inclusive)—Lyngsfjord (inclusive).

5. *Execution of the evacuation—*

a. The entire evacuation area is to be emptied of people.

b. Evacuated settlements are to be destroyed unless they are to be used by troops marching through (that is, at the latest by the rear guards).

c. The operation must be a sudden one and the officers of the Reich Commissioner of Norway must participate and Norwegian authorities must be harnessed for it; the latter, however, only from the beginning of the operation.

d. The seized population is to be led to the nearest ports under military guard (also small ports with docks suitable for cutters).

e. Local and district commanders are to erect reception camps in or near these ports.

f. Men capable of working and marching, and in the western districts women capable of marching also, are to be coupled to the marching units furthest in front and to be taken along.

g. In as far as the population still has small ships available they are to be used for the deportation of the evacuees. Military cover [guard]!

h. All ships used by the armed forces (freighters and army transports) are to be loaded additionally with as many evacuees as possible.

i. Columns on Reichsstrasse [Reich highway] 50 to be formed only to an unavoidable degree; invalids, women, and children to be assisted by loading them on trucks. Only men really capable of marching are to join the march columns!

k. Transportation of all evacuees first into the area west of the Lyngenfjord, from there further control by Corps Headquarters LXXI Infantry Corps, in direct agreement with the Reich Commissioner Norway.

l. In the area of the Corps Headquarters, XIX Mountain Corps, the operations will start immediately; in the area of Corps Headquarters LXXI Infantry Corps, on 1 November 1944.

m. Mission to be accomplished—

(1) By 9 November 1944 in the area eastward of the line Kistrand-Billefjord-Lakselv-Skoganvarre-Karasjok (including these villages).

(2) By 12 November 1944 in the area east of the line Talvik-Kautokeino (including these villages).

(3) By 15 November 1944 in the remaining area.

Norwegians found in the respective areas after that period are to be arrested and brought to the nearest town headquarters. Directives will be issued concerning their further treatment.

6. It is requested that the Reich Commissioner Norway will make available as much shipping space as possible, as numerous

casualties among the Norwegians will otherwise be unavoidable during the evacuation.

7. I request all officers concerned to carry out this evacuation in the sense of a relief action for the Norwegian population. Though it will be necessary here and there to be severe, all of us must attempt to save the Norwegians from bolshevism and to keep them alive.

[Illegible initial] [Signed] RENDULIC
(Rendulic) General
Ia/Op. No. 1682/44, Top Secret
[Illegible initial]

Distribution:
Only on draft

PARTIAL TRANSLATION OF DOCUMENT NORWAY 10
PROSECUTION EXHIBIT 519

PROCLAMATION TO NORWEGIAN POPULATION SIGNED BY
RENDULIC AND TERBOVEN

To the Population

The evacuation of a part of northern Norway has been rendered a military necessity as a result of the treachery of a Finnish Government clique.

The evacuation necessitates the removal of the civilian population as the enemy has proved that in those territories occupied by him, he ruthlessly and brutally forces the civilian population to give him active assistance in achieving his aims.

This means that no shelter or means of existence of any kind can be left to the Bolshevik enemy in the fighting zone. All such installations as housing accommodation, transport facilities, and food stocks must be destroyed or removed.

The population in these districts will therefore be deprived of the basis for their existence, so that in order to be able to survive, they must evacuate to those Norwegian territories which are still protected by the German armed forces.

* * * * *

He who does not comply with these unequivocal instructions exposes himself and his family to possible death in the arctic winter without house or food.

RENDULIC
General, Commander in Chief, 20th (Mountain) Army

TERBOVEN
Reich Commissioner for the Occupied Norwegian Territories

TRANSLATION OF DOCUMENT NOKW-090
PROSECUTION EXHIBIT 506

REPORT FROM EVACUATION STAFF TO 20TH MOUNTAIN ARMY,
25 NOVEMBER 1944, CONCERNING EVACUATION
OF NORTHERN NORWAY

[Stamp] Secret

[Handwritten] Supplement 5

Army Headquarters, 25 November 1944

[Handwritten] War Diary

20th (Mountain) Army
Oberquartiermeister/Evacuation Staff
No. 31/4 Secret

The Evacuation of Northern Norway

I. *Mission.*—The intention to induce the population of Finmark and East Troms to evacuate these territories voluntarily failed because of the limited willingness to support this demand.

Accordingly, the Fuehrer has ordered the forced evacuation of the territory east of the Lyngsfjord in order to protect the population from bolshevism. The Fuehrer order to the armed forces commander in chief of north Finland contains the following demands:

1. The territory is to be emptied of human beings so that the enemy cannot rely on the working potential and local knowledge of the population.
2. All quarters, traffic and economic installations are to be destroyed so ruthlessly that the enemy is deprived of every possibility of living in this area.
3. Whatever can be evacuated in important goods is to be salvaged.

The initial time period set for evacuation, Porsangen territory by 9 November, Alta/Hammerfest territory by 12 November, and East Troms by 15 November [19] 44, could be prolonged until 20 November [19] 44 as a result of a change in the situation. Accordingly, a salvaging of economic goods in excess of the first planned amounts was possible.

The territory to be evacuated corresponds to 1½ times the size of Denmark. The distances on the single national highway, the Reichsstrasse 50, amount to 1,000 kilometers from Kirkenes to Narvik, and from Hammerfest to Tromsøe 500 kilometers. Furthermore, this highway was occupied by the march movement

of the army, so that first of all the sea lane came into question with regard to deportation.

For the purposes of the execution an evacuation staff was formed at the 20th (Mountain) Army Headquarters, to which a representative of the Reich Commissioner for the Occupied Norwegian Territories was added.

II. *Means*.—1. The possibility was merely offered as far as the sea lane was concerned to utilize the unused transport space on ships of the Reich Commissioner for Naval Transport (German Commercial Flag) and on ships of the navy (Reich Service Flag and Reich War Flag). Beyond that, Norwegian local ships and numerous cutters were utilized.

2. On land, the population wandered off individually with their own trucks (trucks, omnibuses, and horse drawn vehicles). The young folk also made use of bicycles frequently for the march to Narvik.

III. *Execution*.—1. The inadequate records of the Norwegian resident register were the *basis for the seizure* of the population. According to them, the territory to be evacuated, including the nomadic Lapps, had a population of about 62,000 before the war. The (apparently very restricted) number of those persons who fled the evacuation can accordingly only be estimated.

2. On account of lack of time *the order* to the population for *evacuation* could only take place in the form of a joint decree of the Commander in Chief of the 20th (Mountain) Army and by the Reich Commissioner for the Occupied Norwegian Territories.

3. *Assembly points* for the deportation by sea were erected in Billefjord and Honningsvåg for the area Porsangen and East Finland, in Hammerfest for the island territories, and in Alta-Sopnes-Burfjord for the territory Alta with Kautokeino. The collecting, i.e., the bringing together was accomplished by trucks and omnibuses, from the sea with cutters, or from the islands and the coastal localities in North Varanger by units of the navy.

Deportation from the Porsangen area took place mainly in two mass transports with 1,700 and 1,060 persons on the steamers "Karl Arp" and "Adolf Binder" from Billefjord. In Alta, through a mass transport of 750 persons on the supply ship "Dithmarschen". Deportation for the rest, with Norwegian local ships and cutters.

4. *Roundup [collecting] organizations* were set up through civilian offices for quarters and further transport of the deported population in Tromsø, Narvik, and Harstad.

Forwarding to Mosjøen and Trondheim took place with ships of the Norwegian "Hurtigrute". Besides them, the following

ships were utilized: the steamers "Brabant", "Dronning", "Sigurd Jarl", "Stella Polaris", as well as the hospital ships "Lofoten", "Nordstern", and "Polarlys". This forwarding was finished by 25 November [19] 44, in the main.

5. *Supplies*, including quarters and medical help, could not be guaranteed by the civilian sector in this wide area to a full extent. The armed forces helped accordingly on a generous scale—

a. Through the provision of rations where supplies could not be managed in such bulk by the civilian sector. In the reception stations on land as well as on board the German ships warm rations were given out from field kitchens.

b. Through the provision of barrack camps as quarters at the assembly points, Billefjord and Sopnes.

c. Through the help of the unit during transport to the coast, as well as during embarkation, especially by assisting families with children.

d. Through large-scale care of sick, injured, pregnant women, and mothers with small children by doctors and medical installations. Admission of women for confinement into hospitals, further transport on hospital ships, provision of small children with milk, etc.

The transport of sick and injured from outlying homes for the aged and homes for tubercular cases whose evacuation was necessary, in order not to afford the enemy propaganda material, required an especial regulation. The deportation from Karasjok, Boerselv, Kautokeino, and Talvik and/or Korsfjord took place under the responsible leadership of Colonel [medical] Dr. Gaebler with medical trucks of the armed forces and our own boats used for this.

6. The population could only take *what baggage* they could carry, on account of the restrictions of the transport space. The cattle had therefore to be taken over by the armed forces against memoranda receipt, as far as it could not, in individual cases, be taken along.

After extension of the evacuation time an extensive salvaging of important economic goods was also ordered for the civilian sector. Here the execution was the responsibility of the armed forces. Furthermore, a final search was carried out by the Norwegian police detachments on the islands and outlying localities. Destruction will accordingly only be ordered by the subsector commanders [Unterabschnittskommandeure] and/or rear guard officers in agreement with the evacuation commissioners when the salvaging of valuable economic goods (especially fishery equipment) is finished, or impossible.

Salvaging of the reindeer herds took place by an order to the Lapps to drive their herds to the west over Kautokeino-Helligskogen into a reception territory in Tromsfylke. A retreat to the south was prevented by a blockade on the Swedish border, a lock at Helligskogen made possible the driving through of the reindeer herds by the march movements of the unit on to the highway Finland-Skibotn. This action could not be finished yet, since, on account of the slight snowfall, the expedition of the Lapps could not yet be put into operation to the full extent. Where a herd could not be transmitted further, part of the animals were taken over against memoranda receipts by the armed forces; the Lapps were nevertheless left the minimum necessary for existence.

IV. *Results* (see appendix).—1. In the reception organization, including the fishermen already settled on the Lofoten, 36,914 persons were taken all together. About 5,000 persons migrated before the start of the evacuation up till October from east Finmark. About 1,100 persons have migrated by means of self-aid without passing through the reception organization. A smaller residue of workers of the armed forces is to be moved off later with the unit.

2. About 10,000 persons have remained in the area of Kirkenes, as a result of the war events. In west Finmark and East Troms only about 8,500 persons, mainly Lapps, are left behind, whose deportation was only of interest in connection with the finding back of reindeer herds.

The evacuation in the territory between Lyngsfjord and Porsangenfjord could therefore be carried through almost completely. Even voices of the Swedish press had to admit the success of the action and speak of an almost 100 percent evacuation of the population.

The success of the action was made possible through the excellent cooperation of all participating offices of the armed forces, the Reich Commissioner, and the Norwegian administration.

V. *Experiences*.—1. Orderly evacuation under the conditions imposed is only possible if an orderly method of seizure is present in the hands of an administrative medium. Both were not at hand. The Norwegian police [Lensmaenner] were partly the first to leave their realm of their own accord. The administration in Hammerfest and in Talvik worked well.

2. Even in short periods for evacuation, a frictionless development is possible, if a calendar is also at hand in civilian offices for the evacuation of important goods. Idleness and avoidable losses of important goods result from improvising.

3. It contributes in any case to the quieting of the population,

if every family can have at their disposal a memorandum with the individual orders for carrying out the evacuation. Such a memorandum was to be issued by Minister Lie according to the suggestion of the army Headquarters, but came too late to have any great effect on the population.

4. Some untoward events, such as the execution of the "Law concerning evacuation services" ["Gesetz ueber Hand- und Spanndienste"] with the separation of the men from their families to be deported and with guarding like prisoners, burning down of houses in the presence of the inhabitants even where an immediate destruction was not necessary and shelling of the locality Kjoellefjord by units of the navy, hinder the readiness of the population to follow the officially prescribed way.

[Signed] HERRMANN

Colonel and Leader of the Evacuation Staff

Distribution:

In draft

Enclosure to Headquarters of the 20th (Mountain) Army

Oberquartiermeister/Evacuation Staff, No. 31/44 Secret

Section IV

Table of Evacuation

As per—25 November 1944

Number of residents to be evacuated on 9 April 1940—		
East Finmark	circa	25,000
West Finmark	circa	27,000
Troms, eastwards Lyngsfjord	circa	10,000
		<u>62,000</u>

Carrying out of the evacuation.

1. People evacuated—

a. Evacuees included in the report—		
Via Tromsøe to the south	29,014	
Via Narvik	circa 3,400	
Via Harstad	circa 1,000	
On the Lofoten Islands	circa 3,500	<u>36,914</u>
b. Moved to the south without registering		1,101
c. Moved from East Finmark up to October	circa	5,000
d. Workers employed by the armed forces etc. Transported with the troops.		285
	[Total]	<u>43,300</u>

2. <i>People not evacuated</i> —			
No longer able to leave east Fin-			
mark -----	circa	10,000	
Laplanders remaining in west			
Finmark (mainly Nomads).		8,500	
Fugitives who have avoided			
evacuation. -----	circa	200	18,700
		[Total]	62,000

C. Extract from Testimony of Defendant Rendulic*

DIRECT EXAMINATION

* * * * *

DR. FRITSCH (counsel for the defendant Rendulic): General, how did your assignment in the northern area come about? I think, to begin with, you were sent to northern Finland. How did that come about?

DEFENDANT RENDULIC: In the spring of 1944, the Finns had entered into negotiations with the Russians, and these negotiations did not lead to any results. In June of the year 1944, a Russian offensive had started. This had taken place on the southern Finnish frontier along Lake Ladoga and the Finnish border. This offensive had a number of successes in the beginning. The morale in Finland had so far been quite a depressed one, and it was to be expected that the Finns would enter into new negotiations with the Russians. In this situation General Dietl had an airplane accident. Up till then he had been the Commander in Chief of the 20th Mountain Army in Lapland. General Dietl was a personality who was much esteemed in Finland. I believe all this took place on 23 June. During the night, on 24 June, I received the order to report on 24 June to the Fuehrer's headquarters. On that day I was given the post of the Commander in Chief of the 20th Mountain Army in Lapland.

Q. What was the relation between Germany and Finland at that time?

A. Germany and Finland waged a common war against Russia. The German mountain army and the Finnish Army fought side by side on the Finnish eastern border. In spite of this there was no pact or alliance between these two countries. The two countries only acted out of a common interest against the common enemy on the basis of military agreements.

* Complete testimony is recorded in the mimeographed transcript, 28-31 October, 3 November 1947; pp. 5126-5472.

Q. What was the military situation generally when you arrived in Finland?

A. On a front of about 1,200 km. east of the Finnish eastern border there was the 20th Mountain Army from the Arctic Sea toward the middle of Finland, and then came the Finnish Army. There was no common leadership. The Finnish Army was led by the Marshal of Finland, Baron von Mannerheim. The front of the mountain army was comparatively quiet. A war of position of a normal kind was going on here. The army itself was stationed in two large groups, with one corps in the south of Lapland, that is, the middle of Finland; and one corps was on the coast of the Arctic Sea. Between those two large groups there were no other forces. The width and depth of this area was 400 km. and was rocky or jungle-like. For all practical purposes it was not possible to cross it.

Q. Was this question of terrain which you just mentioned of any special significance and importance concerning the battles and the later events?

A. Yes, it was of quite decisive importance. In the whole area of Lapland, that is, the northern part of Finland, and the area of my army, three-fourths of the country was covered with impassable jungles. The area was rocky or swampy. Toward the north, up to the Arctic Sea, there was tundra and entirely rocky areas. It was very important, considering the fact that the area was impassable, that there were only very few roads in this area. In Lapland there were, for all practical purposes, only three highways—the so-called Arctic Sea highway which ran from north to south through Lapland and which was about 600 km. long; and in the south of Lapland there were two highways, each of which led to one of the corps stationed there. All these highways met in Rovaniemi in southern Lapland, a locality which is situated near the polar circle; and from there two roads led to the Swedish frontier, to the so-called frontier highway which went along the Swedish frontier to Norway, to the Lyngsfjord.

Q. How did the political situation in Finland develop after all that?

A. At the beginning of August the Finnish Government had resigned, and the Finnish President had founded a new government. The head of this government was Mannerheim. This government soon entered into new negotiations with Russia. The Finns loyally informed us of this pact. We expected that this time the negotiations with the Russians would lead to success. We expected that Finland would leave the alliance.

Q. What would be the situation then confronting the 20th Mountain Army?

A. The situation had necessarily to be extremely difficult if one considers the fact that from the Arctic Sea, on the eastern coast of Finland, the front led down to the south and that in the center of Finland the German mountain army was joined by the Finnish Army, then in the event of Finland's leaving the alliance very suddenly a deep, open, uncovered flank would arise, which was 400 km. deep. This would be even more dangerous because the best roads from southern Finland led to the unprotected road junction of Rovaniemi and to the Swedish frontier highway. The loss of Rovaniemi to strong Russian motorized forces and the fact that these forces might reach the Swedish frontier highway, which is the shortest distance to Norway, had to lead to a catastrophe for the mountain army.

Q. Were any provisions prepared for these events and, if so, which ones?

A. Naturally, everything possible was prepared. The proper forces were withdrawn and put up in preparedness. We had to block the roads which led from southern Finland. We had to dynamite all bridges and mine the roads to the greatest possible extent. All this we had to do to prevent, wherever possible, the enemy breaking into the practically unprotected flank of the army. Of course this could only be prepared in order not to provoke the Finns and also if possible not to provoke the Russians. But it was prepared in the smallest detail.

Q. Now was anything known about the armistice conditions which were to be expected on the basis of the negotiations?

A. No, unfortunately nothing was known about this. We did know, from the negotiations which had taken place earlier, that they had not been successful because of two conditions which the Russians had imposed. The first condition was that the Russians wanted to occupy Finland; the second condition was that the Russians demanded that the Finns were to fight against us. We tried to do everything to get clues about the terms of the armistice because that would be extremely important to know in good time. We were not successful in our attempts, and as late as 2 September, the day when the Finnish Army signed the armistice conditions, I had a long talk with Mannerheim, in which, of course, we did not discuss the armistice which was already a fact. But I thought that I was right in the impression that the Finns would this time accept the condition to fight against us.

Q. And how did the situation actually develop?

A. On 3 September, the armistice between Finland and Russia was concluded. Finland broke off all relations with Germany and demanded that the German troops be withdrawn from Finland within 14 days.

Q. Was this demand to withdraw the troops within 14 days feasible from a military point of view?

A. That demand could not be carried out. The demand obviously had the purpose of forcing the Finns to fight against us. In order to evacuate Finland, the troops had to carry out marches of 800 to 1,000 km. on foot. This would have meant marching unceasingly for 5 to 6 weeks. Such an enormous effort could not be expected of the troops in such a climate, and at that time of the year, and in such a terrain as I have described. The soldiers would have been able to bear up under this effort, but the horses would not have been able to do it. And the mountain army had very many horses because everything had to be carried on horseback. In addition we have to consider the fact that there were many stores which had to be carried off and, finally, we have to consider that the troops just cannot march off like that. The enemy would prevent them from marching off and involve them in combat actions which actually did take place. The combat actions which took place, in order to get the mountain army out of that area, took 5 to 6 weeks, and if one is fighting one cannot, after all, march. It was more than 3 months until finally the last man of the German Army had left Finland, and we tried to expedite matters as much as we possibly could, especially in consideration of the approaching winter.

Q. General, you will remember that a representative of the prosecution has stated here that this period of 14 days was better than no time at all? Would you consider that statement correct?

A. Anybody who had any insight into the conditions of the roads there, the fighting situation, and what the leadership of an army needed, would probably not have made such a remark. Those 14 days to us only meant that we could evacuate to Germany the depots and the medical stores which we had in southern Finland. We could not do anything with these stores there because we had so much that we didn't know what to do with it all. After all, the army had been provided for for a period of 9 months. These 14 days had no influence at all on the condition of the army; it had even less influence because the Russians did not feel themselves bound by this time limit. They attacked as early as 8 September.

Q. General, will you, very briefly, indicate the next event which occurred so that we may gain a picture of the situation?

A. As peculiar as this might sound, when we were concerned with a retreat we were, first of all, busily engaged in building up a new front, a front with a depth of 400 km. We succeeded in doing this in 4 to 5 days. Then, we started transporting and evacuating. On 7 September the first troop movement was carried

out. We succeeded in withdrawing the southern corps without the Russians knowing it. The Russians followed, and from that date on they attacked continuously. Crises developed. The troops which had already marched off had to return in order to relieve the others. But, on the whole, our movement was successful. The obvious purpose of the Russian attacks was to tie us and the army down, to force us to fight, and to destroy us with their superior forces. From the point of view of military leadership the Russian actions were entirely correct. It was the Russian endeavor to use all available means to reach the road junction of Rovaniemi, in order to overtake us from the rear and thus reach the highway near the Swedish frontier before we could. The battle to prevent this Russian intention, which sometimes lasted for hours, meant to us the existence or nonexistence of the army. And it succeeded.

Q. Did the Russian attack now remain restricted to the southern parts of the army?

A. No. Three weeks later an attack with especially superior forces was made against the XIX Corps on the Arctic Sea. This was a mistake on the part of the Russian leadership, which was incomprehensible to me. It was a mistake to carry out these two attacks at different times so that it became possible for us to counter the Russian superiority by withdrawing forces from the southern group and putting them at the disposal of the corps near the Arctic Sea, and thus support this corps. These forces succeeded in relieving the XIX Corps and getting it out of the Russian encirclement.

Q. General, is this the XIX Army Corps which was east of Kirkenes?

A. Yes, this was the XIX Corps which was east of Kirkenes, about 150 km. east of Kirkenes.

Q. Who commanded it?

A. Lieutenant General [of the Mountain Troops] Jodl, who appeared here as a witness for the prosecution.

Q. And now when did the first order arrive to evacuate northern Norway?

A. To the best of my recollection that must have taken place towards the latter half of September.

Q. And how was this order carried out?

A. We carried out this order very loosely. The army order at that time was to retreat towards approximately the center of Lapland, and there to halt. We felt strong enough to defeat all attacks in this position, and we made this evacuation a voluntary one by supporting those northern Norwegians who wanted to get away.

Q. Did this situation change later on and, if so, for what reasons?

A. This situation changed later for several reasons. Principally on 4 October we received an order saying that we were not to remain in Lapland, but instead the army was to be led back to a position near the Lyngsfjord in Norway. That meant to us a movement of about 800 to 1,000 km. which would necessarily last far into the Arctic winter. Then, when in October the attacks against the XIX Corps started, we were, after all, quite surprised that the Russians were in a position to successfully commit their great numerical superiority, even in that barely negotiable terrain. And just around that date, a further order arrived. The four best mountain divisions were to be sent to the Continent, which meant more than half of the strength of the army. These were events which could not possibly have been anticipated, and they naturally influenced our judgment of all problems at hand.

Q. General, this order—to distinguish between concepts which you mentioned—did the action which was to take place on the basis of the order of 4 September have a code name?

A. This movement was called "Nordlicht."

Q. You were talking about the influence which became effective through the new situation which confronted you?

A. This influence was seen particularly in the fact that the army could not deny that the second evacuation order which had come in on 20 October was fully justified. Only the OKW was in a position to know what would be demanded of the army in the future and which forces would be at my disposal for those purposes.

Q. If you knew, a long time before the second evacuation order arrived, the Russian strength and counted on the Russians' moving up on you, why did you then not demand this order for evacuation and destruction?

A. I never waited for orders which were a matter of course, and I never asked for orders in matters which I thought I could regulate myself. I knew quite well what I would have to do in accordance with the situation. If I had not received this second evacuation order of 28 October, then I intended to concentrate the population in a tolerable area of living space. The necessary sanitary installations were to be left for them, but everything else—the quarters which would have become available, the highways which existed, all bridges and harbor installations, and everything else would have been destroyed. The necessity of these measures was never doubted for a single instant by anybody.

Q. One question in between, General. Were the Russian troops up to standard in a military respect?

A. In the extreme north the Russians had to have excellent troops because the terrain and the climate were so very difficult, and because the German and the Finnish troops which confronted them were some of the best units which existed throughout this whole war. The Russians were excellent fighters, especially in rocky and forest areas. Their special units, such as the "ski brigades" which comprised people from Siberia were excellent, and they gave us considerable trouble.

Q. General, how did you imagine the Russians would follow you up?

A. There were two possibilities as to how this could be done. First of all, it was possible they could follow up on highway 50, which led from Kirkenes via Tana, then it was possible that they would move along the highway via Ivalo, and finally there was the possibility to follow along the so-called frontier highway along the Finnish-Swedish frontier.

Q. General, would you be kind enough to look at the map and show us the most important points on it?

A. One possibility would be to follow up along highway 50.

Q. At this opportunity may I point out to the Tribunal that that is the highway which the Tribunal saw and used when it went to Norway, along Kirkenes to Hammerfest.

A. Then it was possible to use the road to Ivalo, which joined highway 50. The third possibility was to push along via Rovaniemi, along the Swedish frontier highway to the Lyngenfjord. Those were the three possibilities on the land route. A further possibility was to follow up by a sea operation starting in the area Murmansk-Kola Bay, which is roughly about here. [Indicating] The most suitable places for landing were the Fjords of Alta and Varanger in the southern part of Finmark. Into this area the roads lead from Finland, which the Finns could have used on the land route.

Q. You are talking about landing operations, General; did you count on the possibility of such landing operations?

A. Landings had a great deal of advantage for the enemy, because to march through these rugged surroundings in winter time through the whole of Finmark is extremely strenuous, and the Russians could have saved themselves this effort if they had carried out a pursuit operation at sea, which would have been considerably simpler. Such an operation had to be anticipated. The OKW also expected landings, even from the British, and they thought they would take place somewhere near Narvik, and at least half a dozen times we were told the opinion of the OKW

concerning these landings. That can be frequently found in the war diary of the army which arrived here from Washington.

Q. Were the prerequisites for such a landing good for the Russians, such a landing as you expected would take place?

A. Yes, we knew that in the Kola Bay there was a great number of ships, hundreds of thousands of tons which were part of the convoys which came through the Arctic Sea to Murmansk about twice a month. Those were convoys of about 50 to 60 freighters, protected by battleships, destroyers, aircraft carriers, and other auxiliary vessels. The Kola Bay was reconnoitered towards the end of September. We saw there a great number of ships, battleships, cruisers, aircraft carriers, etc., and those, without doubt, were British vessels, because it was well known the Russians only had one battleship in the Arctic Sea.

Q. General, if I mention to you the figure 230,000 tons of shipping, which I found in one diary, as said to have been assembled in the Kola Bay, would that be sufficient to carry out a large landing operation?

A. Yes, 230,000 tons can undoubtedly transport six to eight divisions, but this number of tons reported here is not the maximum of what the Russians would have been in a position to use, because twice a month another convoy of 100,000 to 200,000 tons of convoy vessels arrived in the Kola Bay. Also, we learned towards the end of September or beginning of October—I don't remember the exact date, it's in the war diaries—we learned that these convoys, which up until then had been sent by the Russians with British support, were led by the British Admiralty from the end of September onward, and a landing operation would have been supported through the fact that the Allies had in the extreme north undoubted supremacy on sea and in the air, and those were the best prerequisites that they could possibly have for a landing.

Q. Were there other factors as well? I am mainly thinking about the question of Swedish neutrality; did you in this respect have to anticipate any difficulties?

A. Yes. We had to anticipate a violation of the Swedish Government. It could not be expected that the Swedes would resist Russian pressure if the Russians demanded from the Swedes to do the same as we had demanded from them in 1941. In that year we had, with the consent of the Swedish Government, moved one infantry division through Sweden to Haparanda, near the Finnish frontier. Of course, that could only have been an operation of secondary importance which would have mainly been directed against the area near Narvik. The main operation was to be expected against southern Finmark.

Q. Is a landing operation in southern Finmark dependent on the season?

A. No, it is not dependent on the climate, because under the influence of the Gulf Stream the fjords do not freeze up. Also, there is not very much snow in those districts in winter, but it is quite cold. It was known that the Russians, as well as the Finns, were extremely well equipped for this winter climate.

Q. General, if I may summarize your statements, you said that the army found itself in an extremely difficult position; did the difficult position have any effect on the morale of the troops?

A. Yes, it had a considerable effect on the morale of the troops. Everybody was aware of the difficulty of the position. From censorship of soldiers mail we learned that the morale of the soldiers sometimes bordered on panic. We found letters written by soldiers in which they said that a "second Stalingrad is in preparation," "the army is doomed," "when we freeze in with the Arctic winter we will freeze as Russian prisoners."

Q. Did the Russian propaganda, and if so to what extent, make use of this situation?

A. The Russian propaganda made very clever use of this situation. Above all they tried to make the men distrust their leaders. Very soon after Finland left the alliance they spread the news, by radio as well as by leaflets, that the commander in chief of the mountain army was an Austrian, and he wanted this army to fall into the hands of the Russians; this fact was discovered and his withdrawal and dismissal was to be expected. In connection with the events of 20 July 1944 and the consequences of this event which had only happened a short time before, this propaganda found fertile soil. There was a very dangerous crisis among the soldiers especially with regard to confidence in their leaders which could have led to a catastrophe if the army or parts of it came into difficult situations. In order to counteract the effects of the Russian propaganda, Hitler, on 17 September, decorated me with the Golden Badge of Honor, and thus the effect of the propaganda was counteracted immediately.

Q. General, when were you convinced that the Russians would not follow up on the land route via Northern Finmark?

A. I cannot tell you exactly when I became convinced of that fact. I assume it was toward the latter part of November.

Q. Well, what was it you ascertained at that time?

A. It had become known that the Russians had only followed us up past Kirkenes with weak forces. At first however, we had to assume that they wanted to wait and gain time in order to allow things to settle down and to consolidate their forces after many weeks of hard fighting which had cost them many

losses, and as one is apt to do as a rule when one prepares a new operation.

Q. Was it possible to reconnoiter the Russian positions so that you could be informed about them?

A. During the decisive period of time, the middle of November, for practical purposes it was no longer possible to reconnoiter. The airbases had all been transferred to Norway. The nearest one was in Butevos, which is about 1,000 kilometers distant from the Murmansk railway. Around about that time daylight lasted only a very few hours each day. The Arctic night had already extended over the majority of the 24 hours. Therefore, at such a great distance for a flight and with the very short period of daylight, it was not possible to reconnoiter the movements along the Murmansk railway thoroughly.

Q. General, would you be kind enough to show us on this occasion the distances on the map?

A. Butevos is here [indicating].

Q. I would like to point out, Your Honor, that we made an interim landing in Butevos.

A. That would have been the direction of flight for reconnoitering, and here is the Murmansk railway [indicating].

Q. Therefore, you would have had to fly over parts of Sweden and Finland or you would have had to fly around this area?

A. We would have had to fly over the whole of Finland.

Q. When was it certain to you that Russia had withdrawn forces from her former Lapland front?

A. The first news concerning this fact was received toward the beginning of December. It was a communication from Army Group North which was stationed near the East Prussian frontier, and it had been confronted by a division which up to that time had confronted my front [troops] in Lapland. We did not receive any further news concerning any other forces. My front in Lapland faced about 30 Russian divisions, and the Finnish front faced the same number. These forces would have been, in any case, far too strong in the very restricted area in Finmark. The withdrawal of forces from the Lapland area could not give us any information concerning the real intents of the Russians in Finmark. How many forces the Russians actually did withdraw never became known to us, and I do not know it to this day.

Q. And for what reason did you after that period continue the evacuation and the destruction?

A. The evacuation had, at that date, been actually carried out for all practical purposes. The report concerning the evacuation is dated 25 November. (NOKW-090, Pros. Ex. 506.)* There-

* Document reproduced in section B.

fore, it can be assumed that around that date it had been concluded. The destruction which was carried out also in the southern area of Finmark had to be continued, because moving up on highway 50 was not the only possibility which was open to the Russians. The even more likely operation as of November would have been a landing in southern Finmark.

Q. Why were the destructions which you carried out not restricted to the villages along highway 50?

A. At first sight one might suppose that marching troops would only need the localities along the march route for quarters, but that is not the case. Even in districts which are densely populated there were and are many villages, like for instance, in the center of Russia. The villages along the march route were never sufficient for the accommodation of the marching troops.

Instead, these troops also had to use those places which were a good distance away from the march route, and they had to overlook the great strain of the march, when it was necessary to quarter them in houses, etc., and that would have undoubtedly been necessary at that time in Finmark because of the climate. If the weather is good those extra marches can be saved by spending the night in tents right on the road.

Q. May it please the Tribunal, I would like to submit a photostat of this map for information purposes because it is rather difficult to see the map. (*Rendulic 100, Rendulic Ex. 44.*)

General, how about inhabited locations along the coast and along the fjords?

A. The inhabited localities along the coast and along the fjords were of the same significance. One has to consider the fact that highway 50 led partly immediately along the coast and partly was very near the coast. It further has to be considered that an army does not only march; it also has to live, especially when it is supposed to prepare an attack. Then the army is apt to spread over the whole country. Not only the troops have to be accommodated but there are also many installations to be taken care of such as work shops, hospitals, depots, installations for supply; and for all these installations everything that was there concerning houses, etc., was necessary to accommodate all these operations and that was the military significance of the apparently far distant inhabited localities.

Q. Did that also apply for the fishing villages which were up in Norway?

A. Yes, the same fact applied to them. As a rule, they could only be reached by cutters or boats. These were the most important means of transportation in that district. We also had our

bases in the fjords in those isolated localities and we maintained communications with them by boat.

Q. I would now like to talk about one specific place and that is Hammerfest. Will you please tell us the significance of Hammerfest?

A. We worked through all the possibilities which the enemy had concerning landings. On that occasion, we again and again were confronted with the fact that Hammerfest would be the best point for supply for troops which had already landed. It would be a good starting point and would be a good place for distribution for the more detailed supplies to the other landing points in the fjords. Further, Hammerfest was situated in the vicinity of highway 50. In order to get there all one had to do was to cross the narrow Kvaenangen Fjord and then one had an excellent road. The place itself could accommodate a strong regiment or even a division if necessary. This double significance of Hammerfest was a fact for an enemy in pursuit. You must not think that we destroyed wantonly or senselessly. Everything we did was dictated by the needs of the enemy. That was its necessity.

Q. And what was your attitude now toward the evacuation order?

A. I was fully aware of the effects of this evacuation order on the population and I also knew that the execution of the evacuation would mean a considerable burden to the army. In spite of this I had to obey the order. Concerning the necessity of carrying out destructions, my opinions coincided with the opinions of the OKW. It was a matter of course to me, and everybody else, that destructions had to be carried out. My opinion deviated from Hitler's opinion in the beginning only in the one factor. I did not think it was absolutely necessary to transfer the population to other areas but I could not close my eyes to Hitler's reasons of military necessity. I could not deny that they were justified.

Jodl warned me too. He said this time I had better follow the evacuation order since Hitler insisted under all circumstances that this order be carried out. Furthermore, I knew—and this is also contained in the OKW order—that the most decisive factor in this whole affair was the Reich Commissioner in Norway. It was well known that he, this man, was very angry because the first evacuation order had not been carried out and now he would closely supervise all activities of the army. It was therefore quite impossible not to obey this second evacuation order.

Finally, I had to tell myself that it would possibly be better for the population to be transferred to other areas rather than to spend the hard winter in the destroyed country. I participated in

both winter battles in Russia. Therefore, I know what flight from cold means. I had to realize that the Russians, if they followed us, and if they were confronted with the choice of either saving themselves by using what remained in the way of shelter or sparing the population, it was certain that they would not spare the population. Therefore, in the final analysis it was the best thing for the population that they were removed.

Q. You were talking about the Reich Commissioner for Norway. Will you give us the name of this man, please?

A. His name was Terboven.

Q. That is the same Terboven whom you have already mentioned?

A. Yes, he is.

Q. General, what were the measures you ordered for the evacuation?

A. I have to say something else first. The operation which had to be carried out by the army was possibly the most difficult land operation of the whole war. During those days I said to my chief of staff, "If sometime after this war you have to train general staff officers, then you will have to make this operation a basis of the training because it's impossible to think of anything more difficult." The army was spread over an area of 600 kilometers. That is, it was spread over a wider area than, for instance, the Allied forces in France and those forces were more than a million men strong. The problem was to relieve this army out of an encirclement from three sides and that, in battle with a superior enemy. Then this army would have to be concentrated on two highways and, finally, it would have to march along only one highway. All that would have to be done on foot and in the Arctic winter. That meant an enormous task for my staff, a more difficult task cannot be imagined. I could not burden it further with the extensive work concerning the evacuation. Therefore, I formed a special staff for this operation—that is, the evacuation.

Q. General, can you indicate to us on this map the area over which the army was spread?

A. No, I am afraid I can't. The whole eastern part is missing.

Q. You said the eastern part of that area is not contained on the map?

A. Yes, that is what I said.

Q. Did the evacuation staff receive definite directives?

A. It received certain instructions mainly with respect to cooperation with other agencies of the armed forces and with the Norwegian Government. I am afraid I don't know any details. That was the work of my chief of staff. All I know is that I emphasized particularly that the evacuation had to be carried out

with all consideration for the population. Around that time I had learned unofficially, for some time, that after taking the army back to Norway I was to take over the post of the Commander in Chief of Norway, and immediately after the evacuation order I received the official order for this transfer. I attached the greatest importance to good relations between myself and the Norwegian population. For this reason alone I insisted that the evacuation should not give any cause for misgivings among the population. You may also rest assured that if any kind of excesses had become known to me, any unnecessary harshness or any inconsideration, I would have taken countermeasures immediately. I was not a man who would let himself be prevented from carrying out his intentions by some action of a subordinate agency.

* * * * *

VIII. PHOTOGRAPHIC REPRODUCTIONS OF DOCUMENTARY EVIDENCE

WB1011

Geheim Entwurf

Fernschreiben

An
Bergh. Kom. General in Serbien 59

- 1.) Sämtliche unterstellten Truppen, einschließlich Bulgaren, sind anzuweisen, bei Meldung über Sabotage, Überfälle usw. sofort erfolgte oder beabsichtigte Sühnmaßnahmen bzw. Gegenmaßnahmen mitzumelden.
- 2.) Behandlung von Gefangenen im Verlauf von Unternehmungen bedarf Anwendung strengeren Maßstabes. Im Kampf Gefangene können nicht unschuldig sein. Leute die sich im Kampfgebiete herumtreiben und nicht in ihrer Behausung sind, ^{müssen} als kampf-beteiligt angesehen und dementsprechend erschossen werden. ^{Wilde} Milde Auffassung in Truppe im Hinblick auf gleiche Einstellung im vergangenen Sommer und die daraus entsprungenen Folgen schärfstens bekämpfen!

h 42
General der Pioniere

W.Bzh.Südoest (AOK.12) Ia Nr. 431/42 g.
6.2.42, Uhr

Nach Abgang:

Ia
Id
O₁
Ic
K.T.B.

AKP
111

Document NOKW-945, Prosecution Exhibit 174. Draft copy of teletype requesting reports on reprisal measures, with signature-initial "K" of defendant Kuntze, Acting Commander Southeast, next to date "6/2". His chief of staff, defendant Foertsch initialed the draft in the lower right; "F" with date "6/2". Translation of the teletype appears on page 999.

11 03 13-2

Cohelm

Infanterie-Regiment 734
Br. B. Nr. 437/41 Geh. I

Den 4. November 1941

704. Inf.-Div.
Ging. 14. 11. 41
9111
704. INFANTERIE-DIVISION

Der

704. INFANTERIE-DIVISION

4770

704. Inf.-Div.
6. 11. 41
704. Inf.-Div.
6 NOV 1941
Ha Lib in Abt. 103

Betr.: Sühnemassnahmen.
/ 1 Anlage.

In der Anlage überreicht das Rgt. einen Bericht
des Oblt. Walther, 9./J.R. 433, über Erschießungen von Juden
und Zigeunern am 27. und 30.10.1941 mit der Bitte um
Kenntnisanahme.

11/71

2

Document NOKW-905, Prosecution Exhibit 143[1], a forwarding letter from 734th Infantry Regiment to 704th Infantry Division, of which it was a component part, enclosing a report of shootings. Translation appears on page 995.

Gheim

Oberleutnant Walther
Chef 9./I.R.433.

O.U., den 1. 11. 1941.

Bericht über die Erschießung von

Juden und Zigeunern.

Nach Vereinbarung mit der Dienststelle der SS holte ich die angesuchten Juden bzw. Zigeuner vom Gefangenenlager Belgrad ab. Die Lkw. der Feldkommandantur 599, die mir hierzu zur Verfügung standen, erwiesen sich als unzweckmäßig aus zwei Gründen:

1. Werden sie von Zivilisten gefahren. Die Geheimhaltung ist dadurch nicht sichergestellt.
2. Waren sie alle ohne Verdeck oder Plane, sodaß die Bevölkerung der Stadt sah, wen wir auf den Fahrzeugen hatten und wohin wir dann führen. Vor dem Lager waren Frauen der Juden versammelt, die heulten und schrien, als wir abführten.

Der Platz, an dem die Erschießung vollzogen wurde, ist sehr günstig. Er liegt nördlich von Pancevo unmittelbar an der Straße Pancevo - Jabuka, an der sich eine Böschung befindet, die so hoch ist, daß ein Mann nur mit Mühe hinauf kann. Dieser Böschung gegenüber ist Sumpfgelände, dahinter ein Fluß. Bei Hochwasser, (wie am 29.10.) reicht das Wasser fast bis an die Böschung. Ein Entkommen der Gefangenen ist daher mit wenig Mannschaften zu verhindern. Ebenfalls günstig ist der Sandboden dort, der das Graben der Gruben erleichtert und somit auch die Arbeitszeit verkürzt.

Nach Ankunft etwa 1 1/2 - 2 km vor dem ausgesuchten Platz stiegen die Gefangenen aus, erreichten im Fußmarsch diesen, während die Lkw. mit den Zivilfahrern sofort zurückgeschickt wurden, um ihnen möglichst wenig Anhaltspunkte zu einem Verdacht zu geben. Dann ließ ich die Straße für sämtlichen Verkehr sperren aus Sicherheits- und Geheimhaltungsgründen.

Die Richtstätte wurde durch 3 l.M.G. und 12 Schützen gesichert:

1. Gegen Fluchtversuche der Gefangenen.
2. Zum Selbstschutz gegen etwaige Überfälle von serbischen Banden.

Document NOKW-905, Prosecution Exhibit 143[2]. Page one of report of shootings from 9th Company, 433rd Infantry Regiment which was at that time attached to 734th Infantry Regiment. Translation appears on page 996.

Das Ausheben der Gruben nimmt den größten Teil der Zeit in Anspruch, während das Erschießen selbst sehr schnell geht (100 Mann 40 Minuten).

Gepäckstücke und Wertsachen wurden vorher eingesammelt und in meinem Lkw. mitgenommen, um sie dann der NSV zu übergeben.

Das Erschießen der Juden ist einfacher als das der Zigeuner. Man muß zugeben, daß die Juden sehr gefaßt in den Tod gehen, - sie stehen sehr ruhig,- während die Zigeuner heulen, schreien und sich dauernd bewegen, wenn sie schon auf dem Erschießungsplatz stehen. Einige sprangen sogar vor der Salve in die Grube und versuchten sich tot zu stellen.

Anfangs waren meine Soldaten nicht beeindruckt. Am 2.Tage jedoch machte sich schon bemerkbar, daß der eine oder andere nicht die Nerven besitzt, auf längere Zeit eine Erschießung durchzuführen. Mein persönlicher Eindruck ist, daß man während der Erschießung keine seelischen Hemmungen bekommt. Diese stellen sich jedoch ein, wenn man nach Tagen abends in Ruhe darüber nachdenkt.

Oberleutnant.

Document NOKW-905, Prosecution Exhibit 143[3]. Page two of report of shootings, signed by 1st Lt. Walther, commanding the 9th Company, 433rd Infantry Regiment.

IX. CLOSING STATEMENTS

A. Extracts from Closing Statement of the Prosecution¹

MR. RAPP: It is a challenging and formidable task for any advocate to sum up a record of almost 10,000 pages in a trial which has lasted for almost 7 months. When the panoramic events of several years of military and political history in four different nations are the subject matter of a judicial proceeding, when nearly 700 prosecution documents (orders, reports, war diaries, photographs, and even films) are introduced into evidence, when 50-odd witnesses have personally appeared before the Tribunal and more than a thousand by affidavit, then in summation one can do little more than outline in incomplete highlights the contents of this sordid and depraved text.

Many things may be said in future days about this trial. No one enjoys the process of being tried and judged, and it would be too much to expect from the defendants praise of the fairness and detachment with which this litigation has been conducted. But it must be obvious even to them that they could not have found a more dispassionate forum anywhere in this world.

No matter what might be said by history about this proceeding, of one thing we can be sure. No fair minded critic may ever say that not all was said in these defendants' favor which might have been said.

It has been somewhat more than a year since the International Military Tribunal handed down two historic decisions involving the criminal responsibility of high ranking officers of the German Army for the outrages of German troops during World War II. In one, Keitel and Jodl were held to be as guilty as Goering and Ribbentrop for the aggressive acts and wars, with their inevitable consequences, that marked the period of German hegemony in Europe. In the other, it was held that the group of military leaders indicted as the German General Staff and High Command was too amorphous a collection to be dealt with as a group or organization. But in commenting on the evidence concerning the guilt of individual German officers the Tribunal made this clear and unequivocal pronouncement²—

“They have been responsible in large measure for the miseries and suffering that have fallen on men, women, and children. * * *

¹ Complete closing statement of the prosecution is recorded in the mimeographed transcript, 3 February 1948, pp. 9557-9718.

² Trial of the Major War Criminals, *op. cit. supra*, judgment, vol. I, pp. 278-279.

"Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense, they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said.

"Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment."

By filing the indictment here, the prosecution was in effect carrying out the mandate of the International Military Tribunal. The defendants in the dock all fit the description of those officers whom the International Military Tribunal believed should not be allowed to escape the consequences of the vile acts which they either fathered, furthered, or allowed to be carried out by their subordinates without a murmur of protest.

Since these crimes all occurred either in territory where active fighting was taking place or in territory which was being occupied by the German Army—since, in a word, they took place in areas where the German Army constituted the only real source of political or military power and where the only organizations of any kind were either directly or ultimately controlled by the army—it is only to be expected that the nature of these criminal acts follows a more or less uniform pattern. Indeed, it would be surprising if this were not the case. Most of these defendants, as has been said, served on the Russian front before being transferred to the Balkans. One does not ordinarily expect to see a total change of character and habits of thought effectuated by an individual's transfer from one place to another, especially if he serves in the same capacity in both places.

Further, the nerve center of the entire German Army was in Berlin, and German troops, wherever they were stationed, were influenced to a certain extent by the broad policy directives which issued from the OKW, so that one would expect to find, as in the case of any army, a certain uniformity of policy and, within a broad framework, certain accepted ideas and methods of action. The defendants, of course, seize on this unifying direction and attempt to balance on the pin point of the OKW a whole absurd inverted pyramid of argumentation to the effect that most of the indefensible acts committed by their troops and auxiliaries can be laid at the door of the OKW, and that they, who were mere

lieutenant generals, generals, and field marshals, were completely stripped of any discretion whatever. This tendency to minimize their own importance is a characteristic which does not appear in their biographies prior to the date the indictment against them was filed.

We will deal with this newly developed self-abasement presently. What is pertinent for the moment is that this identity of personnel, especially in the higher ranks in various theaters during the course of the war, plus this centralized direction of policy reduces the number of legal issues to be considered in this litigation.

Especially in the case of the execution of hostages is the legal issue simple and clear. The prosecution takes the position that the killing of a civilian whose only proved offense is that he or she lives in the neighborhood of a place where some unidentified person did something which displeased the German occupation power is simply murder, no more, no less. This seems to be a principle which is utterly indigestible to the defense.

We might say parenthetically that it is rather amusing that they, on the one hand, can argue with apparent seriousness that it is perfectly legitimate to drag a man out of his house, stand him up against the wall and shoot him without even asserting that he is guilty of anything, and yet on the other hand, with an equally straight face, they are able to quiver with indignation at the outrage on their private rights which was perpetrated when they were relieved of their medals by some souvenir collecting GI in 1945. But this is only one of the many spectacles of moral acrobatics to which we have been treated in the course of this trial.

And the factual issues are really little more complicated. Lifted out of the morass of detail with which the record is deliberately and unnecessarily encumbered, the case is impressive in its simplicity. The prosecution has had no trouble establishing that the German Army carried out executions of innocent hostages and other savagely disproportionate reprisal measures, that it killed prisoners of war of lawful belligerents by the thousands, and that it participated in the round-up and incarceration in concentration camps of the Jews, gypsies, and other groups classified as inferior by the philosopher friends of Hitler. It was easy to show that the army often was used as a uniformed press gang to shanghai foreign workers for the German war machine.

The only complication that arose was in showing where these men were and what positions they held at a given point in time. In order to do this, we have had to go up and down chains of command like so many squirrels. We have had to go into the

question of temporary absences from duty caused by sick leaves, holiday leaves, emergency leaves, and every other sort of furlough recognized by the German Army.

The accuracy of self-preserving personal diaries and prejudicial affidavits of orderly officers with amazingly unerring memories is somewhat more than questionable. But this defense causes us little difficulty. The crimes perpetrated were on so enormous a scale and so continuous in time that there is more than enough to go round for each defendant. Even making allowance for a few days' or weeks' absence from headquarters means at best but a slight deduction from a still staggering totality. The major characteristic which this proceeding has in common with all of the other war crimes trials heard here in Nuernberg is that the prosecution's case is based principally upon captured records of unchallenged authenticity which these very defendants, and their closest subordinates and collaborators themselves prepared, unwittingly and dispassionately enough, in the ordinary course of their business of running a war. Ordinarily, in a criminal case, documentary evidence plays a minor role. Most of the proof consists of the oral testimony of the persons who were present or near by when the crime was committed. But for the prosecution to prove by oral testimony all of the murders, and arsons, and unlawful arrests, and deportations committed by the agencies which these defendants directed was quite impossible for a number of reasons. In the first place, a person charged with a crime is ordinarily tried within a fairly short time after the act is committed. In a friendly country where the majority of inhabitants are on the side of the law and the wrongdoer is an outcast, the latter will, in the usual case, be readily apprehended. But it took several years before any one German general could be called to account for atrocities committed by his troops in the occupied territories of Europe. The bulk of the criminal acts which have been the subject of this litigation were committed between 1941 and 1944. The lapse of time and the press of events which occurred subsequent to their commission in themselves made it impracticable to attempt to give the commission of these acts by oral testimony.

Further, in the normal criminal case only one crime, or at the most two or three, are charged against the defendant; and even if more than one criminal act is involved, all of the acts will at least have taken place within a reasonably small area. The courts of one locality are generally spared the task of trying persons who are charged with having committed crimes outside its usually restricted borders. Here, on the other hand, we are dealing with

a series of deeds which are only limited geographically by the perimeter of the German Army's territorial conquests. It is not even entirely accurate to use the term "series," because some of these crimes occurred simultaneously in different parts of Europe. List and Foertsch, for example, were killing hostages in Serbia at the very same time when Kuntze, Lanz, and Leyser were executing commissars in Russia.

Finally, in the conventional murder case the prosecution is usually able to find someone who was in the vicinity of the place where the crime was committed and who lived to tell the tale. Frequently, the murders which form the subject matter of this litigation were committed in such a way that this is not possible. When twenty hostages were marched out of a camp, stood up against a wall, and shot by German troops, it was unlikely that anyone except the German troops actually witnessed the scene and lived to describe it.

The proof of the commission of a criminal act by documentary evidence has certain advantages. It eliminates uncertainty and avoids the hazards of human frailties which living witnesses are heir to, such as poor memories, mistaken identifications, and good or bad demeanor on the witness stand. It enables the prosecution to be more detached and reduces the number of controversial factual issues.

But unfortunately, though documents have some advantages, they are not entirely satisfactory. The dry and dull figures of hanged hostages, shot partisans, and helpers do not and cannot reflect the destroyed homes, shattered hopes, the disillusionment, and misery, and pathos that lie behind them. The human mind—perhaps fortunately for our own ultimate well-being—is capable of absorbing only so much tragedy. If one single murder is brought into sharp focus we can take it in, comprehend, and be moved emotionally. But when crime is piled upon crime, as has been done in this case, we are in danger of losing our sense of proportion, of allowing the meaning to blur, and our moral judgment to become numbed and ineffectual. It is only by considering a cumulative effect that one can shake off the anesthetizing influence of these documents upon one's reason and one's sensibility.

Recorded evidence is handicapped in another respect—documents cannot talk back. They cannot get on the witness stand to annihilate some flimsy explanation, to correct some obvious misinterpretation, or to contradict some outright lie. To the extent that the prosecution's case is based on documentary evidence, the defendant always has the last say. We can prove that a defendant ordered a given excess to be committed and we can prove that it was committed as a result of his order, but we can-

not prove that the defendant did not read the order which he signed or that he did not mean what he said.

But the prosecution's case does not rest entirely on documents. Despite the difficulty of seeking out and transporting witnesses from the countries where these crimes took place, the prosecution managed to produce some—a Yugoslav, five Greeks, and two Norwegians. They were unsophisticated folk of the laboring classes who simply described what they had seen done by German troops under the command of these defendants. It is unlikely that their memories were inaccurate. When a man sees practically all of his fellow villagers, including a good many members of his own family, murdered before his eyes, it is probable that the incident will make a sharp and indelible impression on his mind.

Though the German firing squads missed scarcely a man in Kragujevac during the 3 days that no Serb will ever forget, somehow they failed to kill Zivojin Iovanovitch. He lived to relate that 2,300 of his fellow townsmen were rounded up, marched off, and sent to their deaths in the last of the three 100:1 reprisal executions that makes October 1941 a blemish on German arms that can never be erased.

By sheer good fortune, Stephanos Pappas was able to give an eye witness account of the burning of his village of Konnenos and of the indiscriminate slaughter of his friends and neighbors. And in what must certainly be the most miraculous and breathtaking of all escapes, Takis Sipliopoulos told in quiet and subdued detail the story of his own execution. Had one of Felmy's executions not chanced to omit the crucial *coup de grace*, one might never have known of the massacre at Kalavritha.

The prosecution also used four German witnesses. These men were grilled on cross-examination with particular severity, but with negligible profit. It may be that one reason those witnesses stood up so well was that they knew what they were talking about in the first place.

General Felber certainly knew whereof he spoke when he discussed the nature and purpose of reprisal measures; Bach-Zelewski had more than enough experience to support his conclusions on the subordination relationship of higher police and SS leaders to army military commanders; and General Ferdinand Jodl demonstrated some courage in violating caste loyalty to denounce his one-time commander in chief for militarily unnecessary devastation in Norway. Significantly enough, in spite of the self-proclaimed opposition to national socialism of every last defendant in the dock, it remained for the prosecution to turn

up, in Willy Finger, the only genuine anti-Nazi who appeared in Court during this entire case.

Oftentimes German soldiers, not anticipating subsequent capture and search by the enemy, roguishly photographed their own gruesome work. A number of these photographs were introduced by the prosecution. Can he who had once seen them ever forget the stark horror of their reality: bent figures poised on the edge of a shallow ditch with the raised rifles a moment before the command to fire; the brutal beheading with an axe—in four separate scenes—of a captured partisan; the scattered bodies at Sabac and the German soldier calmly documenting the carnage; the grinning army troops and the burning thatched village in the background; the bodies grotesquely hanging from street poles along the main street in Belgrade; and the revealing humor of the postcard photographer of three men hanging from a tree and the perverted caption, "Trees in Bloom in Serbia, Spring 1941."

But notwithstanding the films on Greece and Norway and the photographs and witnesses from Yugoslavia and Greece, the prosecution has necessarily been forced to rely upon the verichrome records, orders, and communications of the German Army itself in order to prove precisely what the German Army did. These records were kept with no thought of damning or exculpating either their authors or their recipients. They are the most trustworthy evidence of the events to which they relate that can be imagined.

Such is the general character of the prosecution's proof. What has the *défense* adduced to meet it? Principally, their evidence has consisted of disquisitions by the defendants themselves. We will take up the general burden of their song when we discuss their common defenses. They have also brought in a number of witnesses. Most of these defense witnesses have been former subordinates of the defendants, whose self-interest and bias is so palpable that it merits no extended discussion.

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In addition, the defense has introduced several bushels of affidavits. A word about these would not be out of place. It was obviously impossible for the prosecution to call all of these affiants to the witness stand for cross-examination without prolonging the trial for another 6 months. We, therefore, attempted to choose a representative cross-section. Out of more than a thousand affiants we selected 14 and requested that they appear in Court. Twelve of them did. The result was very edifying.

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We turn now to the specific assertions and denials made by way of defense. Since most of the defendants have sought sanctuary in certain common arguments, repetition can be avoided if these are taken up generically before going into the specific use which each individual defendant tried to make of them. If a certain standard defense is invalid on general principles, it evidently is worthless in a particular application.

First, the defendants maintain that the documents do not mean what they say. Several ingenious schemes have been contrived to support this thesis. Among these is the "telegraphic style" argument. According to this, the documents must be viewed with caution and alarm because they contain numerous daily reports which were sent either by teletype or radio and therefore do not possess the same profusion of adjectives, modifying clauses, and so forth in which we have luxuriated here for the past several months. We can appreciate the abhorrence in which these defendants hold a telegraphic style. After having listened to them testify, it is obvious how painful it must be for them to read or hear anything that does not bristle with semicolons, prepositional phrases, and complex-compound clauses inserted parenthetically into the middle of the sentence just to let the speaker get his breath before he makes his last 400-word sprint to the period. But the defendants profess that the brevity and curtness of these reports leads to ambiguous interpretation. Therefore, they have all testified that these reports are in large measure completely incomprehensible to them. The answer to this is that there were no complaints made about their clarity and meaning at the time they were sent, and that they were clear enough to enable the defendants and their subordinates to operate the German Army.

But the telegraphic style argument, handy as it is, will not answer every purpose. When a daily report states that "50 men were *standrechtlich erschossen*" by German troops, there is not much doubt that 50 men were shot and that they were not shot in combat. When another report says, "200 people transferred to Zazaviza concentration camp" by a certain army unit, we have no trouble comprehending what happened. Again, when a report reads, "400 conscripted workers shipped off to Germany" by a certain armed forces unit the meaning seems to be fairly clear. The defendants dispose of this by the simple device of bringing forth a new set of definitions. They assure us that we are confused if we interpret these messages as meaning what they say. The *standrechtlich erschossen* does not mean summarily shot, but shot after court martial. "Concentration camp" does not mean concentration camp, it means collecting camp. "Conscripted

workers" really means voluntary workers. We have not been furnished with a copy of the dictionary which the defendants use but it would be interesting to know, for example, assuming the term "concentration camp" really did mean something else, what term should be used if the word "concentration camp" were meant.

If the text of any given report is perfectly unambiguous and if even the lexicographical talent which has been displayed here cannot redefine it into incoherence, the defendants still have several shafts for their bow. Generally, the first one to be shot is the nonsubordination argument. In the area of command of each corps and army, certain troops or groups of armed men were stationed all of whom were assigned some part in carrying out the German occupation but who were not technically part of the army. Among these organizations were the Security Police, the Einsatzkommandos and other elements of the SD, the indigenous troops belonging to the armies of the puppet states which the Germans had set up, as well as certain non-uniformed guerrilla groups who were technically not part of any army but who operated in close cooperation with the German forces. In one report after another the butcheries and plunders committed by these auxiliary organizations are described. It can be seen from many of these reports that these atrocities were committed while the group in question was in the course of carrying out a certain operation under the tactical command of or in conjunction with the army.

In others, it is not specifically shown that at the time these crimes were committed, the organizations involved were acting with the army in achieving a specific aim but it does appear that they were committing their atrocities within the area of a given army division, and that they were sending constant reports to that division on the nature and location of their activities. In both cases, however, the defendants disavow any responsibility for acts committed by these units.

But they go further than this in their disclaimer of responsibility. A third class of reports exists. In these, a given army division merely reports to its corps headquarters that 50 hostages have been hanged in a given locality within the divisional area. Nothing more is said. In every case where the daily report does not fix with certainty the company or battalion or regiment which pulled the trigger or tied the hangman's knot, the defendants have argued that these things were probably done by the SS, or the SD, or the police or the Ustasha, or the Kosta Pecanac Chetniks, or the Evzones, or some other unit which

was either not subordinate to the army or else was subordinate only for "tactical" purposes.

There are several answers to this argument. First, it is the prosecution's contention that when the 173d Reserve Infantry Division reports that 50 hostages were hanged and 50 shot on the same day within the divisional area and makes no mention of any of these other organizations in that connection, it is to be fairly inferred that some unit of the 173d Reserve Infantry Division did the hanging and the shooting. The defendants all deny that this was so. They say that the division reported everything that happened within its area, whether it was done by the division or not, and that unless the report puts the finger squarely on the second platoon of company C of the 1st battalion of the 1st regiment of that particular army division no responsibility can be fixed.

We submit that this is an affront to common sense. Time and again these defendants have testified to the way that indiscriminate mistreatment of the population and ill-advised executions, arrests, and deportations by the police and the SD merely added to the army's difficulties in keeping the population pacified and subdued. On the other hand they have testified one after the other that reprisal measures properly directed and carried out with sufficient force had a most salubrious and soothing effect on the natives.

Now, assuming what they have said to be true, does it make sense that an army division, in reporting the execution of a reprisal measure within its area to corps headquarters, would simply report that 100 people had been hanged if it thought that corps headquarters would have any doubt as to who had done the hanging? If this had been the case, the reports would have been less than meaningless. Corps headquarters would have had no way of knowing, when it received intelligence of the occurrence of one of these massacres, whether to expect calm and tranquility in that particular area for a while or whether to anticipate new outbreaks of rebellion, acts of sabotage, and attacks on German troops and installations. Moreover, when a particular action was committed by any of these extraneous agencies, the division's report precisely said just that. We contend that the only sensible interpretation to be placed on one of these reports made by an army division in which the carrying out of a reprisal measure is described is that the reprisal measure in question was carried out by that division, unless some other group is specifically named, and that in fact corps headquarters when it received such a report placed that identical interpretation on it.

But let us, as devil's advocate, assume for the moment that the chaotic system which the defendants claim was actually followed in making these reports and that corps headquarters or army headquarters, when it received the news that a few hundred hostages had been liquidated in the area of a certain division, had no way of knowing who had ordered and carried it out or what its consequences were likely to be. Are these defendants to be exonerated from responsibility for these outrages which were committed by their satellite organizations? When the relationship between these organizations and the army is examined it will be seen that it was the army authorities and no one else who were in a position to forbid, avoid, and prevent those slaughters from being committed.

First, let us take the relationship between the army and the Croatian Domobrans. Shortly after the Germans invaded Yugoslavia the so-called independent state of Croatia came into being. As one of the defense witnesses said, "Germany created the state of Croatia." It was and remained a puppet state of the expansive Third Reich. Any doubt as to this would be quickly quieted by the tone of unctuous servility in which the communications addressed by the Croatian Government to the army occupation authorities were couched. The convenience of establishing such a state from the German standpoint is so obvious that it scarcely need be mentioned. By this simple device the German Army transformed itself from a conquering army stationed in occupied territory to an "allied" force invited to remain in the common struggle. As such, it could step out from under its obligations to the civilian population. As such, it could sponsor the formation of a Croatian Army to be used for its own purposes while at the same time masking its own reeking activities behind the facade of Croatian marionettes.

The nature of this parasitic regime, made up of jackals and scavengers who would stop at nothing, not even the murder of thousands of their innocent countrymen for the few bones which fell from the German table, is so evident that one wonders how anyone can stand in this courtroom, as at least six persons have already done and as three persons will certainly do during the next several days, and hold forth to this Tribunal about the "independent Croatian Government."

But we are not so much interested in the general nature of the Croatian Government as we are in the relation which the Croatian troops bore to the German commanders. To begin with, the Croatian Army was organized and trained by the Germans. Their officers and men, as the documents here show, were screened by the Germans so that all "unreliable elements" could

be purged. Once they were trained, they were then equipped and armed by the Germans, and then sent to their permanent stations by the Germans. Now, since all of the "independent state of Croatia" was included in the area of one of the three German army corps stationed there, and since each of those corps were divided into divisional areas, no matter where the Croat troops were stationed they were bound to be in the area of some German division. Within the divisional area, the Germans indicated where the Croat troops were to be stationed and what their tasks were to be, whether it was the guarding of a bridge by a Domobrans unit or the patrolling of a railroad line by a detachment of Ustasha.

Then, from time to time, the Croat units would be notified that the German troops intended to carry out a certain tactical operation. Usually these operations consisted of "mopping-up" or "combing out" certain areas in an effort to reduce the activities of the partisans, either by destroying their hospitals and bases of supply or by arresting all the able-bodied men in the locality. The Croat troops in such an operation were assigned a certain definite role to play in conjunction with the German troops. When the operation was finished, the German divisional commander would then instruct the Croat troops to take up their old stations and resume their railroad security activities or whatever else they had been doing.

This is what Rendulic, Dehner, and Leyser mean when they say that the Croat troops were not "subordinate" or that they were only "tactically" subordinate to them. It is precisely what Lanz, Felmy, and Speidel mean when they correspondingly deny responsibility for the excesses of Greek "volunteer" units. In both cases the evidence is irrefutable that these sets of gangsters were, from start to finish, no more than the uniformed tools and hirelings of the German Army. Dehner and Leyser repeatedly protest that they could not order a member of the Domobrans to be tried by a German court martial. In that, they may be technically correct—but neither, for that matter, could they order a German soldier to be tried before a court martial. Only a divisional commander could do that. But who is so naive as to believe that a divisional commander dictates to his superior at corps headquarters? The record here shows that the power of the German corps commanders in Croatia was such that they could even remove the Croatian civil officials when it pleased them. It is utterly fantastic for them to say that they could take no measures to curb excesses committed by these Croatian janizaries.

We have singled out the relationship between the Domobrans,

which was the regular army of the Croatian "independent state," merely as an illustration. What we have said about them applies with equal force to the Ustasha, the Croatian counterpart of the Waffen SS. It applied with perhaps even more compelling force to the groups of Serbian nonuniformed irregulars—the Kosta Pecanac, Danzic, and even certain branches of the Mihailovic Chetniks—who were armed and used by the German Army whenever it suited their convenience. It applies, in short, to all of the countries in southeastern Europe in which the Germans set up puppet regimes and used indigenous troops to murder their compatriots. The relationship between a principal and an accessory before-the-fact to murder does not depend on the word "subordination", and the use of that term as these defendants here attempt to apply it to these indigenous troops is as false as the premise upon which it rests, i.e., the myth of the independence of these puppet governments which were installed and kept in power solely at the whim of German arms.

The defendants seek also to escape responsibility by the use of their famous subordination principle for the acts of units of police troops which operated within their areas of command. The witness Korn exploded the theory of the independence of the police troops from army jurisdiction. According to him, during the 18 months he was in the Southeast the police troops only once carried out an operation alone, that is to say, without the help of the army. The police troops received their ammunition, transport, and supplies from the army and it was impossible, he said, for the police to carry on an operation of any size or importance without first obtaining the consent and approval of army authorities. This is fully borne out by what the witness Bach-Zelewski had to say of the close cooperation between the police troops and the 1st Cossack Division in the course of Operation "Arnim." The defendants say that they were not informed of the activities of the police, but the documents show that the police periodically reported to the army on precisely what they were doing.

The defendants say that they and their army subordinates protested against the activities of the police from time to time. They may have done so, but that their protests were not based on any humane considerations was shown by the testimony of one of the defendant's own witnesses, General von Behr, who testified that he as divisional commander objected to the activities of the police only because they were not carried out with enough troops to be really effective. In other words he was not protesting against the severity of the measures taken by the police, but because they were not severe enough. Of further

importance is the significant fact that evidence of these protests is strangely missing from the captured German army documents.

The next group which operated within the area of the armed forces command were the Einsatzkommandos of the SD. The defendants now disclaim any responsibility for what these people did and say that they had no idea of their operations, and no means of curbing them even if they had known. This, of course, flies into the teeth of the many documents here which show that on most of the large scale mopping-up operations carried out by the army, units of the SD were attached to each army unit for the purpose of screening the inhabitants, cleaning up the rear area after the army troops had advanced, and taking care of the persons who were arrested and who were subsequently to be transferred either to concentration camps or hostage camps or shipped off to Germany for forced labor in factory and mine. The SD was the most murderous and dreaded organization in Germany, with the possible exception of the Gestapo, and it is understandable that the defendants are a little sensitive when it is pointed out that the German Army and the SD frequently worked in close cooperation. But the proof showed beyond any doubt that close harmony existed between the two organizations and that when the army had any need for the special services which the SD was so expert in furnishing, they joined hands and worked together as on a common enterprise.

Finally, the defendants seek to throw as much of the blame for this complex of outrages as possible on their favorite whipping boy, the Waffen SS. Here again it is claimed that the army had no authority over the SS except in a purely "tactical" sense. One example is sufficient to show how elastic this term "tactical subordination" is, as used by the defendants. The Court will remember General von Leyser's description of the partisan attack on an armed truck convoy in Albania, in the course of which three German female employees who were being evacuated from Tirana were captured. From the war diary of the XXI Mountain Corps we discover that an SS Oberfuhrer has ordered an SS major to burn down some villages in the locality of the attack and to kill the population. The report goes on to say, "The approval of the corps is still missing. Major Frank asks whether the corps agrees to the carrying out of these reprisal measures and asks for an immediate reply." Two days later a report shows that the SS Division Skanderbeg is holding hostages, who were presumably seized in connection with this same attack. Still later, we find corps

headquarters directing the SS Division Skanderbeg not to carry out the shooting of 50 hostages, because such an action might jeopardize the negotiations with the partisans for the return of the three German women.

Now, if the SS was only "tactically subordinate" to the army, then we can only conclude from this report that the shooting of hostages and the burning down of villages are to be considered as strictly tactical measures. Obviously, the SS would not have asked the corps for permission to do these things unless it was necessary to obtain permission from the army before doing it. This one representative example, an illustration which could be multiplied many score, will suffice.

SS atrocities occurred not in spite of army opposition but because they were an integral part of, and consistent with, German Army occupation policy. But even when "disciplinary" as opposed to "tactical" jurisdiction of the army over one of the conventional scapegoat agencies is proved—as was the case with Felmy and the Rosenberg detachment operating within his area of command in southern Greece in 1941—then we are told, surprisingly enough, that "disciplinary" authority is of no particular importance since it refers only to such minor questions as proper dress, military courtesy, and the like. Thus, when army commanders have it, "disciplinary" authority is essentially unimportant, but when they don't have it, it assumes proportions of importance limited only by the defendant's endurance and vehemence of speech.

The Tribunal should keep in mind in considering all of these attempts to shuttle the responsibility from the army to one of these other organizations that we have been told time and again by these defendants and their witnesses that within a given divisional area the division commander was held primarily responsible for everything that happened and that he was the highest German authority there. The same was true of the corps commanders to an even greater extent. The German Army was always by far superior in numbers, power, prestige, and influence to any of the other units which have been mentioned. The fact that the police, the SD and indigenous troops are named in these reports show that the army authorities were kept fully posted on their activities. Without the full knowledge and consent of the army these organizations could not have come into a given divisional area at all, much less functioned independently after they got there.

The picture which has developed from the exaggerations made by these defendants in their effort to shift responsibility from the army to other agencies is completely ridiculous. We are

supposed to believe that within any given sector assigned to an army division, there were all sorts of odd groups—police, SS, the SD, various units of indigenous military and semi-military personnel, and even certain elements of the armed forces, themselves, such as parts of the notorious Brandenburg Division, wandering around, stumbling over each other, getting in each other's way, and working at cross purposes. They would have us understand that these units simply marched over the division area at random, hanging, shooting, burning, and plundering without giving the division any idea who and where they were, what their purpose, and how they were achieving it. Merely to sum up this description is enough to demonstrate its absurdity. If this were actually what took place, then it would have been the Germans much more than the Croats, Serbs, Albanians, or Greeks who were the partisans. The truth is, as we have already shown, that the commanding officers of the army possessed all of the power necessary to restrain these auxiliaries and they not only had the power but also the duty, since it was they who were primarily responsible for maintaining peace and security within their areas of command. Since they had both the power and the duty to prevent these outrages, it is they and no one else who should be held accountable for their having occurred.

We pass on now to the next excuse offered by the defendants—that they were ignorant of the commission of these crimes. When they are asked to explain a daily report from one of their subordinate units which mentions the burning down of several villages, or the hanging of a dozen-odd hostages in reprisal for an attack on a truck convoy or a railroad blasting, they say it is very difficult for them to do this, because although this report was made to their own headquarters they did not read it and only saw it here at Nuernberg for the first time. How often have we listened to that enervating chant, "I learned of these things for the first time here in this courtroom."

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But it is not necessary to go into a detailed analysis of all the wonders to which we have been treated in the course of the attempts made to bolster these professions of ignorance. These men were the highest ranking members of the German Army within their respective areas. But even if they did not know of this constant campaign of terror and murder of the civilian population being carried out by their troops, reports of which were being sent to their headquarters at least daily, and usually, twice a day, it makes no difference from a legal standpoint. They were charged with the duty of knowing it. It was their

business to know what was being done by their troops, and they cannot escape the responsibility for these atrocities by saying that they did not bother to read what was furnished them for the specific purpose of allowing them to know. This interpretation of the duty of a commanding officer is not novel. In *United States vs. Oswald Pohl, et al.* [Case No. 4, Vol. V *this series*, p. 1011], the Court said, "The law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war." That Tribunal pointed out that the Supreme Court of the United States had already announced this principal in the *Yamashita* case.

Another popular fable is the sick leave or holiday explanation. This is given in two different situations. In the first one, the defendant formulated an order for some criminal acts, passed it on to his subordinates and then went to the hospital or took a few days' leave. In this courtroom he takes the position that no blame can be attached to him if he was not actually sitting in his office at the time the culpable act was carried out. That such an argument is even put forward shows the desperation of the person making it. If a terrorist leaves a time bomb with a 24-hour fuse in a London railroad station and 10 people are subsequently killed by the explosion, it is hardly a legal defense to the charge of murder that the man who planted the bomb was in Dublin when it went off. This is precisely analogous to the argument which the defendants make here.

Then there is another situation in which the holiday or sick leave argument is advanced. Here the defendant himself did not actually give the specific order before he left his headquarters. It was given either by his chief of staff or by whoever happened to be his responsible deputy during his absence. The defendant, therefore, disavows any responsibility for the order even though upon his being advised of it, he took no steps either to rescind it, to reprimand the officer who actually signed it, or to forbid the issuance of similar orders in the future.

Now one can well imagine the subsequent fate of a subordinate who, having temporarily taken over his superior's duties during a short absence, attempted during that time to issue an order to kill people without having first assured himself that any orders of this kind would meet with his superior's full approval and be ratified and defended upon the latter's return. Yet these defendants seriously argue that every time they went to the hospital or to the homeland for a few days their chiefs of staff or deputies not only issued orders without their knowledge and

approval, but indeed issued orders which effected a complete reversal of all policies which had been announced and followed previously. If this had been the case, it would have been necessary for every commanding officer in the German Army to stay awake and alert 24 hours a day, 7 days a week, in order to insure against one of his subordinates bringing about a complete shambles every time he turned his back.

This last variation of the holiday-sick leave argument is merely one of a number of means which have been employed in an effort to achieve the same end. The end is not very pretty, but then these defendants are in no position to pay too much attention to aesthetic considerations. The aim is simply to shove the responsibility for these crimes on to their fellow officers in the German armed forces. They will first try to place the onus on the police or the SS, but if that maneuver is too farfetched, they then cast about to find some other German army officer to bear the blame. As was to be expected, their first choice for the role of scapegoat is generally some officer of lower rank than their own, such as a divisional commander. But if that is not feasible, then as a last resort they say that the responsibility rests with their superiors. Then does every defendant, be he a full army or but a corps commander, conveniently place himself in a pivotal position from which he can, as the winds seem to blow, pass criminal responsibility either up or down the military pyramid.

Now this is all a ticklish business, of course, and has to be approached with care and circumspection. It is not strategically advisable simply to blame any superior officer who may be lying around handy. After all, the German Army must be vindicated, and that aim cannot be accomplished if all of its high ranking officers are to be smeared with accusations of participating in the kind of indefensible butcheries that we have heard discussed here. So a technique has been devised to meet the requirements of the delicate situation. In blaming their superiors, the defendants here have been careful to do one of two things: they have either phrased their language in vague, corporate terms by saying that the High Command of the Army or the OKW was responsible, without naming particular individuals; or else, if it seemed more expedient to unload the blame onto a specific individual, they have been careful to choose individuals who are dead.

First, take the case in which their subordinates have been selected to bear the responsibility. This excuse is patently based upon a deliberate distortion of the whole concept of military organization, not only as it was known in the German Army but in every army in the world. When the general of an army issues

an order, it is to his corps commanders that he looks for its execution. If the order is disobeyed or clumsily carried out, it is the corps commander who is called on the carpet. Perhaps the order was not carried out because some major general was derelict in his duty. Possibly the fault is really that of some colonel or major.

But an army commander is not disposed to be interested in first causes. It may be that for want of a nail the shoe was lost and that eventually for want of the shoe the battle was lost. But neither the blacksmith nor the horse is held accountable by the commanding general. He is not interested in hearing that an order miscarried because of the obstinacy or stupidity of a divisional commander. If a corps commander attempted to render such an explanation he would be told nine times out of ten that it was his job to have discovered the divisional commander's inadequacy long before and to have sacked him and replaced him with some more capable person.

This is not only the practical way in which an army operates but it is the only logical way. All armies are pyramidal in their organization. There is not time for an army commander or an army group commander to call a convention of all his divisional and regimental leaders every time he issues an order. The function of the corps is to make this unnecessary. The corps commanders are told what they are supposed to do and there, so far as their superior is concerned, the matter ends. If this were not so, the phrase "chain of command" would have no meaning. Aside from the fact that it is more than a trifle cowardly for these men to try to shift the responsibility to their subordinates for having executed orders which these men passed on after they were received from higher headquarters, the whole concept is grotesque.

Then take the case in which they have blamed their superiors. The prosecution has already pointed out in its brief that the plea of superior orders is no defense at all. We shall not repeat here the abundance of authorities which we have already cited in support of our position on this legal issue. But a few remarks should be made with reference to some of the testimony on the subject.

The defendants themselves have not been consistent in the stand which they have taken on the issue of obedience to superior orders. Several of them are charged with having carried out the notorious Commissar Order. Every one of those has steadfastly denied that troops under his command summarily murdered political commissars in compliance with that unquestionably criminal mandate. All have admitted having received the order or

at least having been apprised of its contents. Now it should be remembered that the Commissar Order was a *Fuehrerbefehl*, which is to say that it was issued by the highest possible authority. Yet the defendants say that they deliberately neglected or refused to obey it because they felt it was illegal, unsoldierly, and inhumane, or because they believed it would have the precise opposite effect from that which was intended. In that matter they insisted upon substituting their own judgment for that of Adolf Hitler and Field Marshal von Brauchitsch. Yet the very defendants who have testified in that vein about the Commissar Order have said that they had no right to forbid or discourage the shooting of hostages because hostage executions had been ordered by the OKW.

Another general observation might be made about the testimony which has been offered on the superior order defense. Except for Brigadier General von Geitner, the lowest ranking defendants in this dock were lieutenant generals who commanded between 50,000 and 100,000 troops. Career officers who spent their lives learning their profession, they obtained their rank because in the opinion of their superiors they possessed the intelligence and judgment which the responsibility of such a position demanded. Within the framework of the broad directives given to these men, they were allowed and expected to exercise a wide discretion in carrying out their duties. We could hear testimony until doomsday that a lieutenant general or a general or a field marshal was only a loud speaker through which the commands of his superiors were amplified or echoed and it would still not be convincing.

If these men had disagreed with the policies which were being executed within their respective spheres of command, whether such policies affected the treatment of the civilian population, the discipline of the German troops, or the political and racial programs behind the directives handed down from higher echelons, that disapproval would have manifested itself immediately in a hundred different ways. If they were the tools through which the murderous theories of Streicher, Himmler, and Hitler were implemented, it was because their compliance was completely voluntary. The criminal liability for what they did cannot be shunted up the line.

A corollary of the superior order defense is the one predicated upon the assumption of the legality of orders emanating from Hitler and the OKW. Every defendant, without exception, has said that when such orders reached him, it never occurred to him to question their legality no matter what the subject matter or how severe the measures prescribed. They argue that there was

a multitude of legal experts at OKW headquarters in Berlin and that they could not be expected to doubt that every OKW order had been subjected to the scrutiny of these jurists before it was sent out.

One would have to be credulous indeed to believe that professional soldiers with decades of active service and the experiences of a previous World War behind them were so ignorant as not to know that orders which denied the belligerent status to their enemies, which forbade the taking and indeed commended the execution of prisoners of war, and which established arbitrary hostage execution ratios of 50 and 100 to 1 were in patent violation of every recognized standard ever set by civilized nations for the conduct of warfare. This plea would have no validity as a legal defense even if we believed them. The maxim *ignorantia juris non excusat* is as well recognized by the criminal codes of the continent as it is by Anglo-American law.

But how can one possibly accept this argument as sincere? High ranking military judges were readily available at army and division, and in Lanz' case even at corps headquarters if legal advice had been desired, which it clearly was not. Moreover, none of these very defendants, as they were eager to point out, assumed that the Commissar and Commando and Military Mission orders were valid, even though they, too, stemmed from the evil triumvirate in Berlin. Nor, on other occasions, when they were anxious to demonstrate their basic humaneness, did they hesitate to describe their misgivings about those same hostage, reprisal, and band warfare regulations whose legality they insist had to be presumed. Consistency is a word which apparently is not found in their dictionary.

Along with superior orders, military necessity is the most basic of the defenses herein advanced. This defense is almost always yoked together with a long description of what the defendants call "Balkan mentality." We have been told that this peculiar "Balkan mentality" is incomprehensible to the western European mind; that all of southeastern Europe is populated by uncivilized savages who are and were incapable of appreciating the finer things of life such as the presence of 20 or 30 divisions of German troops whose only purpose was to act as missionaries of culture and to protect these helpless people against an invasion by the American, British, or Russian "enemy." We have been told that the disappointing response of the Balkan peoples to all the advantages of a German occupation was proof in itself that that occupation was a positive boon to the region. The Serbs, Croats, Montenegrins, Albanians, and Greeks have been depicted as having had only one desire—to murder as many Germans and as

many of each other as possible. We have been informed that the racial and religious hatreds which exist between the various groups in the Balkans are so deep-seated and bitter that had it not been for the Germans they would have annihilated each other wholesale. This is the picture of "Balkan mentality" as the defendants have painted it.

From this they go on to say that in dealing with such a situation ordinary measures were insufficient. To the last man, all of these defendants have testified that in their opinion it was impossible to govern in Yugoslavia and Greece without the use of reprisal measures. The execution of hostages, the burning of villages, and the shooting of captured partisans was, therefore, a case of military necessity.

The argument of the defense of military necessity is unconvincing here for several reasons. In the first place, it is the prosecution's contention that the plea of military necessity can never be used as a defense for the taking of an unarmed civilian's life, if he is innocent of any hostile conduct against the occupying power. Paragraph 24 of the American Army Field Manual [FM 27-10, 1940, Rules of Land Warfare] correctly states the accepted definition of that term in international law. It reads:

"* * * Military necessity admits of—

"a. All direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of war."

The emphasis of the word "armed" in the text necessarily excludes from the class of persons whose killing may be justified on the grounds of military necessity persons such as those who were used by the German troops as hostages.

In the second place, it is inconsistent to attempt to defend the same action by the plea of superior orders and also by that of military necessity because the two are mutually exclusive. If an act was committed solely because of superior orders, then presumably there was no military necessity for doing it; whereas if it was done because of military necessity, it would have been done anyhow regardless of the existence or nonexistence of superior orders.

In the third place, the defense of military necessity flies into the teeth of all the available evidence here. In addition to the oral testimony of such witnesses as General von Greiffenberg, Bach-Zelewski, and even General Winter, there are among the documents many complaints made by responsible German officers, who pointed out that the technique of reprisal measures had proved to be a boomerang in that it resulted in a stiffening of

partisan resistance in the areas where these measures were carried out.

We need not here go into a long refutation of what the defendants have said about "Balkan mentality." They were not in a position while in the Balkans to get a very clear or detached view of it, any more than the Balkan peoples were able to view from a favorable vantage point what could be conceivably argued to be a unique German mentality. The mentality of the Serbs, the Croats, and the Greeks was undoubtedly a source of frustration and bafflement to the defendants, just as perhaps the British mentality was. Whatever the present or future relations between the United States and the governments of Yugoslavia, Albania, and Greece may be, the tenacious and inextinguishable spirit with which these people resisted the German occupation, sustained for two long and bitter years only by their own determination, will always be remembered as one of the greatest demonstrations of courage displayed during this or any other war. Resistance against enslavement has absorbed a good deal of these people's time during the past 100 years. It has been less than a century since the Serbs and Greeks threw off the Turkish yoke, and scarcely more than 2 decades have passed since those same heroic Serbs battled unaided for almost 4 years against the armies of the Triple Alliance. The Germans knew this, of course, when they invaded Yugoslavia, but these defendants and their brother officers thought that by applying von Clausewitz's theory of unrestricted warfare with sufficient ruthlessness they could break the spirit of these long suffering people as even the Turks had failed to do before them. The long record of crimes which have been described at the bar of this Tribunal are the natural result of the practical application of this method of restoring quiet to the Balkans. It not only failed but it stirred up such a hornet's nest of resistance that tens of thousands of soldiers desperately needed elsewhere were immobilized to do nothing but garrison and police duty—all because of this obstinate "Balkan mentality."

The contention predicated and the allegedly binding effect of the surrender of the Greek and Yugoslav armies is just as infirm as the other so-called defenses. General Tsolocoglu who signed the capitulation agreement on the part of the Greek Epirus Army was not the commander in chief of that army but only its deputy commander in chief. Further, there is no evidence whatever that Tsolocoglu was authorized either by the Greek Government, headed by King George II, or by the actual Commander in Chief of the Epirus Army to sign that capitulation agreement. The defense had not even attempted to prove who signed the capitulation agreement on behalf of the Greek Thracian Army

or that that capitulation too was authorized by the Greek Government.

The situation is even clearer in the case of the capitulation of the Yugoslav Army. The surrender agreement there was signed by the former, and deposed, Foreign Minister of Yugoslavia, Cincar Markovic. The Commander in Chief of the Yugoslav forces, General Simovic, who was simultaneously Prime Minister of King Peter's government, not only did not sign the agreement of surrender of the Yugoslav armed forces but had previously fled the country along with the rest of his cabinet for exile in England. In this case not even the deputy commander in chief of the Yugoslav armed forces, General Kalafatovic, signed the agreement of surrender to the Germans. So much for the facts regarding the defense based upon the capitulation of Greece and Yugoslavia.

The legal theory of the defense on this point seems to be this—when an officer signs an agreement of surrender, even though he is not only not authorized but specifically forbidden from doing so, then it is unlawful thereafter for any of that officer's countrymen under any circumstances to take up arms against the conquering power. If this reasoning is valid, then all of the American forces in the Pacific after April 1942, could have been treated as *francs-tireurs* simply because General Wainwright, their fellow American, had surrendered on Corregidor. Before the defendants can justify themselves for having refused to accord belligerent status to a particular partisan on this ground, it must first be shown that the partisan in question had formerly been a member of the Yugoslav Army and was, therefore, constructively bound by the surrender agreement. One need not labor the obvious by remarking that no such proof had been offered.

The defense with respect to these capitulation agreements has still a further flaw. It was said that following the collapse of Greek resistance in April 1941, the Greek prisoners were allowed to return to their homes with the understanding that they would not in the future take up arms against the conqueror. Prisoners of war, who are set at liberty on parole, are bound, on their personal honor, scrupulously to fulfill the engagements they have contracted. Presumably one of those engagements which the surrendered Greek soldiers contracted to fulfill, though the evidence is flimsy to say the least, was to never again take up arms against Germany. But even if any evidence of such a parole agreement at the time of the surrender of the Greek forces had been made by the defense, it would not be binding here for several reasons. First, prisoners of war may be set at liberty on parole

only if the laws of their country allow and there has, of course, been no proof of what Greek law is on this matter.

Furthermore, there can be no parolling on the battle field, no parolling of entire bodies of troops after battle, and no dismissal of large numbers of prisoners by a general declaration. Even if one accepts the scant proof offered by the defense on this point, it can scarcely be doubted that this forbidden type of parole was exactly the kind that the German Army there adopted at the time of the Greek surrender.

In addition, a prisoner of war cannot be *compelled* to accept his liberty on parole nor is the hostile government obliged to accede to the request of a prisoner to be set at liberty on parole. There has been no proof that the Greek Government in exile ever consented to or ratified the discharge of captured members of the Greek Army on parole—even if there was any such discharge on the part of the German Army at that time. The only evidence adduced by the defense would indicate that the Greek prisoners of war were merely disarmed and sent home without further ado to save the German Army the trouble of feeding them.

Further, the conqueror has certain duties and obligations to perform to the conquered even in a case of an unconditional surrender. The making of an unconditional surrender does not free the victor from his obligation to observe international law; and when the Germans commenced their campaign of indiscriminate shootings and hangings of the civilian population, even former members of the Greek and Yugoslav armies—who had given their individual paroles, if such there were—were perfectly justified in using whatever means they could to rid their country of this plague.

The last of the common defenses is to the effect that since the partisans were not entitled to the status of lawful belligerents, the German Army was not bound to follow the rules and customs of war in combating them. The defendants themselves have skirted the fringes of some of the subsidiary arguments involved here rather cautiously. For example, none of them has been willing to rest his contention that the partisans were unlawful upon any one ground.

In the face of the German intelligence reports concerning the organization, strength, armament, and location of the partisan units, the names of their officers, the elaborate courier, postal, judicial, and governmental administrative systems in force in the large areas under their control, it is hardly arguable that the partisans were not a regular and highly effective military, political, and economic organization which is the basic test for

determining whether an enemy group is entitled to the status of a belligerent.

The defendants have realized how feeble it is to maintain that the partisans were not militarily organized and have fallen back on the completely irrelevant complaint that the designations which the partisans gave to their units, such as battalions, regiments, and brigades, did not correspond to the German nomenclature. It is perfectly apparent that in Yugoslavia, for instance, the partisans had a perfectly well defined chain of command which went from Tito down to every company and platoon. If from time to time a small unit of partisans was cut off from the main body of troops to which it belonged and was unable to communicate with them, they were no more disorganized for that reason than were segments of the German Army which were frequently in the same situation.

It is unnecessary for us to take up here the other subsidiary contentions which have been made—those to the effect that the partisans were not in uniform, did not carry their arms openly, and systematically violated the laws and customs of war. It is enough to say that the evidence which has been produced to support such arguments smells very strongly of *ex post facto* justification. Time after time the documents mention that the partisans wore uniforms or readily identifiable insignia. The defendants say that this may have been true, but that the uniforms were not standard; that the distinguishing insignia of the Tito and Mihailovic partisans in Yugoslavia and the Edes and Elas Andartes in Greece were not identical; that some of them wore parts of German, Italian, British, and American uniforms. But what possible factual difference could that have made then, or what legal difference now? The Hague Rules prescribe no standards of sartorial elegance. The object of the rule requiring the use of a uniform is to enable a combatant to recognize his enemy. And in Yugoslavia or Greece it was distinctly understood that anyone who wandered around in a uniform had invited himself to become a target, regardless of its cut or color.

The fact of the matter is, of course, that no matter how elegantly the partisans had dressed, they would have been shot upon capture in any event. List made that incontestably clear when he admitted that un-uniformed Kosta Pecanac Chetniks were permitted to collaborate with German troops against the Tito and Mihailovic partisans, and Foertsch was even more forthright when he testified that the German Southeast Command concerned itself only with considerations of military expediency and not the Hague Rules in dealing with the partisan problem.

One word as to the testimony about partisan tactics. One examines the official reports and records of the German Army in vain if his object is to find descriptions of mutilations inflicted by the partisans. Yet the defendants have produced several pounds of affidavits describing these things in detail. We have tried to reconcile the strange silence in the official reports with this endless recital in the affidavits. The simplest and most likely explanation is that the events described in them also have as their factual basis some paper that was lying on General Dehner's, or General Kuntze's, or General Geitner's desk that the affiant did not read.

This interpretation is bolstered by the disparity between fact and testimony which occurred in the case of the Instructions of the Communist Party of Serbia for Band Warfare. List, Kuntze, the Foertsch testified at length that they had read captured copies of these instructions and that the gist of them was to encourage and incite the partisans to mutilate German prisoners and kill German wounded. Then the defense, peculiarly enough, produced these very instructions from the mass of documents which were sent from Washington. There was not a single word in their entire 10-odd pages which by any stretch of the imagination would have been construed to mean what the defendants testified they themselves had read in them.*

So much for the common defenses and explanations, which like a loud yet dissonant chorus, the defendants all chanted together. We turn now to a necessarily incomplete and undetailed review of the main evidence for and against the individual defendants.

* * * * *

MR. FENSTERMACHER: These then are the wicked men and this the depraved record of their crime in five countries for 4 years.

Since the various aspects of the legal issues involved in these proceedings have already been stated in the prosecution's two memoranda, there is no need here to tread that ground again. The defendants would have this Tribunal deny the right of a people to fight back against a temporary conqueror, no matter how flagrant his aggressor or how cruel the regime of his occupation. Such a result would surely encourage some future tyrant to make his bid for world domination. Moreover, it is not for the defendants now to complain of violations of international law which were allegedly committed against them. It was their own violations of international law—the mass executions, exploitation, destruction, to say nothing of the initial violation of

* See enclosure, "Partisan Warfare" (Doc. List 202, List Def. Ex. 46), p. 951.

Greek and Yugoslavian sovereignty—which gave rise to the resistance which these defendants now contend was beyond the pale.

The rights and privileges of an occupier under international law do not accrue simply because a land is declared conquered and occupied. The occupation must be effectively maintained. It is precisely on that issue that the legal arguments of the defense on the unlawfulness of partisan resistance breaks down. One need not go into all of the details here. But the fact does remain that the initial conquest of Greece and Yugoslavia was not maintained. If what the defendants say is true that they could have, at any given moment and for any given place, subdued the partisan opposition, one naturally asks why that was not done. The very fact that each of the defendants has testified to having loudly and continuously pleaded for troop reinforcements is in itself a complete admission of the military failure of the German occupation.

After the plenitude of documentary evidence submitted here, it would be supererogation to set forth again all the reasons why the Greek and Yugoslav guerrilla forces were entitled to recognition as lawful enemy belligerents. That they were recognized by the Allied forces as such, and indeed that these defendants themselves urged similar recognition upon their own government is much too clear to necessitate further argument.

The prosecution has also argued that the execution of hostages is unlawful *per se*. That fact is recognized not only by the specific statute under which this proceeding is brought, but by preexisting, international law as well.

The defense has attempted to dispute our contention that Control Council Law No. 10 is a correct statement of existing international law on the hostage question by introducing evidence of alleged executions of hostages by the Allies during the last war; but none of the evidence which has been brought forward proves what it was advanced to prove.

The rebuttal witness David Bernstein made the defense testimony regarding an alleged American announcement threatening the execution of the hostages at a 200:1 ratio complete perjury, and the affidavit of Franz Karl Maier did likewise with respect to the supposed 5:1 hostage order said to have been publicly posted in Stuttgart by the French occupation authorities.

The evidence indicating that four hostages were executed by French troops in the village of Reutlingen in retaliation for the death of a French soldier is ambiguous and indefinite at best. The placard which was posted following that supposed execution of hostages stated that "those responsible" for the shooting had been apprehended and shot. It is certainly not clear beyond doubt

that any hostages were ever executed by the French at all. Moreover, if hostages were really shot on that occasion, it was in flagrant violation of section 21 of the French Army regulations which provides only for the taking and not for the execution of hostages.

The attempt to prove that the Control Council Law is an inaccurate statement of international law by demonstrating that the American Army considers the execution of hostages not to be unlawful met with a similar lack of success. The entire file of the American 6th Army Group on the question of the American attitude towards the order of the French general, LeClerc, in Strasbourg which provided for the execution of 5 hostages for each French soldier killed by snipers in that city is a complete refutation of the defense attempt. The LeClerc proclamation was in effect not more than 24 hours at most. As soon as American authorities heard of it, it was rescinded for the very reason that it was in violation of international law.

A supposed execution of hostages in the city of Markdorf was also alluded to. But in that case too, the evidence of the defense is on its face irrelevant. One affiant stated that no hostages were executed at Markdorf but rather that German soldiers dressed in civilian clothes had been captured and dealt with obviously as spies.

It is apparent, therefore, that not one single hostage execution was proved to have been carried out by the enemies of Germany during the entire war. But even assuming for the sake of argument that there had been violations of international law on the part of Germany's opponents, that still would not destroy the validity of the law under which we are proceeding. It is a common place to say that two wrongs do not make a right. To assume that the organized planned and governmentally-authorized executions of hostages which the Germans committed, even if individual, sporadic, unorganized, and unauthorized hostages killings were carried out by the Allies, could rescind or make ineffective international law upon the subject is, of course, illogical in the extreme. If international law ceases to be such because of sporadic violations, there will never be any such law, no legal system could survive such a theory. Under the defense theory of how international law is made the criminal himself could prevent the enactment of the very law which would make his act unlawful. The criminal then, by his negative action, could in fact annul any attempt by the rest of society to make him responsible for his deed.

But even if the execution of a single hostage were not a crime in itself, the evidence of the numbers of hostages killed and the

ratios employed which has occupied the attention of this Tribunal for these 7 months would sustain convictions against each one of these defendants. The defense here has sought to avoid the application of hostage law to this evidence by advancing the theory that these executions are justifiable under the doctrine of reprisal. But not a single one of the criteria which govern the taking of reprisals was met in the case of these defendants. By their own testimony, the question of the lawfulness of their measures was completely irrelevant. Every minor German officer was permitted to order reprisals that were not only completely disproportionate, but based solely on revenge as well.

Our interruption of the law with respect to superior orders and military necessity has also been set forth in great detail elsewhere. The number of cases in which the defense of superior orders has been held not to confer immunity from criminal responsibility are legion. And General Winter, a defense witness, gave the lie to the plea of military necessity when he told the conference of chiefs of staff on 9 December 1943 that if reprisal measures were to be made effective, then the "really" guilty had to be sought out, and that the execution of hostages and the levelling of entire innocent villages would merely bring about an increase in the bands. It is precisely because of the military stupidity of the heavy-handed policy that the Germans were eventually forced to withdraw from the Balkans.

There then are the facts, the law and the men with which we have been concerned over this extended period. How they shall be punished for their ruthless offenses against humanity is to be decided by this Tribunal in its wisdom. It may be true that the defendants did not each commit crime in the same degree or to the same extent. Murder is murder whether it be committed singly, by tens, or by tens of thousands. It is no defense to Leyser that he did not kill on the same scale as List and Kuntze. Each executed commissar is still an open violation of the most fundamental precept in the soldier's code—an enemy who has laid down his arms in surrender may not be killed because he wears a particular emblem on his sleeve.

If the Tribunal believes that comparisons between this case and others are instructive, there are many examples and precedents which merit examination. A number of the colleagues and subordinates of these defendants have had to answer for similar crimes or similar charges—Loehr, Kuebler, and Neidholdt in Yugoslavia, and Braeuer, Mueller, and Andrae in Greece. Others have been called to very severe account on charges very much narrower than those which have been brought, and we submit,

amply proved in this case. Field Marshal Kesselring¹ and Generals Mackensen and Maelzer² were sentenced to death, and then reprieved to a life sentence, because of a single large hostage execution at a ratio of 10:1 in Rome in 1944, and because of certain general orders with respect to the treatment of Italian partisans which were in effect for only a short time and were not nearly as wantonly brutal as the orders issued and enforced by these defendants. Other generals have been convicted of capital offenses because of their responsibility for the killing of Allied airmen who had been forced down in Germany, and General Anton Dostler has been tried and shot for the execution of American Rangers in compliance with the criminal mandate of the Commando Order.³

The task of making the punishment fit the crime is the task of this Tribunal not of the prosecution; but the prosecution cannot say that it believes the action taken in these other cases to have been unreasonable or unduly severe, and we suggest that willful participation in a systematic and preconceived program of crime, such as has been proved in this case, is, from the standpoint of world society, a far more serious offense than responsibility for isolated or spasmodic criminal outbursts. Charity and forgiveness are among the divine attributes of man, but they, like all other capacities, must be exercised with intelligence and discrimination or they lose their meaning. We must not allow false mercy here to insult the hundreds of thousands who lie buried in Greece, Yugoslavia, and Norway because of what these men did; justice must be wise and firm as well as merciful.

One might perhaps have been more moved to feel pity for their fate had any one of them shown the slightest sign of remorse or given the faintest indication of repentance for what they have done. But in explanation and excuse they have only pointed out the personal, national, and international tragedies which intruded upon their lives. They, all of whom served in the First World War, say that they returned to a milieu of hopelessness and collapse, that they were subject to political, economic, and social forces of crushing impact and titantic magnitude, and that they are the hapless victims and the whipped and irresponsible products of a confused people in a disturbed and bewildered world. It is this philosophy of emotional fatalism which has made their proffered excuses of individual and collective guilt so cowardly and contemptible.

¹ See Law Reports of Trials of War Criminals, *op. cit. supra*, vol. VIII, Case No. 44, Trial of Albert Kesselring.

² *Ibid.*, Case No. 43, Trial of General von Mackensen and General Maelzer.

³ *Ibid.*, vol. I, p. 22, Case No. 2, The Dostler Case.

Their fault, like Brutus', lay in themselves and not in their stars. It was their individual response to their own individual situations which marked their failure. It is not because they were soldiers, nor because they have lost, but because they were not men that we ask now that they be permitted to reap the full harvest of that which they so conscientiously sowed.

These men have disgraced themselves, so shamed their own profession and their country that it will be decades before the world will be able to think again in terms of the Germany of Schiller, and Heine, and Mendelssohn, and Brahms. It is not their individual fates for which we now feel concern. Their power for evil has already been broken. None of them will ever lead the legions of the German armed forces again. But if what they have done is not branded as criminal, if the myths they seek so desperately to perpetuate are not clearly labeled as such, if the facade of starched respectability behind which they seek to hide is not disclosed, then another generation of Germans may rise to revere them, accept their ethics, and say they did no wrong.

The real complainant at this bar is civilization. Let its plea be granted; let those who would destroy it be punished; let the laws be upheld.

PRESIDING JUDGE WENNERSTRUM: I take it that you have concluded your presentation of the argument on behalf of the prosecution?

MR. FENSTERMACHER: That is right, Your Honor.

PRESIDING JUDGE WENNERSTRUM: The Tribunal will be in recess until 9:30 tomorrow morning.

B. Extracts from Closing Statement for Defendant List*

DR. LATERNSEER (counsel for the defendant List) : Your Honors, may it please the Tribunal. In the long series of trials which have been held against leading members of the German Officers' Corps, the trial against Field Marshal List is a new, and in many respects, an especially remarkable one. Once again in a mass trial a number of German generals are called into the lists to face an enemy Tribunal, and sometimes it seems as if the chain of these trials will not be broken until the lists of the highest commanders in American custody are exhausted and they are all condemned.

* Complete closing statement is recorded in mimeographed transcript, 4 February 1948, pp. 9719-9874.

The only question now is how future generations will judge this new attempt at a penal apprehension of the events of a gigantic world-wide war.

There is no doubt that the methods of warfare during the course of the years have intensified increasingly. This applies, however, to both sides. But the cases in which deviations were made from the ground of international law were completely different. As far as violations of definite fixed rules of international law were concerned, I am the last man to dispute the right to take proceedings against the perpetrators. As far as matters which lack adequately clear rules about which there can be no misconception are concerned, the legal position must be judged in a fundamentally different manner.

The charges against Field Marshal List belong exclusively to the second group. They refer to spheres in which the provisions of international law are either still entirely undeveloped or are elastic or contradictory. By grouping their trial with the large chain of Nuernberg Trials, it falls to the lot of men, who up till now have rejoiced in a blameless name and reputation, to be placed together with the leading exponents of the NSDAP and the SS.

This attempt by the prosecution to implicate officers with those who bear political responsibility contradicts historical facts.

The German soldier and officer has always enjoyed the highest respect among soldiers throughout the world because of their military ability and their generally acknowledged chivalry in waging war. These qualities have also been recognized by the enemy in this war, and in this connection, I should like to refer to Field Marshal Alexander, who confirmed the fair and praiseworthy waging of war in the Italian theater.

May it please the Tribunal. The defendants did not don their uniforms for the first time during the National Socialist period. In fulfilling their duty throughout decades, it was their one desire to uphold the ideals of German soldierdom, its principles of decency and purely objective tasks, and to perform them in the face of all the new developments of the Hitler regime which were occurring around them and expanding more and more.

These centuries of old German army tradition which—as Field Marshal List often expressed to his confidential colleague General Olbricht, who was executed for participation in the attempt on Hitler's life—“were an unbridgeable gap” between officers and the exponents of the Hitler regime. Is he supposed to have thrown all this overboard shortly before the end of his long period of service, and to have become a war criminal?

Is it possible for men of such origin, with such careers and such development as Field Marshal List and the other defendants, suddenly to become criminals?

Is it credible that these men subordinated themselves to an alleged plan to decimate or to exterminate the population of occupied countries?

Here, too, history in its own way will seek and will find the truth, and in so doing will take into account the unique, difficult situation in which these men were placed.

It will also discover that the Nuernberg prosecution in its one-sided method of observation has not properly tracked down causes and backgrounds, has overlooked vast implications, and in many cases has looked at things upside down.

How would it be possible otherwise for these men to be implicated in plans which are completely alien to their disposition, and for it to be completely disregarded that all these officers were far removed from the ideology and logic of the Hitler regime?

During this trial, the defense considered it its task to show how things were in reality—how Field Marshal List was never a Nazi general, how he was always opposed to the exponents of the Party and its organizations, and how more than once there were serious conflicts between him and Hitler. The unbridgeable opposition between the two finally led to the premature discharge of Field Marshal List in 1942. His whole past experience removed him clearly from Hitler, his people, and the National Socialist ideology. These facts did not prevent the prosecution from attributing to Field Marshal List motives and plans which were always alien and unknown to his whole being.

I address an urgent appeal to the Tribunal not to follow the prosecution along this road, but to keep the following facts in view: When Field Marshal List left the army, he had 44 years of an honorable career behind him; and he enjoyed the highest esteem not only at home, but abroad as well. Persons of the most varied nationalities were among his pupils, and missions from many countries participated in military maneuvers under his command. None of the literature as yet published concerning the events of the Second World War contains one single unfavorable word about him.*

A man who can produce all these facts to speak on his behalf does not suddenly become overnight a murderer and a pyromaniac who rejoices in torturing and oppressing occupied countries and innocent civilian populations drawn into the miseries of war! I think it not only a cardinal rule in the procedural law of civilized

* Compare notes in von Hassel, *From the Other Germany*. Ambassador von Hassel was sentenced to death for participation in the attempted murder of Hitler on 20 July 1944.

countries but also a natural commandment of judicial fairness to attribute unfair motives to a man with such a past only on the basis of quite definite evidence. I must stress this fact here at the very beginning because essential parts of the indictment will then appear from the start in a different light.

Your Honors, in this connection I have reason to refer to the instructive course of events which followed the verdict in the case of Field Marshal Kesselring. It was the prosecutor himself who, at the beginning of this present trial, mentioned the strong differences of opinion which arose in England concerning this verdict. The violent opposition which it called forth there must constitute food for thought for every jurist. This verdict met with such disbelief and so much indignant rejection in England because people saw in it a striking contradiction. The condemned man was known to the world as an able soldier and an honorable man, and his former enemies on the Italian front did not hesitate to testify for him in public to this effect during the trial and after the pronouncement of the verdict. All this refers to the same man who was supposed to have been guilty of the basest war crimes.

It is encouraging evidence of the alertness, the sensitivity, and the profound awareness of law in the British people that they reacted immediately to this contradiction and took their authorities to task for this striking sentence.

In its detailed comment on the sentence against Field Marshal Kesselring, from which one can see the profound uneasiness of British public opinion concerning this sentence by the British Military Tribunal, the Manchester Guardian wrote on 22 May 1947 that considerable doubt must arise as to whether and to what extent German generals can be made responsible for the events of the war.

“There is an uncomfortable feeling that we have sentenced these men to death because they are figureheads, the commanders of a defeated army whose execution would satisfy the public clamour for revenge. But that is not justice as we understand it.”

My request to you, Your Honors, is that, when making your concluding evaluation of the case in question, Your Honors proceed from the desire and the firm purpose not to be influenced in the least by the prejudices and insinuations of the prosecution, and always bear in mind the sort of personality Your Honors are dealing with in Field Marshal List.

* * * * *

There have always been aggressive wars, and a nation's right to defend itself has never been disputed. It is just as certain that this right has always been bound to certain recognizable forms. Just as it is in the nature of man to defend himself, so it is a primordial rule of war that the civilian population must not take part in the struggle. If they do they should know that they must expect the most stringent countermeasures, and they ought to know that. This is a very harsh but a very natural law. It springs as much from human nature as from the essence of war as we have been able to trace it as a sociological phenomenon in human history. This law has always been valid and the belligerent population and those who influence its behavior would do well always to bear it in mind.

The rule that the population is not allowed to take part in the fighting dates back to Cicero. Professor Wheaton writes in this connection:¹

"Cicero tells us in his '*offices*,' that by the Roman feacial law no person could lawfully engage in battle with the public enemy without being regularly enrolled and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would be indeed greatly aggravated if every individual of the belligerent states were allowed to plunder and slay indiscriminately the enemy's subjects without being in any manner accountable for his conduct."

Professor Spaight has analyzed this problem in some detail in his fundamental *War Rights on Land*. He writes *inter alia*:²

"Though the sparing of a peaceful population is a fairly modern growth in war usage, the refusal of combatant rights to nonmilitary people is almost as old as history; it is mentioned in '*De Officiis*'."

Professor Spaight then goes on to quote Kipling who puts the following words in the mouth of an Indian Sikh, the embodiment and spokesman of a tribe of fighters:³

"It is manifest that he who fights should be hung if he fights with a gun in one hand and a *purwana* [a permit given to non-combatants for their protection] in the other."

Professor Spaight comments on this:

"There is a whole chapter of war law—its history and its principle—epitomized in these words."

¹ H. Wheaton, *Elements of International Law* (Carnegie Endowment for International Peace, Washington, 1936), p. 379.

² J. M. Spaight, *War Rights on Land* (MacMillan, London, 1911), p. 37.

³ *Ibid.*, p. 38.

Modern history provides numerous instances to show that the violation of this principle has entailed dire consequences for the population in an invaded or occupied territory, there being, as Professor Spaight remarks, “* * * ample evidence of the universality of an invader’s war right to punish popular resistance with a heavy hand”.¹

I shall mention a few instances in which there is obviously no question of “Prussian Militarism,” a term which in this connection is frequently quoted with some relish.

In 1792, the French occupation army in Switzerland suppressed an uprising in the Canton of Nyderwalden [Nidwalden] by a punitive expedition of cruel harshness, no prisoner being taken. After the rising had been quelled, the French General Schauenburg issued the threat to the other cantons in the heart of Switzerland that “upon another uprising, everybody offering resistance will be killed and homes and farmsteads burnt down.”²

Eleven years later, appeals to rise against the French occupation army were issued in Tyrol. The plea for this rising was described as “self defense” and the “right of self defense” in the official proclamations. The insurgents were denied recognition as belligerents. In 15 May 1809, Napoleon ordered:

“* * * that all Tyroleans possessing arms be shot and hanged upon capture, and that, whenever within an area, village, district, or territory under the jurisdiction of a court, a dead soldier is found, the entire valley or area or territory under the jurisdiction of the court be burnt down within 24 hours, the most prominent inhabitants thereof be hanged on the next tree even if they be found without arms.”³

In 1814, the Duke of Wellington threatened the French frontier villages that he would burn down the villages and have the inhabitants hanged if they supported the partisans.⁴

A most informative instance of the natural reaction of an invasion army to hostile acts on the part of the population is provided by the American Civil War. On 24 December 1864, General Sherman wrote in a letter to General Hallek:

“This war differs from European wars in this particular; we are not only fighting hostile armies, but a hostile people,

¹ Spaight, *op. cit. supra*, p. 40.

² Correspondence of Peter Och, 1796-99, No. 331, vol. 2.

³ Proclamation of the Duke of Danzig, 15 May 1809, quoted from Meurer, *The Hague Peace Conference*, vol. II, p. 66.

⁴ I. C. Bluntschli, “Das Moderne Voelkerrecht der zivilisierten Staaten,” 2d Ed. (Noerdlingen, 1872), p. 519, quoted in J. W. Garner, *International Law and the World War* (Longmans, New York, 1920), vol. II, p. 643.

and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies.”¹

“The people must be left nothing but their eyes to weep with over the war.”²

The Swiss historian Bircher writes in his book *War without Mercy* about General Sherman: “In his instructions he gives the following typical order: ‘The roads, the horses, and the people have to be destroyed.’”

In his memoirs General Sherman himself writes as follows:

“Before we left Carolina, the soldiers had become so used to destroying everything which was on the route of the march that the house in which I had my headquarters frequently burned before I had left it.”

The following remark was made by General Kilpatrick, the commander of Sherman’s cavalry:

“Only the ruins of what used to be human dwellings shall prove to future generations that Kilpatrick’s horsemen came this way.”³

A few years before that (1860) a “well informed” author—so designated by Spaight—pointed out:

“* * * that attacks by the inhabitants of an invaded country directed against the hostile troops would recoil with terrible effect upon their own heads. ‘Men, women, and children sacrificed, the innocent as well as the guilty, houses burned, and property was plundered and devastated—all are considered legitimate retribution for actions of aggression by an unorganized population.’”⁴

Time has spread its cloak over these events. They have lost their harshness and have disappeared from human memory. I have referred to these remarks only because they show in an incisive and direct fashion the reaction which is called forth all too easily if the population participates in the battle against an invading army. They are convincing proof for the correctness of Professor Spaight’s statement to the effect that—

“* * * those who claim for every citizen the right to take arms at his pleasure against an invader are really striking at the roots of all clean and civilized war.”⁵

¹ Sherman Memoirs, p. 226, quoted by Spaight, *op. cit. supra*, footnote, p. 35.

² Higgins, *War and the Private Citizen* (P. S. King and Son, London, 1912), p. 65.

³ George Ward Nichols, *Story of the Great March* (Harpers and Brothers, New York, 1866).

⁴ *Blackwoods Magazine* (1860), vol. 88, p. 612, quoted by Spaight, *op. cit. supra*, p. 39.

⁵ Spaight, *op. cit. supra*, p. 38.

That is the *grave* responsibility of those who incited the Greek and Yugoslav populations—after the surrender of their armed forces and after the occupation of their countries—to fight against the German occupation army, thereby violating international law, and it is also the responsibility of all those who promoted and supported such warfare from abroad, thus preventing the speedy reestablishment of law and order in the occupied territories.

The delegates to the Brussels [Hague] Conference of 1899 and of 1907 have keenly dealt with the problem of participation by the indigenous population in the fight against an invading or occupying enemy army. Regarding the result there is no serious disagreement among the authorities on international law, and the unequivocal attitude of the governments with regard to this problem can be seen from the military manuals of the United States and of Great Britain, both of which deny the rights of belligerents to insurgent populations.¹

It is true that at the Brussels Conference of 1877 [1874] as well as at both Hague Conferences the deputies of various small and medium size states stood up for far-reaching recognition of the right of their population to fight against an invading enemy. They referred to tradition, history, and to the patriotic feelings of their fellow citizens while forgetting the practical consequences which have always been brought about by the participation of the civilian population in combat. The well known Belgian expert on international law, Rolin—the President of the Institute for International Law and Referent of the Commission for the Law of Land Warfare at the Hague Convention of 1899—immediately after the Brussels Conference expressed the warning and pointed out that the insurrection of a population was a means of combat—“which should not be regarded in the heroic light of certain famous episodes but with an eye to its miserable and common reality.”²

None of these conferences of the great powers, as has been asserted, had the intention to deny a population its natural right to defend its fatherland. The attitude taken by their deputies was rather in agreement with the laws of war which have applied as legal usage particularly with regard to the problem of participation by a population in the fight and its insurrection in occupied territory, and this attitude took account of the interests of the populations in a far more realistic manner than the somewhat pathetic views of some of the deputies of smaller nations.

One has to bear in mind that Article 85 of the “Instructions for the Government of Armies of the United States in the Field” of

¹ Rules of Land Warfare. U. S. Army Field Manual 27-10 *op. cit. supra*, pars. 12 and 349; British Manual of Military Law, Rules of Land Warfare, ch. XIV, art. 29.

² *Revue de Droit International* (1875), p. 109 ff.

1863, written by Professor Lieber just eleven years previously at the request of President Lincoln and almost literally reproduced in paragraph 349 of the American Rules of Land Warfare of 1940, above being the first codification of martial law which, with regard to insurrections in occupied territories formulated the then valid law very accurately, reads as follows:

“War rebels are persons within territory under hostile military occupation who rise in arms against the occupying forces or against the authorities established by the same. If captured they may be punished with death, whether they rise singly or in small or large bands, whether or not they have been called upon to do so by their own expelled government, and, in event of conspiracy to rebel, whether or not such conspiracy shall have matured by an overt act of hostility.”

The Russian suggestions for the Brussels Conference were based to a large extent on those instructions from 1863. The fact that Article 74 of the Russian draft was withdrawn owing to the objections raised by Belgium, Holland, and Switzerland was a compromise only as far as the form went but not in essence.

The manual of the Institute for International Law, issued in 1880, which was mentioned by the prosecution in its Memorandum of Law¹, was not a codification but—strictly speaking—merely the work of the experts represented at the Institute. Having been accepted in a meeting of the Institute in Oxford, on 9 September 1880, the manual was made available to the governments of Europe and of the United States with the suggestion that corresponding provisions be incorporated in the instructions to be given to the armies. The above-mentioned provisions of the military manuals of the United States and Great Britain prove that the suggestion contained in the manual that insurgents in occupied areas be afforded the rights of prisoners of war was not approved by the governments.

During the Hague Conference in 1899, the small states, this time supported by England, renewed their struggle for the recognition of an unrestricted right of the population for self-defense. The Belgian representative, Beernaert, requested that Articles 9 and 10 of the draft² (Articles 1 and 2 of the Hague Conventions of 1899 and 1907), which limit the conditions for a legal resistance of the population and of irregular units, be eliminated.

The Russian president, Martens,³ opened the discussion in the meeting of 20 June 1899, during which the differences of

¹ Prosecution's Memorandum of Law, English text, p. 11.

² La Conférence Internationale de la Paix, La Haye, 18 May–29 July 1899; Ministère des Affaires Étrangères, La Haye, 1899, French text, vol. III, p. 112.

³ Fedor Fedorovich Martens, Russian Jurist, 1845–1909.

opinion clashed, and he outlined the point of view of the large powers.¹ He declared that the "holy right of the nations" for defense was to be impaired by no means. Articles 9 and 10 were only to provide that a duty, which was equally incumbent on all nations, was to be duly fulfilled, namely to ascertain the essential conditions under which a nation was to be permitted to participate in a war, and thus to avoid unnecessary bloodshed. He closed his statement with the words—

"It is not our task to limit patriotism; it is solely our task to establish by common agreement between the nations the rights of the population as well as the conditions to be fulfilled by those who want to fight legally for their fatherlands."

The Swiss representative, Colonel Kuenzli, recognized the fact, which Martens had already stressed, that according to the existing customs of war any insurrection had up to date been countered with equal ruthless severity. Colonel Kuenzli therefore moved that reprisals against open armed resistance of the population in occupied territory be forbidden.² He withdrew that motion after the British representative, General Ardach, moved that a special article was to establish that the right of defense of the population in a territory which had been invaded by the enemy was to be neither reduced nor destroyed by article 10.³ This motion was also withdrawn after the German representative, Colonel von Schwarzhoff, objected to it, and even after the Belgian representative, Beernaert, and the representatives of Denmark, Sweden, Norway, Holland, Rumania, and Italy opposed an attitude such as was demanded by General Ardach to be expressed by the article to be included in the Regulations, and after only Switzerland was prepared to vote for the British motion.

Thus Articles 9 and 10 of the Brussels draft became international law as Articles 1 and 2 of the Hague Rules for Land Warfare of 1899 and 1907. In 1907, however, the recognized right of the population of occupied territory to rise against an approaching enemy was qualified by the conditions that arms would have to be carried openly.

The results of the Hague Conferences with respect to the question of an insurrection of a population in occupied territory have been formulated very clearly and unequivocally by Professors Oppenheim and Lauterpacht. In the well known commentary "International Law" the following is stated after a discussion on Article 2 of the Hague provisions:

¹ *Ibid.*, p. 151 ff.

² *Ibid.*, p. 154.

³ See Prosecution's Memorandum of Law, English text, p. 12.

“Totally different, however, is a levy *en masse* of the population of a territory already invaded by the enemy, for the purpose of freeing the country from the invader. Article 2 of the Hague Regulations does not cover this case, in which, therefore, the old customary rule of international law is valid, that those taking part in such a levy *en masse* are liable to be shot if captured.”

We assume that the provisions of the military manuals of the United States and Great Britain concerning insurrections in occupied territories contain the official opinions of these two states about the status of international law with respect to this particular question. They read as follows:

Paragraph 12 of the American “Rules of Land Warfare”—

“Uprisings in occupied territory.—If the people of a country, or any portion thereof, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.”

Paragraph 349—

“War Rebels—War rebels are persons within territory under hostile military occupation who rise in arms against the occupying forces or against the authorities established by the same. If captured they may be punished with death, whether they rise singly or in small or large bands, whether or not they have been called upon to do so by their own expelled government, and, in event of conspiracy to rebel, whether or not such conspiracy shall have matured by overt act of hostility.”

Paragraph 29 of the British Rules of Land Warfare reads as follows:

“* * * They are exempt from the obligations of being under the command of a responsible commander and wearing a distinctive sign. It must, however, be emphasized that the inhabitants of a territory already invaded by the enemy who rise in arms do not enjoy the privileges of belligerent forces.”

Concerning this question the most prominent authorities on international law and the competent military agencies, including those of the United States and Great Britain, are in agreement—certainly not because they want to restrict the rights of the nations to defend themselves or because they are followers of a narrow doctrine. Instead, their opinion is based on the realistic recognition of the basic fact that war exists, which Spaight formulated as follows:*

* Spaight, *op. cit. supra*, p. 37.

“The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable.”

The events in Yugoslavia and Greece were a very impressive proof of the decisive importance of the principle which had been basically recognized for some considerable time. This principle was violated during the war in the Balkans by Germany's enemies to an extent never equaled in history. In Yugoslavia as well as in Greece, the civilian population was incited to rise against German occupation forces by powers constantly instigated and supported from abroad. One glance of history ought to have sufficed in order to realize the consequences which this, according to a fundamental law of war, was bound to entail for the population.

It is not without significance to note that this realization, even before the last war, was also shared by the nations who, as recently as at the Hague and Brussels conferences, had ardently advocated a very far reaching recognition of the right of their population to rise against an invader. I have already mentioned that at the Hague Conference of 1899, Switzerland was in the end the only country prepared to vote for the far reaching motion of the British representative. The Swiss view has meanwhile undergone a radical change. Please listen to the opinion of an eminent soldier of that country which owes the preservation of its independence and its great prestige in the world as much to the courage of its inhabitants, so often proved in history, as to their shrewdness.

In 1927 the Swiss chief of the general staff, Oberstdivisionaer Sprecher von Bernegg, stated in a lecture on the question of a people's war:

“The claim that such a rising by any rules can no longer be sustained today after the 1907 Agreement has provided the means of procuring belligerent rights to all participants in the fight, if they want to take the trouble of availing themselves of this means. Besides, the consequences entailed by an unlimited popular participation in the fighting must be realized. By that, the opponent will be forced to see an enemy in every inhabitant and to attack every locality, even if it be at first undefended, and in any case to destroy it because its inhabitants claimed the right after invasion by the enemy to use their hidden arms on guards, trains, and noncombatants. That would no longer constitute war, but wholesale murder.”

If one wants to make war humane one must not make such wild demands. The conclusion from this realistic consideration,

in which other high-ranking Swiss officers concurred too, was drawn in the Swiss Service Regulations of 133, Article 5 of which states :

“Troop commanders and authorities will explain to the population that everyone who wants to participate in the fighting must do so as a member of the army. They will refer the volunteers to those authorities who are authorized to enlist them.”

The assertion that Yugoslav and Greek resistance was merely the consequence of violations by the Germans of the obligations to which an occupation power must adhere and that all acts of resistance of the Yugoslav and Greek populations had occurred only after the German occupation power had violated its obligations according to Articles 43 and 46 of the Hague Regulations, is incorrect. Quite apart from the fact that the attempt thus to make the offenses against international law committed by the population appear lawful is more than dubious from the point of view of international law; the facts submitted during these proceedings make it quite clear that the contrary was true. Everything we have heard in these proceedings shows plainly that all measures of the German occupation forces were defensive and constituted countermeasures by which, as the prosecution itself has stated, the German occupation forces attempted to reestablish peace, law, and order in Yugoslavia and Greece.

The population of Yugoslavia and Greece did not resist because it wanted to defend itself against the conduct of the German occupation armies, which was allegedly contrary to international law, anymore than was the case in other theaters of war where German troops fought the partisans. It has rather been established that the partisan movement was called into existence by the Allies because it was considered to be one of the most essential factors in order to vanquish Germany.

Even the German orders, directives, and reports which have been submitted to the Tribunal by the prosecution as well as by the defense in great numbers suffice to show that such was the case. They give an unequivocal picture of the situation which the commanders of the German armed forces in Yugoslavia and Greece were facing, and it can be seen from them why the above-mentioned commanders were compelled to take defensive measures. These orders and reports prove clearly that the German countermeasures were caused by the illegal conduct of the population and by the partisan activities and that the contrary was not the case as has been asserted here.

Where is there an order to the effect that Yugoslav or Greek citizens were to be executed without mention having been made that previous to it German soldiers had been murdered and acts of sabotage perpetrated by the population? Where is there a report which does not prove that the German countermeasures were merely the consequence of such surprise attacks against the occupation forces? Where is there an order which directs the arrest of Yugoslavs and Greeks and which does not, at the same time, show that the arrest is to take place for reasons of security, sabotage acts, and murders of German soldiers having occurred because of partisan activity? Where is there a message or report which does not confirm that the arrests concern hostages, the taking of which is permissible under international law, or the interning of suspicious elements and such parts of the population which represented a potential danger to the German armed forces, or at least could have done so, and furthermore in areas threatened by insurrections, where surprise attacks against the German armed forces had occurred or partisan activity had been uncovered?

We only have to look at the most important orders, and we will find this unequivocally confirmed.

The first order issued by General Boehme as German Plenipotentiary General in Serbia states that the beginning of the German campaign in Russia was for Serbia a signal for a new insurrection, to which hundreds of German soldiers had already fallen victim.

Paragraph 1 of the order of Field Marshal List, 5 September 1941, concerning the "Suppression of the Serbian Insurrection Movement" (NOKW-084, *Pros. Ex. 42*)* reads:

"The situation in Serbia does not seem to eliminate the possibility of a spread of the insurrection movement. Increased attacks on soldiers and armed forces installations by strong, well armed bands apparently organized and adroitly led, prove that previous countermeasures are not adequate.

"Commander Serbia and LXV [Higher] Corps Command consequently are to make all preparations *immediately* to enable them to cope with any aggravation of the situation and to *pacify the country completely before the beginning of the winter.*"

The OKW order dated 16 September 1941 concerning "Communist Insurgent Movement in the Occupied Territories"

* Document reproduced in section VB,

(*NOKW-258, Pros. Ex. 53*) summarizes the results of reports received by the OKW in the following statement:¹

“Since the beginning of the campaign against Soviet Russia * * * Communist insurgent movements have broken out. The forms they take have increased from propaganda measures and attacks against individual members of the Wehrmacht to open revolt and widespread partisan warfare.

“It is established that it is a question of a *centrally directed mass movement* which also must be held responsible for minor isolated incidents in territories quiet up to now.

“In view of the manifold political and economic tension in the occupied territories one must also assume that *nationalistic and other circles* will exploit this opportunity to cause difficulties for the German occupation power by joining the Communist revolt.”

The teletype of Field Marshal List, dated 4 October 1941, issues regulations concerning the “Treatment of the Male Population in the Insurgent Areas Cleared of Partisans”. (*NOKW-203, Pros. Ex. 70.*)²

The order by General Boehme, dated 9 October 1941, concerns the “Cooperation of the Military Courts in the Suppression of the Uprising in Serbia”. (*NOKW-271, Pros. Ex. 76.*)

His order, dated 10 October 1941, also deals with the “Suppression of Communist Insurgent Movement”. (*NOKW-557, Pros. Ex. 88.*)³

I have selected only orders dated during the initial periods of the occupation. All orders issued later show the same picture.

In the reports from the troops about countermeasures which had been carried out, we read again and again that the measures were carried out “in reprisal” as “retaliation measure,” “in retaliation of,” “for the murder of,” “in retaliation for the murder of,” “for the attack of,” etc.

Numerous other documents which have been submitted during this trial and testimony of witnesses have only confirmed what messages and reports have shown, which were written under the immediate impression of the events of the time. In view of all this, where is the proof for the assertion that the Germans had been the first ones to violate their duties as occupation power, and that all acts of resistance of the population had merely been the reaction?

¹ Ibid.

² Ibid.

³ Ibid.

I have already described the situation which prevailed at the time when Field Marshal List was appointed Armed Forces Commander Southeast on 23 June 1941.

It may be expedient at this point to give once again a clear picture of the development.

Scattered surprise attacks on members of the German occupation army, murders of German soldiers, and sabotage acts took place in Yugoslavia very soon after the termination of hostilities and the occupation of the country. Indications of the formation of partisan bands became apparent in several areas before any kind of countermeasures were taken. Surprise attacks were carried out by individual members of the Yugoslav population and apparently also by former members of the Yugoslav armed forces, who had declared despite the capitulation of 12 April 1941, thus violating the capitulation agreement "that they would continue their resistance," as the prosecution stated in its opening statement.

Neither in Yugoslavia nor in Greece were any reprisal measures carried out during the initial period of the occupation; neither were any steps taken which even in the most unfavorable interpretation could be designated as a violation of the duties of the occupying power toward the population. This fact has to be regarded as refuting convincingly the unfounded assertion that the resistance activity of the population had been the consequence for the violation of responsibilities which are incumbent in an occupation army towards an occupied population.

The sudden and simultaneous flare-up of sabotage and partisan activity which started with the beginning of the German campaign against the Soviet Union shows clearly the causes and motives for illegal resistance activity, the combating of which was the concern of German commanders in Yugoslavia and Greece during the next 3 years. It was apparent even at that time that the attempts at insurrection were mainly incited by Communist propaganda. The immediate aim toward which this policy was directed was a relief for the Russian Army, which was involved in heavy fighting. We know today, too, that this insurgent activity against the German occupation armies was only the first step along the road to an ulterior goal, and the seizure of governmental power by Marshal Tito in Yugoslavia and the events along the northern frontier of Greece which have concerned statesmen for 2 years and have been discussed in the Security Council and in the meetings of the United Nations were merely steps along this road.

The events in Greece also prove the incorrectness of the assertion which argues that German reprisal measures caused counter-

actions on the part of the insurgents. The reports of the 164th Infantry Division, concerning events in northern Greece in the autumn of 1941, show unequivocally that there, also, partisan activity had resulted in German countermeasures, and not vice versa. This is further proved by the result of the German measures. The Commander Salonika-Aegean, to whom the 164th Infantry Division was subordinated, reported on 3 November 1941:

“The energetic treatment had its effect; at the end of the month an apparent easing of the situation is noted.”

It was possible at that time in Greece to nip the insurgent movement in the bud. During the subsequent period there was complete quiet and order until the end of 1942 and the beginning of 1943. Even Russian parachutists found no basis for their activities there.

Having established that the right for the Yugoslav and Greek population to resist against the German occupation forces can be concluded neither from the concept of an unlawful war nor from alleged violations of international law on the part of the Germans, we now approach one of the most important questions in international law at issue in this trial. That is, the question of the status of Yugoslav and Greek resistance forces, especially the partisans. It is obvious, for instance, that justification of the execution of captured partisans and also justification of German reprisal measures, which were aimed at suppressing partisan activity, depend on the illegality of the formers' status.

I do not believe that during the examination of the indicted German commanders the Court will have gained an impression other than that of a firm conviction on the part of all defendants that the partisans in Yugoslavia and Greece had no claim to the status of legal combatants. If we examine the reasons which caused these men in their capacity as soldiers to deny the partisans a status of legal combatants, we shall find that certain facts, stressed by the defendants again and again, such as capitulation, occupation, and noncompliance with Article 1 of the Hague Rules of Land Warfare, actually force us from the point of view of international law to regard the Yugoslav and Greek partisans as illegal combatants. That means that captured partisans do not have to be afforded the rights of prisoners of war, and that instead, they had forfeited their lives and that reprisal measures could be taken for the purpose of suppressing partisan activity.

For the same reason, of course, the status of individual civilians and nonorganized bands of snipers is of interest. They also committed numerous surprise attacks, murders of German sol-

diers, and acts of sabotage against installations and communication lines of the German occupation forces. However, the problem is less complicated with respect to these persons than it is with respect to partisan units, which at a later date showed a certain amount of organization and some of which might have complied in this or that respect with the provisions of Article 1 of the Hague Rules of Land Warfare. The illegality of resistance activity carried out by individual persons or nonorganized groups of civilians is so obvious that I can be very brief in dealing with it.

The prosecution has—in connection with the legality or illegality of the resistance activities against the German occupation forces—laid considerable stress on the problem of an actual and effective occupation. The prosecution contests that the German occupation of certain parts of Yugoslavia, and for the period of time after August 1942 of certain parts of Greece also, was an effective one. From this assumption the prosecution concludes that not all of the German troops occupying Yugoslavia and Greece were entitled to the rights of an occupant of these countries. For the same reason certain duties which in the normal course of events have to be observed by the population of an occupied country toward the occupation powers were allegedly not to be imposed on the population of Yugoslavia and Greece.

It is obvious that the illegality of resistance activity which entitled the enemy army to punish the perpetrator and to carry out reprisal measures can be based on two completely different factual circumstances—

1. Either on the effective occupation of the area where the resistance took place, or
2. Independent of the occupation, merely on the fact that those who offered resistance did not hold the status of legal combatants.

The concept of effective occupation refers to the legality of military government in enemy territory. This is particularly stressed, for instance, in the introduction to chapter 10 of the American "Rules of Land Warfare." Effective occupation transfers to the occupant the governmental authority or power to exercise some of the rights of sovereignty with regard to legislation, administration, and jurisdiction for the duration of the occupation. It follows that the occupant can demand such obedience from the inhabitants of occupied territory as may be necessary for the security of his forces, for the maintenance of law and order, and for the proper administration of the country. As Professor Fenwick* puts it—

* Fenwick, *op. cit. supra*, p. 569.

“* * * he may demand of the inhabitants the same obedience and temporary loyalty to which their lawful sovereign is entitled.”

From this governmental authority and power of the occupant, which is based on the laws of war, results his right to punish any resistance and any insurrection within the occupied territory as rebellion, irrespective of whether those who are offering resistance comply with Article 1 of the Hague Rules of Land Warfare; and equally irrespective of whether the occupying power—as happens frequently and as was the case with the Germans in Greece and Yugoslavia—has declared that through express decrees and penal directives that the possession of arms and any subordination is a crime punishable by death. I do not believe that there can be any doubt that if today in Germany certain persons would decide to fight the occupation forces openly, and if they would form an organization for this purpose, if they wore uniforms and carried their arms openly, if they observed the laws and customs of war, and were led by persons responsible for their subordinates, that despite compliance with Article 1 of the Hague Rules of Land Warfare, merely on the basis of the effective occupation of Germany, they would rightly be regarded as rebels by the occupation powers.

We see, therefore, that where an effective occupation is in force, the otherwise rather complicated problem of the legality or illegality of partisans and their activity becomes considerably simpler. It is therefore of importance for me that the prosecution admits that an effective occupation existed with respect to Greece during the period up to August 1942. It is a direct consequence of the effectiveness of this occupation that all the acts of resistance were illegal which were carried out during the quickly suppressed attempt at insurrection in the autumn of 1941 in northern Greece, and so were all individual actions committed later. The fact that the occupation was admitted to be an effective one, relieves me of the task of describing in detail that the Greek partisans—at least during the period of time which is of interest for Field Marshal List, i.e., October—could not claim the rights of legal belligerents, apart from other reasons, also because they did not comply with the provisions of Article 1 of the Hague Rules for Land Warfare.

The occupation of Yugoslavia, after the conclusion of the campaign, was also effective, despite the surprise attacks and sabotage acts which occurred here and there fairly soon, if isolated at first. In this statement in defense of Field Marshal List I have only to deal with the time during which he was in the Balkans as

armed forces commander. During this period of time the occupation of Yugoslavia never ceased to be an effective one.

Paragraph 280 of the American "Rules of Land Warfare," which deals with the cessation of an effective occupation, is somewhat contradictory in its wording. From the sentence "In case the occupant evacuates the district or is driven out by the enemy, or by a levy *en masse*, and the legitimate government actually resumes its functions, the occupation ceases", it follows that the resumption of the governmental functions by the legitimate state authority in the occupied territory or in parts thereof is a necessary condition for the cessation of effective occupation in the territory in question. This fact alone is a sufficiently clear indication for the cessation of an occupation. A clear marking of the cessation of an occupation can, however, not be dispensed with because of its far-reaching consequences with regard to international law, for the occupation power as well as for the inhabitants. An occupation power, which temporarily shunted a national uprising, might, after all, return before the legitimate government resumed its function in the territory in question, and the former would then be entitled, of course, to treat the participants of the national uprising as rebels.

The same has to hold true also in instances of partisan activity. An occupant might frequently and for a considerable period of time be facing partisan or guerrilla activities and the resistance offered can show various degrees of strength and extent from isolated surprise attacks and attempts which undoubtedly cannot impair in any way the effectiveness of the occupation, up to operations of a larger scale, which might force the occupant to evacuate temporarily certain parts of the occupied area. Can somewhat vague symptoms, such as the strength and extent of the partisan activity, or the period of time which elapsed until counteraction is taken, be regarded as useful indications for the cessation of an effective occupation, which has such far-reaching consequences? Where can the line be drawn, in such a case, if not in the fact that the legitimate government has resumed its functions in the area where the partisans were operating and under their protection. This is also the opinion of two authors as prominent as Hall and Westlake. Professor Hall writes:*

"* * * a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied as long as the enemy's army is on the spot; or so long as it covers it, unless the operations of the national or an allied army or local insurrection have reestablished the public exercise of the legitimate sovereign authority."

* Hall, William E., International Law (Oxford, Clarendon Press, 1924) 8th Edition, p. 576.

Professor Westlake has accepted this opinion as his own.

In no part of Yugoslavia did the legitimate government resume its functions at any time during the war.

Since the prosecution contends, however, that the effectiveness of the occupation of parts of Yugoslavia even for the period immediately following the conclusion of the campaign is questionable, I shall make the opinion of the prosecution the basis of my arguments for the purpose of examining the facts when I now deal with the status of the Yugoslav resistance forces as seen from the point of view of international law.

Three groups of people participated in resistance activities in Yugoslavia.

1. Members of the dissolved Yugoslav Army, who above all participated in acts of resistance and surprise attacks during the period of time immediately following the conclusion of the campaign.

2. Individual persons and unorganized bands of civilians.

3. Partisan groups of various political orientations.

We have been able to gather from statements made by the prosecution that members of the Yugoslav Army escaped to the hills after the conclusion of the campaign and that they used stores of arms and equipment which they had taken with them to continue to fight against the Germans.

This leads us to the question of the capitulation and its effects. The campaign in Yugoslavia was concluded through a capitulation of the whole of the Yugoslav Army and of the Yugoslav Government. The capitulation was concluded on the part of the Yugoslavs and signed for the army by a lieutenant general and a full general with proper authority; and for the Yugoslav Government by the former Foreign Minister Markovic by virtue of authority given by General Kalafatovic, which in turn was based on authority given by General Simovic. The substance of the capitulation agreement was that the whole of the Yugoslav armed forces were to discontinue hostilities and unconditionally surrender their arms. I have produced proof for this fact through the testimony of the witness, Dr. Feine, who was present during the capitulation negotiations as an observer for the German Foreign Office. Testimony given by the witness, Dr. Feine, further proved that the carefully examined authority of the Yugoslav delegates was properly authenticated. This important fact cannot simply be eliminated now through the assertion that the members of the Yugoslav delegation were Quislings which, by the way, is not correct. General Simovic, on whose authority Minister Markovic was authorized to conclude the capitulation, was at that time the head of the Yugoslav Government and later on the head of the exiled

Yugoslav Government in London. There can be no doubt whatsoever, therefore, that the capitulation was effectively concluded on the part of the Yugoslav Army as well as on the part of the Yugoslav Government.

Capitulations—in the strict sense of the English term—are agreements between the armed forces of belligerents, stipulating among other things, the terms of the surrender of troops. Their purpose is the abandonment of hopeless struggle. They concern, as mentioned before, the surrender of armed forces and are military agreements solely and exclusively, the competence of the conclusion of which is vested in the commanders of the forces opposing each other. Only in as much as they contain any agreements which exceed the capitulation of the armed forces, is it necessary for the validity of the former that the competent political authorities participate in the negotiations.

Article 35 of the Hague Rules for Land Warfare states concerning military capitulations that they must take into account the rules of military honor and that, once settled, they must be scrupulously observed by all parties.

We have gathered from statements made by the prosecution that capitulation which concerned the whole of the Yugoslav armed forces was supposedly not adhered to by parts of the army; if we examine the consequences of such behavior for these members of the Yugoslav armed forces who continued to fight against the Germans, we find that this factor alone justifies their punishment as war criminals and could be countered by reprisal measures on the part of the Germans.

In the commentary by Oppenheim-Lauterpacht the following is stated in this connection:

“That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent government, and a war crime if committed without such order. Such violations may be met with reprisals or punishment of the offenders as war criminals.”

In this connection I recall again the statement by former Prime Minister Churchill on 8 May 1945 which he made when announcing the unconditional surrender of Germany. I have quoted it once before, in my opening statement:*

“Hostilities will end officially at one minute after midnight tonight, Tuesday, 8 May.

* * * * *

* The New York Times, 9 May 1945, p. 8.

“The Germans are still, in places resisting the Russian troops, but should they continue to do so after midnight, they will of course deprive themselves of the protection of laws of war and will be attacked from all quarters by the Allied troops.”

The Germans were, therefore, authorized according to the laws of war, if only because of the breach of the military capitulation alone, to treat those former members of the Yugoslav Army who thought they could continue fighting the German troops as war criminals and to counter their resistance with reprisals; and it cannot now be said that the German commanders committed war crimes by so doing.

That was the direct effect of the military capitulation on those members of the capitulating Yugoslav Army who continued to resist the Germans; and this direct effect is independent from the participation of the Yugoslav Government in the capitulation agreement. I will deal with the indirect effect which capitulation of the armed forces of a belligerent nation and its government had on the status of all the resistance forces of the country concerned when I turn now to these resistance forces.

The status of the partisans, according to the laws of war, depends on two fundamental factors.

1. The clear division of the enemy population into armed forces and peaceful inhabitants, which I have already indicated in another connection.

2. The fact that war exists between states and only between states.

As a consequence of the Brussels and the two Hague conferences and as a compromise between the strict views of the larger countries with standing armies and the efforts of the smaller countries to achieve for their peoples a right of defense in a less permanent form, we have Articles 1 and 2 of the Hague Convention.

They contain the minimum demands which can be made on irregular combatants in order to regard them as legal belligerents according to the laws of war. It is true that some delegates at the time thought that from certain declarations and from the preamble of the Convention, Articles 1 and 2 could not be interpreted as exclusive. But we know today that development has outdated those reservations and opinions. The prophecy made by the Swiss delegate as long ago as at the Hague negotiations in 1899 has also come true. It was that in the final analysis only the text of the law is decisive. In this respect, too, the preponderance was evident which codified rules in a sphere so full of uncertainties as the laws of war quite naturally contain.

I quote Professor Oppenheim's statements:

"Articles 1 and 2 of the Hague Regulations make the greatest possible concessions regarding hostilities committed by irregulars. Beyond the limits of these concessions belligerents will never be able to go without the greatest danger to their troops."

And how unrealistic the opinions of some of the representatives of the smaller states were at that time can be seen, for instance, from the fact that the Belgian delegate, Lambremont, asked quite seriously what the fate of a citizen would be who on his own in an unoccupied part of the country committed hostile acts in order to halt the advance of the enemy. There was never any doubt that such an inhabitant robbed himself of the protection afforded by the laws of war.

The very definite interpretation of the governments, especially the governments of the United States and Great Britain concerning the exclusiveness of Articles 1 and 2 of the Hague Rules of Land Warfare* is set down in the provisions of the military manuals of these countries in which no right, beyond the text of Articles 1 and 2, is recognized on behalf of the population to participate in combating the enemy.

With regard to the uprising which is sanctioned under definite provisions in Article 2, it can be seen from the intentional choice of the term "on the approach of the enemy" that this can only be recognized in an area into which the enemy has not yet penetrated. This is stressed, for instance, in paragraph 29 of the British Rules of Land Warfare, and similarly emphasized in the comments of Oppenheim-Lauterpacht which ran as follows:

"It is of particular importance not to confuse invasion with occupation in this matter. Article 2 distinctly speaks of the approach of the enemy and thereby sanctions only such a levy *en masse* as takes place in country not yet invaded, although the invasion has not yet ripened into occupation, a levy *en masse* is no longer legitimate."

Since, as I have already stressed in my investigation of the status of the Yugoslav partisans, I proceeded from the standpoint of the prosecution that an effective German occupation was not shown in all parts of Yugoslavia, this clarification may perhaps be of some importance. Because, if the prosecution also disputes an effective occupation, then it certainly cannot be denied that throughout Yugoslavia and Greece after the end of the campaigns the conditions for a legitimate people's rebellion in the form of an organized uprising were no longer present.

* Annex to Hague Convention No. IV, *op. cit. supra*, p. 15.

Therefore, the prosecution takes into account for the Yugoslav and Greek partisans the fulfillment of the conditions in Article 1 of the Hague Rules of Land Warfare. But if we examine the partisan units from this point of view, we discover first of all, that they were obviously not militia and voluntary corps in the sense of Article 1 which means either the army of the country concerned, or part of it, or who were connected with the regular army or still existing parts of it.

Just as little did they fulfill the further conditions set down in Article 1 for recognition as legal combatants.

1. Someone had to be in charge who is responsible for his subordinates.

This provision is not absolutely clear. Oppenheim-Lauterpacht's comment on this is—"It probably means responsible to some higher authority."

This demand is in line with the viewpoint emphasized in the British Rules of Land Warfare, "* * * so that there may be no doubt that they are not partisans acting on their own responsibility."

The whole fundamental difference which exists between partisans, even organized ones, and the militia and voluntary units, to which Article 1 of the Hague Rules of Land Warfare refers, is expressed in these words. Every guerrilla or partisan band has its leader, but, of course, if he merely wears an officer's uniform, as may have been the case occasionally in Yugoslavia or Greece, or if he were an officer in the dissolved army, this does not suffice to make these men into a recognized militia or a voluntary unit. This applied, without doubt, to the initial period, which is the one period of interest to me as defense counsel for Field Marshal List.

2. They must wear a definite, fixed insignia, recognizable from a distance, and

3. Must carry their weapons openly.

These two demands are closely bound up with each other, because both refer to a certain habit of the partisans which has been from time immemorial a characteristic of this type of irregular; a habit which the partisans in Yugoslavia and Greece also exhibited to the largest possible extent. I mean the alternate appearance as armed resistance forces and—after committing surprise raids, or if danger is near—as seemingly peaceful citizens. The valid general principle in this respect is clearly expressed in the British Rules of Land Warfare—

"The division of the enemy population into two classes, the armed forces and the peaceful population, has already been

mentioned. Both these classes have distinct privileges, duties, and disabilities. It is one of the purposes of the laws of war to insure that an individual must definitely choose to belong to one class or the other, * * * and shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen."

From this principle arises the demand set down in Article 1, paragraph 2, for a fixed insignia, which cannot be removed at the wearer's discretion.

For the same reason, the provisions of Article 1, paragraph 3 are, of course, not fulfilled if the weapons are merely carried openly during combat, as the partisans may have done occasionally when they were not only acting as snipers. The provisions in paragraph 3 are not adhered to, if, when the fighting is over—or as soon as they are in trouble—the irregulars hide their weapons or get rid of them somewhere, in order then to appear as seemingly peaceful civilians, as was usual with the partisans in Yugoslavia and Greece. Paragraph 26 of the British Rules of Land Warfare notes in this connection—

"The third condition provides that irregular combatants shall carry arms openly. They may therefore be refused the rights of the armed forces if it is found that their sole arm is a pistol, hand grenade, or dagger concealed about the person, or a sword stick, or similar weapon, or if it is found that they have hidden their arms on the approach of the enemy."

The fact that a violation of this principle deprives the perpetrator of the protection of the laws of war has been stated in Article 82 of the American Instructions of 1863. This contains a comprehensive characterization of the guerrillas and partisans which, in many respects, still applies to date. I quote:

"Men or squads of men who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or *with the occasional assumption of the semblance of peaceful pursuits, diverting themselves of the character or appearance of soldiers* such men or squads of men are not enemies, and therefore if captured are not entitled to the privileges of prisoners of war, *but shall be treated summarily as highway robbers or pirates.*"

Spaight writes on the same question:*

“It cannot be seriously questioned that those *francs-tireurs* who made themselves indistinguishable from the peaceable population either by removing their distinctive badge, or as some did by changing into civilian garb after committing acts of aggression, were not entitled to belligerent rights. No army commander will suffer his troops to be menaced by men who claim now the privileges of combatants, now those of the peaceful inhabitants.”

If we look at the evidence which the prosecution has submitted as proof of the fact that the Yugoslav and Greek partisans complied with the demands of paragraph 2 of Article 1 of the Hague Rules of Land Warfare, then we find that the partisans are supposed to have worn a cockade or a Soviet star, or certain other insignia in their lambskin caps—the Chetnik partisans also had black beards and crossed cartridge belts.

Of course, from the presence or the absence of a beard, or its coloring, one can draw no conclusions about the status of a person according to the laws of war, and the black beards of the Chetniks, on which the prosecution relied, are therefore not insignia in the sense of Article 1, paragraph 2.

The fact certainly cannot be doubted that Serbian cockades, skull and crossbones, red star, small ribbons, or tassels on the usual lambskin caps worn in the country are not insignia which can be seen from a distance. And it is just as certain that these articles worn on the headgear are definitely not fixed insignia in the sense of Article 1, paragraph 2.

Where is it customary for the members of an armed force only to be recognizable by their headgear? And why did the partisans not wear these insignia fixed to their clothing? The reason is obvious. I maintain that the partisans, as far as they wore insignia at all, only wore them on their headgear because these could be quickly thrown away, in the same way as their weapons and cartridge belts were usually thrown away or hidden, so that after the fighting or when the Germans were closing in and danger threatened, they could give the appearance of peaceful civilians. Insignia fixed to the clothing would have prevented these tactics which were usual among all partisans in the Balkans. That is why there is not even the slightest indication, not to speak of proof, that the partisans wore any kind of insignia which could not be removed immediately.

The absence of a fixed insignia also gave the partisans the constant opportunity, under the guise of peaceful civilians and

* Spaight, *op. cit. supra*, pp. 42-43.

harmless peasants, to commit acts of sabotage in the territory occupied by German troops. They made extensive use of such tactics, which have always been closely bound up with the partisan methods of warfare. Such conduct was war treason, even if the perpetrator would otherwise be credited with the full rights of a belligerent. I refer to paragraph 445 of the British Rules of Land Warfare—

“Many other acts, however, which may be attempted or accomplished in occupied territory, or within the enemy’s lines, by private individuals or by soldiers in disguise, are also based on war treason, although perfectly legitimate if done by members of the armed forces * * *.”

The American armed forces in the Philippines took the same point of view during the fighting in 1900–1901.

4. During their operations they must observe the laws and customs of war.

The defense has submitted extensive evidentiary material to show that the Greek and Yugoslav partisans quite generally did not observe the laws and customs of war. This evidence has not been refuted by the fact that the prosecution referred to a few individual cases in which the partisans did observe the laws of war.

I therefore maintain that the partisans in Yugoslavia and Greece did not fulfill the four demands set down in Article 1 of the Hague Rules of Land Warfare for legal belligerents.

The examination of whether the partisans complied with Article 1 of the Hague Rules of Land Warfare embraces only one side of the problem of the status of the irregulars; the other side is governed by the fact that war exists between states.

The two authors, Nurick and Barret, quoting a number of the most well known authorities on international law, state:

“In addition to the requirements set forth in the Hague Regulations, it is also required, before the members of a military force are entitled to be treated as lawful belligerents, that they serve a political entity, which is a state *de jure* or *de facto*, or which at least exhibits certain indicia of that status. This additional requirement is a fundamental premise implied in the Hague Regulations, and an individual does not become a lawful combatant under Article 1 thereof merely because he owns a uniform, carries arms openly and is commanded by a person responsible for his subordinates.”

This statement, of course, is not based on Article 1 of the Hague Rules of Land Warfare which neither expressly nor tacitly

contains this further requisite, but it is based on the principle which has been generally recognized from time immemorial, that war exists between states.

Even Cicero applied this principle to the supporters of Antonius and treated them, therefore, as robbers.

And one of the earliest authors of international law, Gentili, stated that war must be public and official on both sides, and that there must be sovereigns on both sides to direct the war.

The American Instructions of 1863 contain this principle in articles 20 and 57.

Professor Westlake, a prominent authority on international law, states:

“We therefore accepting the definition of Grotius in other respects, will say that war is the state or condition of governments contending by force. Whether and how far individuals can be treated as parties to a war is a question to be discussed in the sequel, and is not prejudiced by the use of the word ‘government,’ as indeed it would not have been by the use of the word ‘state’. If they are treated as parties to a war, that can only be justly done when there is a reason for their being identified with their state or government.”

Professors Oppenheim and Lauterpacht also state:

“War a contention between states:

“To be war, the contention must be between states * * *. A contention may, of course, rise between the armed forces of a state and a body of armed individuals, but this is not war * * *. Nor is a contention with insurgents or with pirates a war.”

They state expressly that this characteristic of war also decides whether so-called guerrilla war is really war in the technical sense of the word.

Similarly in a leading article, “The Guerrilla and the Lawful Combatant” by George C. Wilson in the American Journal of International Law, July 1943, it is stated, particularly with reference to the status of the partisans—

“It may not always be easy to determine when a guerrilla party is acting in aid of the regular forces, but as the marks of a regular force in its uniform, flag, etc., are distinguishing, the burden of proof may properly rest upon the irregular party to establish its lawful identity if it expects treatment under the laws of war.

“War is between states and the forces entitled to the rights of the laws of war are those duly enrolled in state forces or at

least under its control and for whose acts the state is responsible.”

We can certainly assume that these authors took into account the historical events and the practice of belligerents, at least as much as the scientific reasons; and in actual fact we state that on all the occasions in question the commanders of armed forces and the governments, when considering the problem of the status of the irregulars, worked on the principle that war exists only between states, and that the armed forces of both sides must be identified with the states; as a result of this, a war, in the sense of international law, no longer exists if a government or its armies have capitulated, or the government has been expelled, its armed forces captured, and its territory occupied.

The principle is indisputable; and no injury is done to its value by the fact that belligerents and their commanders, in a few cases in which the enemy government was still in its own country and fought the invader there with so-called guerrilla tactics, referred illegally to it; as in the case of Maximilian von Oesterreich [Austria] toward the armed forces of the rival government of Juarez, and the British toward the regular armed forces of the Boer Republic during the South African war. The fact that the American armed forces in the Philippine War, 1899–1902, made a justified difference between regular armed forces of the Philippine Government which was in the country, and the guerrilla bands who were not part of the regular armed forces, is in complete agreement with the view taken by the defense in this trial with regard to the status of irregulars.

The principle, as such, is well established and universally recognized. Only in cases in which the position is not quite clear, the government or its entire forces not having capitulated, it may, at times, be difficult to decide whether a state of war still exists and whether the irregular forces are to be identified with the defeated government or not. The order issued by General Grant to General Sheridan during the Civil War on 17 May 1865, after the capitulation of Lee's and Johnston's armies when only the troops commanded by General Edmund Kirby Smith were still in the field in the trans-Mississippi area, provides a most significant and informative precedent. This order was based on the principles formulated in Articles 20 and 57 of the Instructions for the Guidance of the Armies of the United States in the Field of 1863 and read:

“If Smith holds out, without even an ostensible government to receive orders from or to report to, he and his men are not entitled to the consideration due to an acknowledged belligerent.

Theirs is the condition of outlaws making war against the only government having an existence over the territory where war is not being waged.”

The fact that the order was not carried out because General Smith did not continue his resistance but also surrendered on 26 May 1865 does not diminish its importance as a very important precedent. Neither does the fact that this order was issued in the American Civil War, and not in a war between different nations, detract from its general significance. The Confederate States had been recognized as belligerents by President Lincoln’s blockade proclamation dated 19 April 1861 and enjoyed the full rights accorded to a belligerent. The principles evolved in this so-called Civil War, embodied in the Instructions for the Armies of the United States of 1863 and followed in the practice of both of the contending armies have, as we know, provided the most important foundation for the subsequent codification of the laws of war.

Both of the joint authors Nurick and Barret, after examining both the historical instances in which the principle that war exists only between states is of practical importance, and the theoretical foundations of this principle, arrive at the following conclusion :

“It appears clear, however, that even under the most humane of interpretations the requirement that combatants serve a government has been regarded as satisfactory only where it is a responsible and fairly representative political entity which can exercise authority over its armed forces. If there is a formal surrender by the enemy government and capitulation of the main body of armed forces, there is a noteworthy precedent, particularly in the position taken by General Grant in the Civil War, for regarding as unlawful combatants those who continue to resist, even though they may be substantial in number. The fact that the surviving combatant may be impelled by patriotic motives in continuing to resist does not appear to have been regarded as material to their status as lawful combatants. Of course it may be that those who continue to resist may be large in number and may themselves constitute a *de facto* government; if so, they should be treated as lawful combatants. Although there is little authority, the complete military defeat of the enemy armed forces, the disintegration of the government, and the occupation of its territory would seem to have the same consequences upon the status of those who continue to resist as does a formal surrender.”

The view of these two authors is in line with Professor Oppenheim's statement.*

“On the other hand, one speaks of guerrilla war or petty war when after the defeat and the capture of the main part of the enemy forces, the occupation of the enemy territory, and the downfall of the enemy government, the routed remnants of the defeated army carry on the contention by mere guerrilla tactics. * * * Now, the question whether such guerrilla war is real war in the strict sense of the term in international law must, I think, be answered in the negative, for two reasons. First, there are no longer the forces of two states” (or even the forces of a state and of an opposing government) “in the field, because the defeated belligerent state has ceased to exist through the military occupation of its territory, the downfall of its established government, the capture of the main part and the routing of the remnant of its forces. * * * If then, guerrilla war is not real war, it is obvious that in strict law the victor need no longer treat the guerrilla bands as a belligerent power, and their captured members as soldiers.”

In accordance with these principles, it is beyond doubt that the Yugoslav and Czech partisans cannot be regarded as lawful combatants. For after the surrender of the Yugoslav Government and its armies and after the surrender of the Greek armies, the Germans on the Balkan peninsula were no longer opposed by any lawful belligerents whose existence might have entitled any forces in these countries to claim treatment as lawful belligerents—even if all other conditions essential to such a recognition had been satisfied—which, however, they had not.

The fact that exile governments were formed in London which endeavored to wield a kind of paper sovereignty does not make any difference. Quite apart from the fact that the Yugoslav Government by its act of surrender had precluded itself from carrying on the prosecution of the war, the following considerations apply to these governments in exile.

The multifarious political structure of the partisans in Yugoslavia and Greece, some of whom were fighting each other, shows that they cannot be identified with these governments in exile; and the latter, on the other hand, were unable to exert any authority on the groups of partisans which were very loosely organized, in their initial stages at any rate. Besides, the prosecution has failed to establish any kind of connection between the partisans and the governments in exile in London.

* Oppenheim, *op. cit. supra*, pp. 77-78.

Finally, the principle applies that guerrilla forces can never derive their claim for recognition as lawful belligerents from a government expelled from its country.

This axiom is already implicit in General Grant's order dated 17 May 1865 specifically in the sentence referring to the soldiers under General Smith in the event of their continuing to fight, which states:

“ * * * Theirs is the condition of outlaws, making war against the only government having an existence over the territory where war is now being waged.”

This principle is further enunciated in Article 85 of the Instructions of 1863 and in paragraph 349 of the United States “Rules of Land Warfare” of 1940, where explicit reference is made to war rebels in the following words:

“If captured they may be punished with death, whether they rise singly or in small or large bands, whether or not they have been called upon to do so by their own expelled government * * *.”

General Eisenhower's declaration dated 15 July 1944 with respect to the French resistance forces, referred to by the prosecution, is not a proper precedent which would invalidate the general principle that it must be possible to identify resistance forces with their respective governments and that the surrender of the government precludes the right of resistance forces to claim recognition as lawful combatants. This declaration was based upon an attempt to compel recognition by threats against German prisoners of war. It was not recognized by the German Government.

Neither does the position taken by the Committee of the International Red Cross during the recent war in regard to the treatment of partisans speak against the existence of the principle adduced by the defense. The committee did not subscribe to the view that the partisans, provided they complied with certain conditions, were to be accorded the privilege of treatment as prisoners of war but that they ought to receive such treatment. The sentence in the memorandum dated 17 August 1944 is a clear confirmation of the legal argument put forward by the defense in this case—

“The International Committee considers that the above-mentioned principles should be applied regardless of any legal argument relating to the recognized existence or the belligerence

of the authorities to which the combatants in action claim to belong.”

I have already said in my opening statement that it may well be expedient for a belligerent to recognize irregular combatants as lawful belligerents if they act on the orders of a responsible commander and observe the laws and customs of war—this never happened in Yugoslavia—and particularly in the event that the irregular forces have taken the field in great numbers and have formed a *de facto* government, a fact emphasized by Nurick and Barret. This in no way modified the fact that, from the point of view of international law, it is left to the opponent to decide whether and when he wishes to recognize the irregular forces as belligerents. In this respect, the statement by Professor Oppenheim applies.*

“If, then, guerrilla war is not real war, it is obvious that in strict law the victor need no longer treat the guerrilla bands as a belligerent power and their captured members as soldiers. It is, however, advisable that he should do so, so long as they are under responsible commanders and observe the laws and usages of war. For I see no advantage or reason why, although in strict law it could be done, those bands should be treated as criminals.”

It cannot, therefore, be a war crime that the German commanders, by denying recognition as belligerents to the partisans, acted as the laws of war authorized them to act. The principle of military necessity is always paramount in war, and this principle compelled the German commanders, in a dangerous position, to take stringent action against the unlawful, i.e., unlawful also under international law, activity of the partisans in order to protect their troops against a population fighting them by treacherous and insidious methods, actuated as the German commanders were by a sense of responsibility in regard to the task assigned them within the scope of the German over-all direction of the war.

Whoever feels inclined to invoke arguments of humanity and chivalry ought to be reminded that partisan warfare must not be viewed as transfigured by the light of one's own war propaganda, but, as Rolin remarked so appropriately as early as 1875, “in its sordid and vulgar reality.” One must not merely visualize the partisans executed as rebels and the burned down houses from which members of the occupation forces were shot at but also the mutilated corpses of German soldiers murdered by snipers—this

* *Ibid.*, p. 78.

was the way the partisan fighting started—and the large number of victims claimed by a treacherous population, which filled the daily casualty reports of the troops. Unbiased observers have always repudiated guerrilla fighting and partisan warfare. From the time that Professor Wheaton wrote¹—“In modern warfare partisan and guerrilla bands are regarded as outlaws, and may be punished by a belligerent as robbers and murderers,” the partisan problem has not changed except for the extent of partisan activity, which has increased on a gigantic scale, and the greater cruelty with which guerrilla warfare was waged by the irregulars, especially during the last war.

The judgment on guerrillas and partisans remains unchanged. In the most recent edition of Professor Hyde's book, dated 1945, a time when the partisan problem encountered in the war just ended could be surveyed and appraised in its full significance, we find the following statement:²

“The law of nations, apart from the Hague Regulations above noted, denies belligerent qualification to guerrilla bands. Such forces wage a warfare which is irregular in point of origin and authority, of discipline, of purpose, and of procedure. They may be constituted at the beck of a single individual; they lack uniforms; they are given to pillage and destruction; they take few prisoners; and are hence disposed to show slight quarter. According to the late Dr. Lieber, they may be described as self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular pay roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will, therefore, generally give no quarter. They are peculiarly dangerous because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers and brigands.”

The very people who admit only the patriotic motives which are so often invoked on behalf of the resistance forces, will have to concede that their opponent is, nonetheless, entitled to punish them as criminals. That has been quite explicitly stated in Oppenheim-Lauterpacht.

The British prosecutor in the trial of Field Marshal Kesselring, Colonel Halse, took the same view in his opening statement—

¹ Wheaton, *op. cit. supra*, footnote (a) 172, pp. 379-380.

² Hyde, *op. cit. supra*, p. 1797.

“There are some war crimes which are only crimes in respect of one side. The partisans, for instance, (and I say it quite openly) by attacking the German forces in rear were guilty of a crime against the German law; I say intentionally against the German law. So far as the Italian and Allied law was concerned they were heroes, they did commit a war crime, and if they were captured by the Germans, the Germans were undoubtedly entitled to try them for committing a war crime, and if found guilty of committing that war crime the Germans were entitled to sentence them to death.”

Now this brings me to the second main problem of the trial, the problem of hostages. In my opening statement, I already expounded this problem in some detail, and I believe that in many respects I may now refer to my previous exposition.

The defense contends that, according to the laws of war, the killing of human beings by way of reprisals is an admissible and even indispensable instrument of force in certain circumstances used in order to induce the opponent to refrain from violating the provisions of international law. The defense maintains that the killing of security hostages—that is, the killing of persons taken or detained for the avowed purpose of their being subjected to such reprisals in the event of actions contravening international law being committed by the enemy troops or enemy civilian population—is not precluded in such cases. The defense further asserts that the killing of security hostages, explicitly permitted by the United States “Rules of Land Warfare,” as far as it complies with the conditions warranting a reprisal measure, is not covered by the definition of war crimes as laid down by Article 6(b) of the London Charter and Article II, paragraph 1(b) of Allied Control Council Law No. 10.

It has been emphasized in the judgment of the International Military Tribunal that the Charter reflects and is the expression of international law as it existed at the time of the drawing up of the Charter.

This is as clearly stated in Article 6(b) of the Charter as in Article II, paragraph 1(b) of Allied Control Council Law No. 10.

The prosecution in the present trial has also stated that both provisions represented an exact codification of preexisting international law. Both provisions define war crimes as “violations of the laws and customs of war,” the inference being that they were not intended to identify any actions as war crimes which had not heretofore been regarded as such.

The London Charter and Allied Control Council Law No. 10, then, refer, with respect to war crimes, to the laws and customs

of war as they existed before the promulgation of these provisions.

Even if the reference to the laws of war as practiced heretofore had not been as unequivocal as it in fact is, so that there remained any doubts as to whether Article 6(b) of the Charter and Article II, paragraph 1(b) of the Control Council Law merely referred to preexisting laws and customs of war or whether they were intended to provide a new definition of war crimes, such doubts would have to be resolved along the lines of the first alternative. For the Charter was drawn up "in the exercise of the sovereign power of legislation vested in those countries to which Germany had unconditionally surrendered." This is particularly true with respect to Control Council Law No. 10. But in the United States as well as in Great Britain according to the principle which holds true for the application of domestic legislation with regard to international law it may be assumed in dubious cases that it has not been intended to overrule international law.

Therefore, the summary interpretation of Article 6(b) of the London Statutes and of Article II, paragraph 1(b) of Control Council Law No. 10, according to which killing of hostages is supposed to be a war crime, ought to be supplemented—and that is tacitly understood—by pointing out that killing hostages is a war crime only to the extent to which it constituted such according to martial law as has been in force until now. This summary interpretation which is expressed so generally, is just as incorrect and means just as little as the famous phrase of Vattel—"The very liberty of the hostages is at stake."

Both statements are correct only in those cases in which hostages are killed as punishment for not fulfilling an obligation; they do not concern the killing of hostages from the point of view of reprisals.

The definition which the International Military Tribunal has given with regard to Article 6(b) of the Charter confirms that above regulation does not prejudge the problem of reprisals.

"In as much as war crimes are concerned, International Law, as has been pointed out before, has recognized the crimes designated in Article 6, Section (b) of the Charter as war crimes. Articles 46, 50, 52, and 46 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929 refer to them. It has been so generally accepted that violations of these regulations constitute crimes for which the guilty persons are liable to punishment that there cannot be any further discussion with regard to that issue."

Thus, in the opinion of the International Military Tribunal, the actions designated in Article 6 constitute war crimes because they entail violations of the Hague Regulations. It is, however, known that the very essence of reprisal measures, in as far as they are permissible according to the laws of war, is that a violation of international law is answered by the opposing party with an action which in itself also constitutes a deviation from the laws of war and the purpose of which is to compel the opponent to act in a lawful manner. Since also Article 50 of the Hague Regulations does not forbid reprisals—I shall discuss that later—this leads us to the conclusion that such actions which are carried out under such conditions as warrant reprisals according to international law have to be expected from the definition of war crimes as given in the London Charter and in the Control Council Law.

This is the second reason why in these proceedings, in as much as they concern the hostage problem, all that matters in the state of international law as it was when the charter was issued.

There has always been much written against the killing of hostages. If we analyze their reasons we find that those authors who declared themselves opposed to the killing of hostages mistook their own ideas of justice, humanity, and morality, for the generally accepted rules of warfare—I am using an expression by Professor Oppenheim—just as frequently as they were influenced by the misconception that Article 50 of the Hague Regulations for Land Warfare referred to the problem of reprisals and hostages. Their point of view can in the main be identified with President Roosevelt's statement of 25 October 1941 that "Civilized peoples long ago adopted the basic principle that no man should be punished for the deed of another."*

This attitude can be readily understood from the point of view of humanitarian principles, but it is also quite certain that it is incorrect from the point of view of the laws of war. Thus, also, the two authors, Hammer and Salvin contend that President Roosevelt's statement is misleading.

The humanitarian motives in favor of the view that hostages should not be killed will have to be acknowledged by everyone. It is indeed a terrible thing to make people suffer for the action of others, but it is just that which constitutes the coercive force of reprisal measures.

"Reprisals are an extreme measure because in most cases they inflict suffering upon innocent individuals. In this, however, their coercive force exists, and they are indispensable as a last

* The New York Times, 26 October 1941, p. 1.

resource", states paragraph 454 of the British Manual of Military Law.

It is also a terrible thing to kill innocent civilians, old men, women, and children by means of bombs and burning phosphorous, and yet we have lived to see such measures ordered and carried out to a very large extent.

The first and foremost principle in war is military necessity which has been expressed by Professor Oppenheim as follows:*

"Victory is necessary in order to overpower an enemy, and it is this necessity which justifies all the indescribable horrors of war, the enormous sacrifice of human life and health, and the unavoidable destruction of property, and devastation of territory. Apart from restrictions imposed by the law of nations upon belligerents, all kinds and all degrees of force may be, and eventually must be, used in war in order that its purpose may be achieved in spite of their cruelty and the utter misery they entail. As war is a struggle for existence between states, no amount of individual suffering and misery can be regarded; the national existence and independence of the struggling state is a higher consideration than any individual well-being."

If one reads what authors on international law have written about the problem of hostages, one finds that French scientists, above all, have expressed themselves in the most passionate and eloquent manner against the killing of hostages and, as a matter of principle, against the taking of hostages generally—that is, the scientists of that nation, a commander of which, General LeClerc in the course of this war ordered his troops to shoot hostages at the ratio of 1:5. And if one further realizes that at the beginning of the last 85 years, a period of time which has been of decisive importance for the development of modern laws of war, we have the regulation contained in Article 58 of the American Instructions of 1863, to the effect that death will be the reward if the enemy should enslave prisoners of war, and that at the end of the above-mentioned period of time we find the threat which has been circulated within the American armed forces that punishment is to be meted out at a ratio of 200:1, then, in my opinion, one has to admit that those authors cannot be considered competent authorities in matters of martial law, insofar as it concerns the hostage problem.

There is no agreement regulating this matter. The problem of reprisal matters and of hostages has not been regulated in

* Oppenheim, *op. cit. supra*, pp. 74-75.

the Hague Convention of 1899 and 1907, and before that the powers represented at the Brussels Conference of 1874 had to desist from a regulation of this problem by agreement, owing to the difficulties involved in arriving at such an agreement. In Commission No. 2, which was dealing with the laws of land warfare, it was expressly stated that Article 50 of the Hague Regulations did not prejudge the problem of reprisals—“*sans rien préjuger quant aux repressailles,*” as Professor Rolin, the referent of the commission, remarked in his report to the plenary assembly of the Hague Peace Conference. That has been pointed out expressly in the British Manual of Military Law as well as in the commentary by Oppenheim-Lauterpacht and has also been expressed already by Professor Holland in his book *Laws and Customs of War on Land* which was published at the behest of the British War Office in 1904.

Since the problem of security hostages is included in the problem of reprisals of which it is a part, one cannot, of course, say that Article 46 of the Hague Regulations for Land Warfare excludes the execution of security hostages. Because it is the very nature of a reprisal measure that a belligerent may, in its execution, deviate from the rules of martial law which, in other cases, are binding.

Thus, this problem has remained a matter of martial usage. As I have said before, a great number of authors cannot be regarded as reliable authorities since they are so obviously prejudiced with regard to this problem. They are prejudiced to such an extent that many of them consider even the taking of hostages as contrary to international law, an attitude, which, in view of the actually existing usage, cannot be incorrect. One, therefore, has to rely entirely on the practices of the belligerents, on the measures, orders, and statements of their commanders, as well as on military manuals if one wants to establish martial usage with regard to the problem whether or not human beings, and that includes security hostages, may be killed by way of reprisals.

The American Instructions of 1863, which have had the utmost influence on the development of modern laws of war, regulated reprisals in Articles 27, 28, and 58. They stated that reprisals are an absolutely necessary means of protection against crime committed by the opposing party.

Death was ordered to be the retaliation for the enslavement of prisoners of war.

On 30 July 1863, President Lincoln threatened to have prisoners of war executed in reprisal for the killing of Negroes.

General Sherman ordered 54 prisoners of war to be executed in reprisal for the killing of 27 of his soldiers whose bodies had been found bearing the inscription, "Death to the Looters."

During the Russian-Turkish War of 1877, the Russian commander of Thessaly ordered the inhabitants of houses, from which shots had been fired at the Russian troops, to be hanged from the doors of their houses.

It is well known that the Germans threatened to shoot hostages in France during the Franco-Prussian War of 1870-1871, and that they carried out such shootings in Belgium in the course of the First World War as reprisal for the participation of the civilian population in the fighting, a participation which was contrary to international law.

But those cases do not constitute cases of precedent to which the defendants could suitably point.

It has, however, been shown that the enemies of Germany seized security hostages and had them killed if they thought it necessary to protect their troops in enemy territory against illegal acts of the civilian population.

At the end of 1918 the Belgian commanders requested and obtained hostages in the occupied towns of the Rhineland who were to vouch with their lives for the security of the occupation troops.

Above all, orders were issued in the course of the last war after the Allied armies had occupied German territory which has been the case ever since 1944, and executions of hostages have been carried out which prove that such reprisal measures are also, in the opinion of the Allies, permissible according to international law.

The defense has proved the following cases:

1. The French commander, General LeClerc, threatened to have Germans shot as hostages at the ratio of 5:1 for every French soldier who was killed in Strasbourg by civilians.

2. The French General De Lattre de Tassigny threatened in Stuttgart, to have German hostages shot at the ratio of 25:1 in the case that French soldiers were killed in the occupation town.

3. At Birkenfeld the French forces threatened to shoot people at the ratio of 10:1.

4. At Reutlingen, French troops shot hostages at the ratio of 4:1.

5. At Markdorf, hostages were threatened with shooting at the ratio of 30:1; the executions were carried out at a ratio of 4:1.

6. The Russian occupation authorities had the threat published in Berlin that hostages should be shot at the ratio of 50:1.

7. The American Armed Forces in the Harz publicly threatened reprisal executions at a ratio of 200:1.

I have already in my opening statement dealt with the very important regulations regarding reprisal measures and hostages which are contained in the military manuals of the United States and of Great Britain.

The British Military Manual leaves open the question whether or not people may be killed by way of reprisal. The manual leaves it to the violated party to decide which measures it considers necessary in order to insure that the reprisal measure will fulfill its function as a means of compulsion.

In Professor Spaight's fundamental work regarding the laws of land warfare he answers the question whether or not people may be killed by way of reprisal in the affirmative.*

“* * * and the right to inflict reprisals—to retaliate—must entail the right to execute in very extreme cases. Otherwise there would be no effective means of checking the enemies' worst excesses.”

A reserved but very important statement was made during the proceedings against Field Marshal Kesselring before the British Military Tribunal at Venice by the Deputy Judge Advocate General of the British Army in his summing up.

“However, I have come to the conclusion that there is nothing which makes it absolutely clear that in no circumstances—and especially in the circumstances which I think are agreed in this case—that an innocent person properly taken for the purpose of a reprisal cannot be executed.”

Not one word about Article 6(b) of the London Charter or Article II, paragraph 1(b) of Central Council Law No. 10.

The Rules of Land Warfare of the United States expressly admit that hostages may be killed in reprisal.

The definition which appears in them with regard to reprisals and hostages in many respects concurs with that given in the British Manual. Paragraph 358d [United States “Rules of Land Warfare”], which deals with reprisal measures, does, however, contain the following extremely important regulation as well.

“Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed.”

* Spaight, *op. cit. supra*, p. 465.

The two legal concepts of reprisals and hostages have sprung from different roots and have developed separately for some time; recently, however, when war reprisals have also become a legal concept, they have been integrated in the concept of security hostages.

I was of the opinion that, with regard to this problem, I was not only in agreement with paragraph 358 of the United States "Rules of Land Warfare," but also with the prosecution which had in its opening statement stressed the close connection between security hostages and reprisals—

"It is to be observed that, in principle, the purpose of taking hostages is to be in a position in which one can apply reprisal measures should the enemy (or, in peacetime, the other party to an agreement) engage in an unlawful type of activity or in an activity which is not in accordance with the agreement. That is the reason why an imminent author on international law says—"The entire hostage problem is intricately connected with the problem of reprisals."

From the legal memorandum of 19 November 1947 I see, however, that the prosecution has in the meantime given up its former point of view. In spite of that, I do believe that no other view of this problem is possible than one which is in agreement with paragraph 358d of United States Manual, "Rules of Land Warfare."

Also Professor Glueck, whose book "War Crimes, Their Prosecution and Punishment" apparently supplied the theoretical basis for the policy which the Allied Powers have followed after this war with regard to the prosecution of war crimes is fundamentally of the opinion that the execution of hostages by way of reprisals is permissible. For, at one point, he writes that the Germans are supposed to have killed many hostages for flimsy reasons, "and not by way of legitimate reprisals for illegal acts."

The view has been expressed that there is a contradiction between paragraph 358d and paragraph 359 of the American Military Manual because the former regulation permits reprisal actions against security hostages as well as that such may be killed, whereas paragraph 359 states that people who have been taken as hostages are to be treated as prisoners of war, against whom reprisal measures must not be used. That has been pointed out, e.g., by the two authors Hammer and Salvin, although these authors in particular consider that it is permissible to kill hostages if necessary.

* * * * *

May it please the Tribunal, I had just discussed the relation of the conditions in 358d and 359 of American "Rules of Land

Warfare." I shall now continue with page 103 at the top.

I have explained already in my opening statement that there is not any contradiction whatsoever between those two regulations. One only has to realize that there is, in this respect, a very important difference between security hostages, on one hand, that is, persons who are seized expressly for the purpose of being subjected to reprisal measures, if necessary, and on the other hand, hostages, in the traditional sense of the word, who generally must not be subjected to reprisal actions since they are on the same status as prisoners of war.

That is also the opinion of Professor Hyde. I should like to submit those passages which I found in the last edition of Volume III of his book, "International Law Chiefly as Interpreted and Applied by the United States", which appeared in 1945, insofar as they concern this topic because in them the military situation in which a commander of armed forces can find himself in the occupied territory of a hostile population is taken into account in a very realistic manner.

"After announcing that the offending forces or populations generally may be lawfully subjected to appropriate reprisals, the War Department Rules of Land Warfare of 1940 state that hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed. It is added that reprisals against prisoners of war are expressly forbidden by the Geneva Convention of 1929 (No. [paragraph] 358d). Again, it is added in a later section that 'when a hostage is accepted he is treated as a prisoner of war' (No. [paragraph] 359). Possibly it is thought to be laid down that hostages taken for the special purpose announced are not to be treated as prisoners of war."*

"In the War Department Rules of Land Warfare of 1940, the matter of retaliation is dealt with under the topic of 'Reprisals'. In that connection it is said:

[Professor Hyde quoted here paragraphs 358 a-f of the "United States Army Rules of Land Warfare" (pp. 89-90). However, the defense counsel omitted these paragraphs from the quote in the closing statement for the defendant List.]

"The foregoing statement illustrates the breadth of the latitude which the military arm of the United States deems to be

* Hyde, *op. cit. supra*, p. 1903.

the possession of a belligerent when obliged to defend itself against the lawless acts of the enemy. The statement refers to more than retaliating conduct as such; it explores the field roughly and loosely described as that of 'Reprisals'. It points to conditions under which the armies of the United States may be expected to regard themselves free to commit acts that are normally prescribed as internationally illegal, and under circumstances when they are not of strict retaliating aspect.

"The statement quoted may serve to convince the reader—as it does not the author—that if war ensues to which the United States is a party, there may at times be anticipated contempt by its foes for rules of warfare supposedly declaratory of international law, as against which American forces may be obliged to protect themselves as best they may."*

The hostage orders of the occupation powers in Germany which have been submitted in these proceedings by the defense prove that the views regarding the latitude which, according to paragraph 358d, is allowed by way of protection against actions of the opposing party which are contrary to international law, concur with above opinion of Professor Hyde. These orders are based on the fact that in war military necessity is the highest principle and that it allows for every necessary application of power in as far as there are no hard and fast rules of martial law which obviate this. They have been issued in recognition of the fact that there is one basic principle which governs the otherwise rather uncertain sphere of reprisals, that is, the reprisals are a permissible means of coercion—which means that a certain amount of pressure must always be applied for the objective of the reprisals to be reached which is to compel the enemy to act in a lawful manner.

Ever since the Russian draft for the Brussels conference took up the problem of reprisals, it has been tried to impose some limitations on reprisals, particularly with regard to their extent in relation to the gravity of the preceding violation of international law perpetrated by the opposing party. It can be understood that these regulations could not become fixed rules in as far as they were at odds with the purpose of reprisal measures; that is, to be effective means of coercion.

The ratios which appear in the Allied orders prove that the regulation of the United States Military Manual according to which reprisals must not exceed the extent of violence committed by the enemy *does not constitute a fixed rule of martial law*. All cases of precedent starting with Article 57 of the American

* *Ibid.*, pp. 1842-1843.

Instructions of 1863 which threatened the death penalty in retaliation for re-enslavement go rather to show that belligerents have in fact always placed the purpose of the reprisal action, that is, that it should be an effective means of coercion, above that theoretical postulation regarding the proportions of reprisal measures.

In practice we never find a ratio of 1:10 being applied. Naturally, the reprisal measure must not be excessive; that is, it must not exceed what is necessary. This limitation follows from the general principle of humanity which limits application of power to the necessary extent. The verdict whether or not one is dealing with a military necessity and what is its extent depends on conditions, whatever they may be, and is ordinarily the concern of the military commander who has to make a decision, as has been stressed by Professor Hyde:*

“If the term military necessity implies great latitude, and is invoked by way of excuse in justification of harsh measures, it is because the law of nations itself permits recourse thereto in case of great need, and allows a belligerent commander to be the judge of the existence and sufficiency of the need.”

As far as the carrying out of reprisal and hostage measures is concerned, there is, of course a great difference if there occur occasional attacks which are locally limited against members of an occupation army, such as used to be the case in former times, or, if after the pacification of a country, increasing resistance threatens in the occupied territory. If irregular partisan bands form, the very existence of which is contrary to international law, this is sufficient justification for the occupying power to take the most stringent reprisals and repressive measures. If raids, attacks on installations of the occupation power, and murdering of members of the occupation forces increase to such an extent that they effect the very existence of the particular belligerent, then no responsible commander will be able, in such a situation, to avoid taking all, even the most stringent measures, in order to suppress such crimes. Such was the situation which the German commanders faced in Yugoslavia and Greece, but never has such a situation been faced by a commander of the opposing parties.

The German people did not obey the appeal of their government to form the “Werwolf,” and nevertheless the fear that such illegal forces of resistance might become active was sufficient to evoke a threat that punishment should be meted out at a ratio of 1 to 200 and very minor reasons led to the killing of German hostages at a ratio of 1 to 4, as has been the case at Markdorf and Reutlingen. The fact that the American Army did not face a situation in

* Hyde, *op. cit. supra*, p. 1802.

which it would have had to carry out executions of hostages, since the German civilian population did not participate in the fighting, does not prove that such measures are inadmissible on principle. The threats which were issued in accordance with paragraph 358d of the American Military Manual prove the opposite. Nor can in this connection the general indignation evinced by the killing of two British soldiers by the Irgun followers be cited. This action occurred in retaliation for the execution of two Irgun followers who had been sentenced to death by a court, and therefore was undoubtedly not a permissible reprisal measure.

In my opening statement* I stressed the somewhat unusual conditions in the Balkans which are the result of the geographical and ethnic situation there.

An Allied commander at no time had to face a situation such as the defendants had to cope with in Yugoslavia and in Greece, and at no time have soldiers of the Allied forces had to deal with an enemy who fought so cunningly. Field Marshal List was asked on cross-examination whether he believed that the people of the Balkans were in any way different from those in the western nations, whether for instance they were more cruel. I should like to supplement the answer he gave then by quoting from the introduction to a book written by an expert on the Balkans, Miss Edith Durhan, an English woman. The book is called, "The Slav Danger, 20 Years of Balkan Memories."

"The reader enters an almost unknown new country, which often appears to us as a remainder of medieval days, inhabited by passionate and violent people * * * conspiracies, fanaticism, intrigues, lust for power, and above all, blood * * *."

The population of the Balkans has achieved a way of living which is entirely different from that of the actual European cultural area; their passions are different, so are their impetuosity, their stubbornness, and cruelty. They have always been there, and there particularly, all sorts of illegal fighters, from the common robber to the vendettist son and grandson, from the religious fanatic to the band leader, and all sorts of underground movements.

Ninety years ago, the British report about the march of the Turks, who had been atrociously mutilated by the Montenegrins after the battle of Grahevo, and who were on their way home, near Korfu, startled all of Europe in stark horror.

Thirty-five years ago, yet another report was taken notice of everywhere. At that time, 1913, after the war in the Balkans, the Carnegie Endowment for International Peace sent a mixed

* See section III B.

commission for the investigation of war atrocities to the Balkans. The report of the commission shows through a glance at merely the table of contents such words as, "Extermination * * *", "The Massacre of Donate * * *", "The Massacre and Conflagration of Serres."

On page 79 and the following pages of this report we find pictures of destructions and massacres in Macedonia: Turks, Serbs, and Greeks had a share in them, partly also Bulgarians. Pages 96 and 98 show Greek propaganda prints. In glaring colors one of these prints show a Greek Evzone, a soldier of the guards, who is about to overpower a Bulgarian and bite his face; the other print shows an Evzone, who in the middle of a battlefield, while the battle is raging, is gouging out the eyes of a Bulgarian, with blood pouring down! The International Carnegie Commission put on record, among others, the following statements of Greek soldiers, showing the effect of such advocated cruelty—

"These soldiers all state that everywhere they burned the Bulgarian villages. Two boast of the massacre of prisoners of war. One remarks that all the girls they met with were violated. Most the letters dwell on the slaughter of noncombatants, including women and children.

"Here we are burning the villages and killing the Bulgarians, both women and children.

"We picked out their eyes (five Bulgarian prisoners) while they were still alive.

"The letters relieve us of the task of summing up the evidence. From Kukush to the Bulgarian frontier the Greek Army devastated the villages, violated the women and slaughtered the noncombatant men."

In the cruel destructions of those days the hatred of all against all found an outlet.

The Serbs have at all times been regarded as cruel and malicious fighters, regardless of what good characteristics they might otherwise possess. Of their five kings of the last 80 years, three were murdered.

Miss Durhan describes in her Balkan memoirs events of 1912—

"From the occupied territory pitiful reports arrived about the atrocious cruelties committed by the Serbs as well as by Montenegrins against the Albanian population, and the conquerors boasted of their brave deeds, instead of trying to withhold them. A Serbian officer almost choked with laughter over his glass of beer, when he related how his people in Ljuma bayoneted women and children."

The prosecution's assertion concerning the extensive evidence of the defense about the Yugoslav and Greek atrocities, namely that this evidence does not become any more credible through constant repetition, can hardly be applied to the afore-mentioned reports.

The Balkans have been, unlike any other part of Europe, a source of explosive action, of latent unrest, of partisan fights. Yugoslavia and Greece threatened to degenerate into complete chaos when the explosive passion of the population was incited to fight against the German occupation army. The defendants as German military commanders had a twofold task in that particular situation—to protect their troops and to hold the Balkans—which the prosecution itself has called the Achilles' heel of the German front. For 3 years they carried out this task. They, however, had to use harsh means in order to counter all attempts at insurrection.

I have only very little to say now concerning the reprisal and hostage problem. Apart from the demand for ratios, which I have discussed previously, other rules have been laid in order to restrict the latitude of those parties which take reprisal measures. The American Professor, Foulke, calls all of them “merely an expression of opinion and of little practical value.”

Restrictions for the carrying out of reprisal measures can only exist in accordance with their nature as coercive means in connection with the principle of military necessity.

Why should it be necessary under conditions prevailing in Yugoslavia and in Greece to inform the partisans of the names, addresses, etc., of those persons kept as security hostages, when the forces of resistance were informed by announcements and posters concerning the fact that hostages or so-called “reprisal prisoners” would be used as live pawns?

Paragraph 358d of the American Field Manual merely demands a statement that security hostages, where and when necessary, would be used in reprisal. The manual which was available to the German military commanders for international purposes, the semi-official commentary by Waltzog [*Recht der Landkriegsfuehrung*], Rules of Land Warfare (1942), gave somewhat more detailed instructions in this particular.

“The hostages are detained in a sort of security custody. They guarantee with their lives the lawful conduct of the opponent. When taking hostages, it has to be announced, according to unwritten international law (common law), that hostages were arrested and for what purpose. Above all, the taking of hostages and the threat to kill them has to reach the

knowledge of those parties, against the lawful conduct of which the hostages are a guarantee.

“If the very act occurs, for the prevention of which hostages were taken, and if the opponent continues his conduct in violation of international law, the hostages may be killed. The taking of hostages is, therefore, more than an action depriving a group of people of their liberty. It is, beyond that, a break with the principle of the respect for the life of the citizen, laid down in Article 46.”

These demands have been complied with by the orders in question. I refer particularly to the order of Field Marshal List, dated 4 October 1941, which orders the announcement of the fact, to all persons concerned, that the hostages' lives are at stake.

At times, a territorial connection between the hostages and the preceding action was demanded. However, no reasons can be given for such a demand, not even with Article 50 of the Hague Rules for Land Warfare—as is being attempted occasionally—because Article 50 does not refer to reprisal measures. From the nature of reprisal measures as coercive measures, a general principle results, which Professor Bonfils has formulated in the following way:

“Reprisals have to be such as not to fail to impress those who are the authors and instigators of the excess in question.”

Territorial connection between hostages and perpetrators might have played a part in earlier days when acts of resistance and sabotage against the occupation forces mostly emanated from a limited circle of persons. However, it was of no importance, whatsoever, in Yugoslavia and Greece where the resistance activity emanated from forces which reached beyond all local frontiers. In such a situation only the spiritual connection between hostages and perpetrators could be taken into account, such as it becomes apparent from the membership in or support of the illegal resistance forces, or merely from the fact of a common national basis.

With reference to the authority for the ordering of reprisal measures, the following should be stated:

There existed a regulation in the German Army to the effect that only a senior commander was to decide the fate of hostages—as a rule a division commander. There is, however, no rule in the laws of war to this effect. This is expressly stated in the British Military Manual.

The German regulation was valid only for such length of time as the opponent adhered to it also. Since according to the American “Rules of Land Warfare,” a subordinate commander can order on his own responsibility proper reprisal measures, in urgent cases

of military necessity, no conclusions can be drawn from the fact that German troop commanders have supposedly acted in the same way.

Two further forms of reprisal measures are at issue in this trial; the use of so-called preventative or security hostages, particularly for the protection of railway traffic; and the destruction of houses and localities as a means of reprisal.

The use of railway hostages was discussed at great length when the Germans in 1870–1871 in France and the British during the South African war made use of this means. It is the achievement of Professor Hyde to have analyzed the principles of the problem in an objective manner, after Professor Oppenheim had stated that the use of railway hostages is permissible. The legality of the measure depends entirely on the status of the persons against whom they are directed. Professor Spaight states:*

“If, therefore, one confines one’s remarks to a district in which there is no possibility of damage done to the line having been effected by the enemy’s raiding parties or in which such raiding parties could not achieve their purpose without the inhabitants assistance or connivance * * * I held that no objection arises under the laws and customs of war to the carrying of hostages on trains.”

Since in Yugoslavia and Greece—as I have developed—legal combatants of the enemy did not exist at all after the capitulation and every possibility of legal resistance was eliminated, the use of security hostages was a measure permissible under international law. The considerations raised in paragraph 463 of the British Military Manual against their use, could not be of any practical significance under the conditions prevailing in Yugoslavia and Greece.

Where the destruction of enemy property, houses, and localities is concerned, a difference will have to be made between measures which are necessary in connection with military operations and measures carried out from a reprisal aspect. The laws of war permit them in both instances.

In general, the laws of war do permit the destruction of enemy property if warranted by military necessity.

The history of war provides numerous instances in support of the thesis that viewed under this aspect, in guerrilla fighting and in the event of insurrections, the systematic destruction of towns and villages is sanctioned as a legitimate resort calculated to

* Spaight, *op. cit. supra*, p. 469.

deprive the resistance forces of their means of subsistence. Professor Oppenheim states:¹

“But the fact that a general devastation can be lawful must be admitted. * * * in case of a levy *en masse* on already occupied territory, when self-preservation obliges a belligerent to resort to the most severe measures. It is also lawful, when after the defeat of his main forces and occupation of his territory, an enemy disperses his remaining forces into small bands which carry on guerrilla tactics and receive food and information, so that there is no hope of ending the war except by general devastation which cuts off supplies of every kind from the guerrilla bands.”

During the Boer War, the British very largely availed themselves of such measures. The country was laid waste and wide as a means of cutting off the supplies of the guerrilla forces. At the same time the civilian population was interned in “‘concentration camps’ with the result of serious loss of life.”

In this connection Professor Spaight states that Lord Kitchener carried out this policy of devastation with a systematic thoroughness that seemed like barbarity to some, but was amply warranted by the peculiar nature of the war.

The American scholar, Professor Hershey, also thinks that devastation and destruction, even of a town, are permissible in the face of a threatened insurrection of its inhabitants, or if directed against guerrilla forces in order to cut off their supplies.

Destructions are permissible as reprisals against unlawful acts of the population or against unlawful combatants, nor need a direct connection with military operations be established in such cases. When one of Sheridan’s officers was murdered in October 1864, General Sheridan had all the houses within a radius of 5 miles burned down. Professor Fenwick states:²

“The burning of towns and villages has been a common form of retaliation.”

Professor Cobbet also classes the destruction of localities or houses as among the permissible reprisals against crimes committed there or in their proximity.

In the same way, Professor Holland states that such measures are not uncommon.

Oppenheim-Lauterpacht comments:

“Article 50 does not prevent the burning by way of reprisals of villages or even towns for a treacherous attack committed there on enemy soldiers by unknown individuals.”

¹ Oppenheim, *op. cit. supra*, p. 215.

² Fenwick, *op. cit. supra*, p. 581.

In accordance with the general practice of belligerents and authoritative opinion on international law, the American "Rules of Land Warfare" also describe reprisals consisting in the burning down of houses and villages as permissible measures.

That such measures had also to be resorted to in Yugoslavia and Greece is only natural, considering the extent of unlawful partisan activity in these countries and the methods of warfare practiced by the partisans.

I propose to conclude my legal arguments on the problem of reprisals by once again pointing out the most significant fact in this case.

Neither in Yugoslavia nor in Greece were there any longer any lawful resistance forces after the conclusion of the campaign and the surrender of the Yugoslav Government and the Yugoslav and Greek armies, there were only unlawful combatants, war rebels. The mere fact of organizing these resistance forces and the establishment of partisan formations constituted war rebellion. This alone entitled the German commanders to resort to acts of suppression and reprisals independent of any individual crimes committed by the resistance forces against German troops. The extent of and danger inherent in, the resistance forces very largely determined the scale of the reprisal measures. The latter, though usually provoked by individual acts of resistance, were naturally directed against the illegal resistance as a whole of which individual acts were merely tokens.

1. Within the realm of international law, the plea of superior orders—with respect to war crimes—has always received a different treatment from that accorded to it within the sphere of domestic criminal law.

2. In accordance with a recognized rule of the customs of war, the plea of superior orders, at any rate at the time at which the events at issue in this case occurred, was regarded as a full justification in relation to war crimes.

Professor Lauterpacht has expressed this as follows:

"It is an interesting gloss on the complexity of the problem that in the United States the plea of superior orders is, on the whole, without decisive effect in internal criminal or constitutional law, although it is apparently treated as a full justification in relation to war crimes."

It is certain, moreover, that both the well known comment of Professor Oppenheim, and that of the American author, Manner—as well as the provisions of the military manuals of the United States and Great Britain, in the version which was valid until 1944—treated the plea of superior orders in its full scope as a

justification, a justification, that is, on all levels of the military hierarchy and not merely applicable to the common soldier or enlisted man.

Even Professor Glueck, in his treaties on the ambiguity of the wording in paragraph 347, United States Manual, "Rules of Land Warfare," does not seriously dispute it. Neither was this wide scope of the plea of superior orders ever impugned in the discussions of the Interallied Commission for the Investigation of War Crimes at the end of the First World War or in the discussions on Article 228 of the Treaty of Versailles.

The subsequent amendment of paragraph 347 of the United States Manual, "Rules of Land Warfare," and of paragraph 443 of the British Manual, calculated to render possible the punishment of members of the German armed forces who had acted on orders of their government or their superiors, is a manifest violation of the universally recognized axiom that no punishment must be based on *ex post facto* laws. Besides the restatement of the provisions in the United States Manual, "Rules of Land Warfare" and the British Manual, being acts of domestic legislation, could not amend a recognized rule of international law. In examining the grounds adduced in support of the amendment, mainly those advanced by Professor Glueck and Professor Lauterpacht to whose initiative the new version of the two regulations is to be attributed, one will find that they are dictated by mere expediency.

The events in Germany after 1933 showed very clearly where the casting overboard of fundamental principles of law has got us to. No legal system can survive such treatment; neither can international law.

Professor Hyde's comment proves that, even today, eminent foreign lawyers, including American jurists, regard the plea of superior orders as a justification.

Professor Hyde's reference to reprisal measures, quoted below, proves that he views the subject with the same realism he has displayed throughout.*

"In land warfare the opportunity for a commanding officer to exercise discretion in resorting to retaliation is narrow, because such procedure is commonly determined by the highest authorities of the state, and when decided upon, leaves the commander in the field no alternative."

May it please the Tribunal. I attach decisive importance to the statements of Charles Cheney Hyde, Professor at Columbia University, and former advisor to the State Department of the

* Hyde, *op. cit. supra*, p. 1841.

United States of America, contained in the 1945 Edition of International Law; I submit that these statements are of decisive importance to the case at issue before this Tribunal and, if it please the Tribunal, I commend them to the special attention of the Tribunal.*

* * * * *

May it please the Tribunal. I now come to the final evaluation of the case.

Through the development of the situation in the Balkans after the beginning of the Russian campaign, Field Marshal List was faced with a number of legal questions, scarcely any of which could be given an unequivocal answer. Here, the sins of the past became evident, in that no clear and exhaustive legal rules were created for martial occupation. The League of Nations is just as responsible for this sin of neglect as was the Hague Peace Conference before it. It should have been one of the most urgent tasks of the associations of international law to create clarity in this important sphere of law, but it was neglected, as were so many other things. Nothing shows more clearly the incomplete and defective regulation of this matter than the situation concerning international law which has developed since the end of the Second World War on the territory of the former German Reich! Because how would it be possible for each of the occupation powers to administrate its zone on different principles, if the law of martial occupation were governed by clear, positive principles?

Events since 1945 have brought home to every intelligent man in the world the truth of the fact that scarcely one single sphere of international law is so defective as this one. Those men from the great western nations with a sense of responsibility have drawn therefrom the only possible conclusion, namely that to remedy this condition an occupation statute must be created. It is in the nature of things for the corresponding conclusions also to be drawn from the case in question, and for it to be recognized that Field Marshal List, as all the other German commanders assigned to a German occupied country was faced with a sphere of law full of deficiencies and obscurities.

If in Your Honors' view Field Marshal List surpassed the measure of that which, in retrospect with exact knowledge of the circumstances on both sides, could be designated as justified

* The argument dealing with specific developments in the Balkans, particularly as they applied to the defendant List, have been omitted. See mimeographed transcript, pp. 9812-9870.

and tolerable, then you must allow that on the basis of the state of affairs and considering the vagueness of the legal position, Field Marshal List could feel himself justified in ordering the measures he did.

The Tribunal cannot pass over these inherent facts in view of the basic principles governing the field of criminal law for all civilized nations for centuries.

Reasons of fairness and justice demand that Field Marshal List be treated in this respect exactly as were, for instance, those Allied commanders who gave the orders to attack Dresden and Hiroshima. Both attacks were operations started when the Allies had already clearly won the war, and the officers participating in both operations could have no doubt whatsoever that they would bring a terrible death to tens, nay, hundreds of thousands of innocent civilians. But in spite of this, these orders were given—and carried out!

May it please the Tribunal. I do not believe there is one man in the world today with powers of judgment and a love of truth who would dare to think that the large scale attacks on Dresden and Hiroshima with their hundreds of thousands of dead can be *objectively* justified. If, in spite of this, the question has not yet been brought up about the criminal responsibility of the Allied commanders concerned, then obviously this is only because they were credited with having acted in good faith, and it is assumed they considered that such an action was militarily necessary. But the right conceded to the Allied commanders in such cases, must certainly be granted Field Marshal List in the cases charged against him which involved far fewer losses.

May it please the Tribunal. I must deal with one further point. If the Tribunal passes sentence in cases such as that of Field Marshal List, then Your Honors will create a juridical precedent which may have incalculable consequences. Because in the future no commanders will ever dare to issue an order with any bearing on international law without first obtaining a legal opinion on it. In legally complicated and doubtful cases he will probably never struggle through to a decision. Your Honors would thereby hit the core and the striking power of Your Honors' own army. *In practice this means that in the future the course of military events would be determined not by soldiers, but by lawyers!*

May it please the Tribunal. The consequences of this would be that an enemy with no scruples concerning international law would be given colossal opportunities, and he will not hesitate to make every possible use of them.*

* Defense arguments concerning a number of questions have not been reproduced in the materials of this case. Most of these general questions were likewise raised in the "High Command Case IX." Section G pp. 374-475, this volume.)

X. FINAL STATEMENT OF DEFENDANT LIST TO THE TRIBUNAL ON BEHALF OF ALL DEFENDANTS¹

PRESIDING JUDGE CARTER: We will hear Field Marshal List at this time. I think it would be proper that you approach the microphone in the center of the room, Field Marshal, if you care to.

I also might say that if Field Marshal List is to be the only representative of the defendants who speaks that we will not hold him to any 10-minute period of time.²

You may proceed.

DEFENDANT LIST: Your Honors, may it please the Tribunal. In my capacity as field marshal and as senior of the generals active in the Southeast indicted before this Tribunal, I render the following declaration on behalf of these generals and myself.

In the opening session on 8 July 1947, we answered your question as to whether we pleaded guilty with a definite "no." We repeat this "no" today after the termination of this trial which lasted for 7 months. We are not guilty. We did not want this war, nor are we responsible for starting the fights in the Balkans and in their ensuing effects both were forced on us.

We acted in defense and for the protection of the soldiers entrusted to us, for the protection of the whole German fighting front. We did not serve the Party. We did our duty as soldiers for our fatherland, for Germany, as we had done for decades.

And we were compelled to do our duty even during a battle which bore all the marks of a band warfare, in a combat which every soldier, and above all the German soldier, detests.

If harsh measures entailed, and were bound to entail, it is the guilt of those who caused and sponsored this fight. The fault rests with those who waged this battle from the very beginning, cunningly and cruelly in the Balkan manner. We had only one aim, to pacify the country.

We never thought of terrorization, decimation, or even extermination. Such a plan has never existed. We absolutely refute any such unfounded allegation. In this gigantic struggle which affected and shook the whole world, during which the incidents on the Balkan front formed but a small part, we did nothing except what we considered militarily expedient and justified.

¹ Final statement is recorded in mimeographed transcript, 9 February 1948, pp. 10415-10418.

² In speaking of the order of presentation of the closing statements by the prosecution and defense counsel, the Tribunal stated that following the closing arguments "the defendants may address the court, and will be given 10 minutes each if they care to make use of the time." (*Tr. p. 10355.*)

We acted under the harshness of the conditions which can only be judged rightly on the spot and in consideration of the conditions prevailing then and there.

We therefore maintain: we are not criminals; we refute any such accusation most emphatically, just as emphatically as we refute the insults raised by the prosecution during this trial, insults against our nation, against our profession, against us personally, and against the soldiers entrusted to our care.

I am fully convinced that the American Army, as well as the American people, in whose name the charges have been made, do not approve of such procedure. Justice further demands that we be credited the same bona fide faith as those commanders of the Allied forces are, whose military measures caused the heaviest losses of innocent people, the greatest misery and irreparably destroyed irreplaceable cultural monuments belonging to the whole of mankind.

To arrive at a just appreciation it is furthermore imperative, to take due consideration of the inherent circumstance, under which we were compelled to serve. We were pledged by our oath and duty of obedience. We were living under the coercion of a dictatorship which grew ever more and more demonic and chaotic; a dictatorship where nevertheless strong tendencies and countertendencies were predominant, wherein, however the individual had but little freedom of action; a dictatorship unconceivable by any outsider, least so by a free citizen of a free democracy. These conditions, as a whole, cannot be grasped without an insight into the background of all that happened in these days. Against us stood more or less the same powers who have established today in the Balkans a regime of terror, and plan to do the same in Europe, powers who keep the world in tension, today opposed by the whole Western Hemisphere. May a kind fate spare the nation which now holds trial on us from having to fight a battle as we were forced to fight.

Calmly we await the verdict of the Tribunal.

If sentences should be passed, we will bear them as soldiers for the former German armed forces, as generals for our brave and gallant soldiers, as Germans for our nation.

PRESIDING JUDGE CARTER: Do I understand that this is the only defendant who cares to address the Tribunal? This being true, this portion of the trial has come to an end.

The Tribunal will stand adjourned until the further call of the Tribunal. We ask that both the prosecution and the defense counsel keep in touch with the Tribunal so that they will be available when the Tribunal is ready to meet and render its decision.

The Tribunal will recess until that time.

THE MARSHAL: Court will recess until further notice.

XI. JUDGMENT

A. Opinion and Judgment of Military Tribunal V

In the matter of the United States of America against Wilhelm List, et al., sitting at Nuernberg, Germany, on 19 February 1948, Justice Wennerstrum, presiding.

PRESIDING JUDGE WENNERSTRUM: Judge Carter will read the first portion of the opinion.

JUDGE CARTER: In this case, the United States of America prosecutes each of the defendants on one or more of four counts of an indictment charging that each and all of said defendants unlawfully, willfully, and knowingly committed war crimes and crimes against humanity as such crimes are defined in Article II of the Control Council Law No. 10. They are charged with being principals in and accessories to the murder of thousands of persons from the civilian population of Greece, Yugoslavia, Norway, and Albania between September 1939 and May 1945 by the use of troops of the German armed forces under the command of and acting pursuant to orders issued, distributed, and executed by the defendants at the bar. It is further charged that these defendants participated in a deliberate scheme of terrorism and intimidation, wholly unwarranted and unjustified by military necessity, by the murder, ill-treatment and deportation to slave labor of prisoners of war and members of the civilian populations in territories occupied by the German armed forces; by plundering and pillaging public and private property and wantonly destroying cities, towns, and villages for which there was no military necessity. Upon these charges, each of the defendants except the defendant Boehme has been formally arraigned and a plea of not guilty accepted.

The indictment alleges that the defendants committed the acts charged while occupying the positions hereafter shown during the periods of time indicated—

The defendant Wilhelm List was a Generalfeldmarschall [Field Marshal] (General of the Army) of the German armed forces, serving as commander in chief, 12th Army, from April 1941 to October 1941; Armed Forces Commander Southeast from June 1941 to October 1941; and as commander in chief, Army Group A, from July 1942 to September 1942.

The defendant Maximilian von Weichs was a Generalfeldmarschall [Field Marshal] (General of the Army) of the German armed forces, serving as commander in chief, 2d Army, from April 1941 to July 1942; commander in chief, Army Group B,

from July 1942 to February 1943; and commander in chief, Army Group F, and Supreme Commander Southeast from August 1943 to March 1945.

The defendant Lothar Rendulic was a Generaloberst (General) in the German armed forces, serving as commander in chief, 2d Panzer Army, from August 1943 to June 1944; commander in chief, 20th Mountain Army, from July 1944 to January 1945; Armed Forces Commander North from December 1944 to January 1945; commander in chief, Army Group North, from January 1945 to March 1945; commander in chief, Army Group Courland, from March 1945 to April 1945; and commander in chief, Army Group South, from April 1945 to May 1945.

The defendant Walter Kuntze was a General der Pioniere (Lieutenant General, Engineers) in the German armed forces, serving as acting commander in chief, 12th Army, from October 1941 to August 1942, and Deputy Armed Forces Commander Southeast during the same period.

The defendant Hermann Foertsch was a General der Infanterie (Lieutenant General, Infantry) in the German armed forces, serving as chief of staff, 12th Army, from May 1941 to August 1942; chief of staff, Army Group E, from August 1942 to August 1943; and chief of staff, Army Group F, from August 1943 to March 1944.

The defendant Franz Boehme was a General der Gebirgstruppen (Lieutenant General, Mountain Troops) in the German armed forces, serving as commander, XVIII Mountain Army Corps, from April 1941 to December 1941; Plenipotentiary Commanding General in Serbia from September 1941 to December 1941; and commander in chief, 2d Panzer Army, from June 1944 to July 1944.

The defendant Helmuth Felmy was a General der Flieger (Lieutenant General, Air Force) in the German armed forces, serving as commander, Southern Greece, from June 1941 to August 1942; and commander, LXVIII Army Corps, from June 1943 to October 1944.

The defendant Hubert Lanz was a General der Gebirgstruppen (Lieutenant General, Mountain Troops) in the German armed forces, serving as commander, 1st Mountain Division, from October 1940 to January 1943; and commander, XXII Mountain Army Corps, from August 1943 to October 1944.

The defendant Ernst Dehner was a General der Infanterie (Lieutenant General, Infantry) in the German armed forces, serving as commander, LXIX Army Reserve Corps, from August 1943 to March 1944.

The defendant Ernst von Leyser was a General der Infanterie (Lieutenant General, Infantry) in the German armed forces,

serving as commander, XV Mountain Army Corps, from November 1943 to July 1944; and commander, XXI Mountain Army Corps, from July 1944 to April 1945.

The defendant Wilhelm Speidel was a General der Flieger (Lieutenant General, Air Force) in the German armed forces, serving as commander, Southern Greece, from October 1942 to September 1943; and Military Commander Greece from September 1943 to June 1944.

The defendant Kurt von Geitner was a Generalmajor (Brigadier General) in the German armed forces, serving as chief of staff to the commanding general in Serbia from July 1942 to August 1943; and chief of staff to the Military Commander of Serbia and Military Commander Southeast from August 1943 to October 1944.

It is alleged in the indictment that the acts charged were violative of Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. The portions of the law applicable to this case provide as follows [Article II]:

"1. ***

"(b) *War Crimes.* Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

"(c) *Crimes against humanity.* Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

* * * * *

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission***.

* * * * *

“4. (b) The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”

Pursuant to the provisions of Control Council Law No. 10, the pertinent parts of which are herein set out, the United States of America filed its indictment charging the defendants in four counts with war crimes and crimes against humanity in accordance with the definitions thereof contained. Reduced to a minimum of words, these four counts charge—

1. That defendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed forces; that attacks by lawfully constituted enemy military forces, and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of noncombatants, arbitrarily designated as “partisans,” “Communists,” “Communist suspects,” “bandit suspects” were terrorized, tortured, and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed, and executed orders for the execution of 100 “hostages” in retaliation for each German soldier killed and 50 “hostages” in retaliation for each German soldier wounded.

2. That defendants were principals or accessories to the plundering and looting of public and private property, the wanton destruction of cities, towns, and villages, frequently together with the murder of the inhabitants thereof, and the commission of other acts of devastation not warranted by military necessity in the occupied territories of Greece, Yugoslavia, Albania, and Norway by troops of the German armed forces acting at the direction and order of these defendants; that defendants ordered troops under their command to burn, level, and destroy entire villages and towns and thereby making thousands of peaceful noncombatants homeless and destitute; thereby causing untold suffering, misery, and death to large numbers of innocent civilians without any recognized military necessity for so doing.

3. That defendants were principals or accessories to the drafting, distribution, and execution of illegal orders to the troops of the German armed forces which commanded that enemy troops be refused quarters and be denied the status and rights of prisoners of war and surrendered members of enemy forces be summarily executed; that the defendants illegally ordered that

regular members of the national armies of Greece, Yugoslavia, and Italy be designated as "partisans," "rebels," "Communists," and "bandits," and that relatives of such members of such national armies be held responsible for such members' acts of warfare, resulting in the murder and ill-treatment of thousands of soldiers, prisoners of war, and their noncombatant relatives.

4. That defendants were principals or accessories to the murder, torture, and systematic terrorization, imprisonment in concentration camps, forced labor on military installations, and deportation to slave labor of the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed forces acting pursuant to the orders of the defendants; that large numbers of citizens—democrats, Nationalists, Jews, and gypsies—were seized, thrown into concentration camps, beaten, tortured, ill-treated, and murdered while other citizens were forcibly conscripted for labor in the Reich and occupied territories.

The acts charged in each of the four counts are alleged to have been committed willfully, knowingly, and unlawfully and constitute violations of international conventions, the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by Article II of Control Council Law No. 10 adopted by the representatives of the United States of America, Great Britain, the Republic of France, and the Soviet Union.

The defendant Franz Boehme committed suicide prior to the arraignment of the defendants, and the Tribunal has ordered his name stricken from the list of defendants contained in the indictment. The defendant Maximilian von Weichs became ill during the course of the trial and it having been conclusively ascertained that he is physically unfit and unable to appear in Court before the conclusion of the trial, his motion that the proceedings be suspended as to him was sustained. This holding is without prejudice to a future trial of this defendant on the charges herein made against him if and when his physical condition permits.

Before venturing into a discussion of specific issues, it seems advisable to briefly state the general nature of international law and the sources from which its principles can be ascertained. No attempt will be made here to give an all inclusive definition of international law, in fact, there is justification for the assertion that it ought not to be circumscribed by strict definition in order that it may have ample room for growth. Any system of law that is obviously subject to growth by the crystalization of generally prevailing custom and practice into law under the impact of

common acceptance or consent must not be confined within the limits of formal pronouncement or complete unanimity. For our purposes it is sufficient to say that international law consists of the principles which control or govern relations between nations and their nationals. It is much more important to consider the sources from which these principles may be determined.

The sources of international law which are usually enumerated are (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions, and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) the diplomatic papers. These sources provide a frame upon which a system of international law can be built but they cannot be deemed a complete legal system in themselves. Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of international law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired.

The tendency has been to apply the term "customs and practices accepted by civilized nations generally," as it is used in international law, to the laws of war only. But the principle has no such restricted meaning. It applies as well to fundamental principles of justice which have been accepted and adopted by civilized nations generally. In determining whether such a fundamental rule of justice is entitled to be declared a principle of international law, an examination of the municipal laws of states in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of international law would seem to be fully justified. There is convincing evidence that this not only is, but has been the rule. The rules applied in criminal trials regarding burden of proof, presumption of innocence, and the right of a defendant to appear personally to defend himself are derived from this source. Can it be doubted that such a source of international law would be applied to an insane defendant? Obviously he would not be subjected to trial during his incompetency. Clearly, such a holding would be based upon a fundamental principle of criminal law accepted by nations generally. If the rights of nations and the rights of individuals who become involved in international relations are to be respected and preserved, fundamental rules of

justice and right which have become commonly accepted by nations must be applied. But the yardstick to be used must in all cases be a finding that the principle involved is a fundamental rule of justice which has been adopted or accepted by nations generally as such.

The defendants invoke the defensive plea that the acts charged as crimes were carried out pursuant to orders of superior officers whom they were obliged to obey. This brings into operation the rule just announced. The rule that superior order is not a defense to a criminal act is a rule of fundamental criminal justice that has been adopted by civilized nations extensively. It is not disputed that the municipal law of civilized nations generally sustained the principle at the time the alleged criminal acts were committed. This being true, it properly may be declared as an applicable rule of international law.

It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war. Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists and the interior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice. In the German War Trials (1921), the German Supreme Court of Leipzig in *The Llandovery Castle* case said:

“Patzig’s order does not free the accused from guilt. It is true that, according to paragraph 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law.”

It is true that the foregoing rule compels a commander to

make a choice between possible punishment by his lawless government for the disobedience of the illegal order of his superior officer, or that of lawful punishment for the crime under the law of nations. To choose the former in the hope that victory will cleanse the act of its criminal characteristics manifests only weakness of character and adds nothing to the defense.

We concede the serious consequences of the choice especially by an officer in the army of a dictator. But the rule becomes one of necessity, for otherwise the opposing army would in many cases have no protection at all against criminal excesses ordered by superiors.

The defense relies heavily upon the writings of Professor L. Oppenheim to sustain their position. It is true that he advocated this principle throughout his writings. As a co-author of the British "Manual of Military Law," he incorporated the principle there. It seems also to have found its way into the United States "Rules of Land Warfare" (1940). We think Professor Oppenheim espoused a decidedly minority view. It is based upon the following rationale: "The law cannot require an individual to be punished for an act which he was compelled by law to commit." The statement completely overlooks the fact that an illegal order is in no sense of the word a valid law which one is obliged to obey. The fact that the British and American Armies may have adopted it for the regulations of its own armies as a matter of policy does not have the effect of enthroning it as a rule of international law. We point out that army regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. It is possible, however, that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact. Whether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but in the latter they do not constitute an authoritative precedent.

Those who hold to the view that superior order is a complete defense to an international law crime, base it largely on a conflict in the articles of war promulgated by several leading nations. While we are of the opinion that army regulations are not a competent source of international law, where a fundamental rule of justice is concerned, we submit that the conflict in any event

does not sustain the position claimed for it. If, for example, one be charged with an act recognized as criminal under applicable principles of international law and pleads superior orders as a defense thereto, the duty devolves upon the court to examine the sources of international law to determine the merits of such a plea. If the court finds that the army regulations of some members of the family of nations provide that superior order is a complete defense and that the army regulations of other nations express a contrary view, the court would be obliged to hold, assuming for the sake of argument only that such regulations constitute a competent source of international law, that general acceptance or consent was lacking among the family of nations. In as much as a substantial conflict exists among the nations whether superior order is a defense to a criminal charge, it could only result in a further finding that the basis does not exist for declaring superior order to be a defense to an international law crime. But, as we have already stated, army regulations are not a competent source of international law when a fundamental rule of justice is concerned. This leaves the way clear for the court to affirmatively declare that superior order is not a defense to an international law crime if it finds that the principle involved is a fundamental rule of justice and for that reason has found general acceptance.

International law has never approved the defensive plea of superior order as a mandatory bar to the prosecution of war criminals. This defensive plea is not available to the defendants in the present case, although, if the circumstances warrant, it may be considered in mitigation of punishment under the express provisions of Control Council Law No. 10.

It is urged that Control Council Law No. 10 is an *ex post facto* act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20 December 1945, a date subsequent to the dates of the acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23h of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a tribunal trying a case charging a crime under the provisions of Control Council Law No. 10 to determine if the acts charged were crimes at the

time of their commission and that Control Council Law No. 10 is in fact declaratory of then existing international law.

This very question was passed upon by the International Military Tribunal in the case of the United States *vs.* Hermann Wilhelm Goering in its judgment entered on 1 October 1946.* Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language:

“The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”

We adopt this conclusion. Any doubts in our mind concerning the rule thus announced go to its application rather than to the correctness of its statement. The crimes defined in Control Council Law No. 10 which we have quoted herein were crimes under pre-existing rules of international law, some by conventional law such as that exemplified by the Hague Regulations of 1907 clearly make the war crimes herein quoted crimes under the proceedings of that convention. In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements.

The crimes specified in the London Charter and defined in Control Council Law No. 10 which have heretofore been set forth and with which these defendants are charged merely restate the rules declared by the Hague Regulations of 1907 in Articles 43, 46, 47, 50 and 23h of the regulations annexed thereto which provide [*Annex to Hague Convention No. IV*]

Article 43. “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

* Trial of the Major War Criminals, *op. cit. supra*, judgment of the IMT, vol. I, p. 171 ff.

Article 46. "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

Article 47. "Pillage is formally forbidden."

Article 50. "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

Article 23. "In addition to the prohibitions provided by special Conventions, it is especially forbidden—

* * * * *

"h. To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

We conclude that pre-existing international law has declared the acts constituting the crimes herein charged and included in Control Council Law No. 10 to be unlawful, both under the conventional law and the practices and usages of land warfare that had ripened into recognized customs which belligerents were bound to obey. Anything in excess of existing international law therein contained is a utilization of power and not of law. It is true, of course, that courts authorized to hear such cases were not established nor the penalties to be imposed for violations set forth. But this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes. This subject was dealt with in the International Military Trial in the following language* :

"But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of

* *Ibid.*, pp. 220-221.

violating the rules of land warfare laid down by this Convention. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing."

It is true, of course, that customary international law is not static. It must be elastic enough to meet the new conditions that natural progress brings to the world. It might be argued that this requires a certain amount of retroactive application of new rules and that by conceding the existence of a customary international law, one thereby concedes the legality of retroactive pronouncements. To a limited extent the argument is sound, but when it comes in conflict with a rule of fundamental right and justice, the latter must prevail. The rule that one may not be charged with crime for committing an act which was not a crime at the time of its commission is such a right. The fact that it might be found in a constitution or bill of rights does not detract from its status as a fundamental principle of justice. It cannot properly be changed by retroactive action to the prejudice of one charged with a violation of the laws of war.

An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen.

Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army. But some other crimes, such as mass murder, are punishable during and after the war. But such crimes are also war crimes because they were committed under the authority or orders of the belligerent who, in ordering or permitting them, violated the rules of warfare. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent. There are many reasons why this must be so, not the least of which is that war is usually followed by political repercussions and upheavals which at times place

persons in power who are not, for one reason or another, inclined to punish the offenders. The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The captor belligerent may therefore surrender the alleged criminal to the state where the offense was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.

It cannot be doubted that the occupying powers have the right to set up special courts to try those charged with the commission of war crimes as they are defined by international law. *Ex Parte Quirin*, 317 U.S. 1, *In Re Yamashita*, 327 U.S. 1. Nor can it be said that the crimes herein charged are invalid as retroactive pronouncements, they being nothing more than restatements of the conventional and customary law of nations governing the rules of land warfare, restricted by charter provisions limiting the jurisdiction of the Tribunal by designating the class of cases it is authorized to hear. The elements of an *ex post facto* act or a retroactive pronouncement are not present insofar as the crimes charged in the instant case are concerned.

The argument that the defendants cannot be tried before this Tribunal is without force. It is urged they can only be properly tried in accordance with the international principles laid down in Article 63 of the Geneva Convention of 1929 relative to the treatment of prisoners of war. We submit that the provision applies only to crimes and offenses committed while occupying the status of a prisoner of war, and confers no jurisdiction over a violation of international law committed prior to the time of becoming such.

In the recent case of *In Re Yamashita*, 327 U.S. 1, 66 Sup. Ct. 348, the Supreme Court of the United States arrived at this conclusion in the following language: "But we think examination of article 63 in its setting in the Convention plainly shows that it refers to sentence 'pronounced against a prisoner of war' for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant."

The defendants at bar are charged only with crimes alleged to have been committed as combatants before they became prisoners of war. We hold, therefore, that no rights under Article 63 of the Geneva Convention of 1929 can accrue to them in the present case. The jurisdictional question raised is without merit.

It is essential to a proper understanding of the issues involved in the present case, that the status of Yugoslavia, Greece, and Norway be determined during the periods that the alleged crim-

inal acts of these defendants were committed. The question of criminality in many cases may well hinge on whether an invasion was in progress or an occupation accomplished. Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.

The evidence shows that the invasion of Yugoslavia was commenced on 6 April 1941. Nine days later the Yugoslav Government capitulated and on 16 April 1941, large scale military operations had come to an end. The powers of government passed into the hands of the German armed forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On 22 April 1941, the Greek armed forces in the north were forced to surrender and on 28 April 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing international law.

The evidence shows that the population remained peaceful during the spring of 1941. In the early summer following, a resistance movement began to manifest itself. It increased progressively in intensity until it assumed the appearance of a military campaign. Partisan bands, composed of members of the population, roamed the territory doing much damage to transportation and communication lines. German soldiers were the victims of surprise attacks by an enemy which they could not engage in open combat. After a surprise attack, the bands would hastily retreat or conceal their arms and mingle with the population with the appearance of being harmless members thereof. Ambushing of German troops was a common practice. Captured German soldiers were often tortured and killed. The terrain was favorable to this type of warfare and the inhabitants most adept in carrying it on.

It is clear that the German armed forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German armed forces of its status of an occupant.

These findings are consistent with Article 42 of the Hague Regulations of 1907 which provide—"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

It is the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period here involved. The prosecution contends just as emphatically that it did. The evidence on the subject is fragmentary and consists primarily of admission contained in the reports, orders, and diaries of the German Army units involved. There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.

The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained. The Soviet star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovic and the Edes of General Zervas. It is evident also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being *francs-tireurs*.

The status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsi-

bility. But he is definitely limited by recognized rules of international law, particularly the Hague Regulations of 1907. Article 43 thereof imposes a duty upon the occupant to respect the laws in force in the country. Article 46 protects family honor and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship. Article 47 prohibits pillage. Article 50 prohibits collective penalties. Article 51 regulates the appropriation of properties belonging to the state or private individuals which may be useful in military operations. There are other restrictive provisions not necessary to mention here. It is the alleged violation of these rights of the inhabitants thus protected that furnish the basis of the case against the defendants.

The evidence is clear that during the period of occupation in Yugoslavia and Greece, guerrilla warfare was carried on against the occupying power. Guerrilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganized forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applies to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. The rule is based on the theory that the forces of two states are no longer in the field and that a contention between organized armed forces no longer exists. This implies that a resistance not supported by an organized government is criminal and deprives participants of belligerent status, an implication not justified since the adoption of chapter I, Article I of the Hague Regulations of 1907. In determining the guilt or innocence of an army commander when charged with a failure or refusal to accord a

belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. Such commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and, if he willfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent. Where room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.

We think the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

It is contended by the prosecution that the so-called guerrillas were in fact irregular troops. A preliminary discussion of the subject is essential to a proper determination of the applicable law. Members of a militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war. (See chapter I, Article I, Hague Regulations of 1907.) In considering the evidence adduced on this subject, the foregoing rules will be applied. The question whether a captured fighter is a guerrilla or an irregular is sometimes a close one that can be determined only by a careful evaluation of the evidence before the Court.

The question of the right of the population of an invaded and occupied country to resist has been the subject of many conventional debates. (Brussels Conference of 1874; Hague Peace Conference of 1899.) A review of the positions assumed by the various nations can serve no useful purpose here for the simple reason that a compromise (Hague Regulations, 1907) was reached which has remained the controlling authority in the fixing of a legal belligerency. If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.

The prosecution advances the contention that since Germany's wars against Yugoslavia and Greece were aggressive wars, the German occupation troops were there unlawfully and gained no rights whatever as an occupant. It is further asserted as a cor-

ollary, that the duties owed by the populace to an occupying power which are normally imposed under the rules of international law, never became effective in the present case because of the criminal character of the invasion and occupation.

For the purposes of this discussion, we accept the statement as true that the wars against Yugoslavia and Greece were in direct violation of the Kellogg-Briand Pact and were therefore criminal in character. But it does not follow that every act by the German occupation forces against person or property is a crime or that any and every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defense. The prosecution attempts to simplify the issue by posing it in the following words:

“The sole issue here is whether German forces can with impunity violate international law by initiating and waging wars of aggression and at the same time demand meticulous observance by the victims of these crimes of duties and obligations owed only to a lawful occupant.”

At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

It must not be overlooked that international law is prohibitive law. Where the nations have affirmatively acted, as in the case of the Hague Regulations, 1907, it prohibits conduct contradictory thereto. Its specific provisions control over general theories, however reasonable they may seem. We concur in the views expressed in the following text on the subject:* “Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of international law, as when a belligerent declares war upon a neutral state for refusing passage to its troops, or when a state goes to war in patent violation of its obligations under the Covenant of the

* Oppenheim, *op. cit. supra*, p. 79.

League or of the General Treaty for the Renunciation of War.* To say that, because such a declaration of war is *ipso facto* a violation of neutrality and international law, it is 'inoperative in law and without any judicial significance' is erroneous. The rules of international law apply to war *from whatever cause it originates.*"

The major issues involved in the present case gravitate around the claimed right of the German armed forces to take hostages from the innocent civilian population to guarantee the peaceful conduct of the whole of the civilian population and its claimed right to execute hostages, members of the civil population, and captured members of the resistance forces in reprisal for armed attacks by resistance forces, acts of sabotage and injuries committed by unknown persons.

We wholly exclude from the following discussion of the subject of hostages the right of one nation to take them, to compel the armed forces of another nation to comply with the rules of war or the right to execute them if the enemy ignores the warning. We limit our discussion to the right to take hostages from the innocent civilian population of occupied territory as a guaranty against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons, and the further right to execute them if the unilateral guaranty is violated.

Neither the Hague Convention of 1907, nor any other conventional law for that matter, says a word about hostages in the sense that we are to use the term in the following discussion. But certain rules of customary law and certain inferences legitimately to be drawn from existing conventional law lay down the rules applicable to the subject of hostages. In former times prominent persons were accepted as hostages as a means of insuring observance of treaties, armistices, and other agreements, the performance of which depended on good faith. This practice is now obsolete. Hostages under the alleged modern practice of nations are taken (a) to protect individuals held by the enemy, (b) to force the payment of requisitions, contributions, and the like, and (c) to insure against unlawful acts by enemy forces or people. We are concerned here only with the last provision. That hostages may be taken for this purpose cannot be denied.

The question of hostages is closely integrated with that of reprisals. A reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side. It is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct. Where an excess is knowingly indulged, it in turn is criminal and may

* Ibid.

be punished. Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.

Under the ancient practice of taking hostages they were held responsible for the good faith of the persons who delivered them, even at the price of their lives. This barbarous practice was wholly abandoned by a more enlightened civilization. The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a barbarous relic of ancient times. But it is not our province to write international law as we would have it; we must apply it as we find it.

For the purposes of this opinion the term "hostages" will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term "reprisal prisoners" will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offenses committed by unknown persons within the occupied area.

An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility. The effect of an occupation is to confer upon the invading force the right of control for the period of the occupation within the limitations and prohibitions of international law. The inhabitants owe a duty to carry on their ordinary peaceful pursuits and to refrain from all injurious acts toward the troops or in respect to their military operations. The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may only, as a last resort, take and execute hostages.

Hostages may not be taken or executed as a matter of military expediency. The occupant is required to use every available method to secure order and tranquility before resort may be had to the taking and execution of hostages. Regulations of all kinds must be imposed to secure peace and tranquility before the shooting of hostages may be indulged. These regulations may include

one or more of the following measures: (1) the registration of the inhabitants, (2) the possession of passes or identification certificates, (3) the establishment of restricted areas, (4) limitations of movement, (5) the adoption of curfew regulations, (6) the prohibition of assembly, (7) the detention of suspected persons, (8) restrictions on communication, (9) the imposition of restrictions on food supplies, (10) the evacuation of troublesome areas, (11) the levying of monetary contributions, (12) compulsory labor to repair damage from sabotage, (13) the destruction of property in proximity to the place of the crime, and any other regulation not prohibited by international law that would in all likelihood contribute to the desired result.

If attacks upon troops and military installations occur regardless of the foregoing precautionary measures and the perpetrators cannot be apprehended, hostages may be taken from the population to deter similar acts in the future provided it can be shown that the population generally is a party to the offense, either actively or passively. Nationality or geographic proximity may under certain circumstances afford a basis for hostage selection, depending upon the circumstances of the situation. This arbitrary basis of selection may be deplored but it cannot be condemned as a violation of international law, but there must be some connection between the population from whom the hostages are taken and the crime committed. If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.

It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot. The number of hostages shot must not exceed in severity the offenses the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of international law and is a war crime in itself. Whether such fundamental requirements have been met is a question determinable by court martial proceedings. A military commander may not arbitrarily determine such facts. An order of a military commander for the killing of hostages must be based upon the finding of a competent court martial that necessary conditions exist and all preliminary steps have been taken which are essential to the issuance of a valid order. The taking of the lives of innocent persons arrested as hostages is a very serious step. The right

to kill hostages may be lawfully exercised only after a meticulous compliance with the foregoing safeguards against vindictive or whimsical orders of military commanders.

We are also concerned with the subject of reprisals and the detention of members of the civilian population for the purpose of using them as the victims of subsequent reprisal measures. The most common reason for holding them is for the general purpose of securing the good behavior and obedience of the civil population in occupied territory. The taking of reprisals against the civilian population by killing members thereof in retaliation for hostile acts against the armed forces or military operations of the occupant seems to have been originated by Germany in modern times. It has been invoked by Germany in the Napoleonic Prussian War, World War I, and in World War II. Our investigation has revealed that our own Government has resorted to the killing of members of the civilian population to secure peace and order insofar as our investigation has revealed. The evidence offered in this case on that point will be considered later in the opinion. While American, British, and French manuals for armies in the field seem to permit the taking of such reprisals as a last resort, the provisions do not appear to have been given effect. The American manual provides in part—¹

“The offending forces or populations generally may lawfully be subjected to appropriate reprisals. Hostages taken and held for the declared purpose of insuring against unlawful acts by the enemy forces or people may be punished or put to death if the unlawful acts are nevertheless committed.”

The British field manual provides in part—²

“Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community, for some act committed by its inhabitants, or members who cannot be identified.”

In two major wars within the last 30 years, Germany has made extensive use of the practice of killing innocent members of the population as a deterrent to attacks upon its troops and acts of sabotage against installations essential to its military operations. The right to so do has been recognized by many nations including the United States, Great Britain, France, and the Soviet Union. There has been complete failure on the part of the nations of the world to limit or mitigate the practice by conventional rule. This requires us to apply customary law.

¹ Rules of Land Warfare, U. S. Army, Field Manual 27-10, *op. cit. supra*, par 358d, p. 89-90.

² British Manual of Military Law, par. 458.

That international agreement is badly needed in this field is self-evident.

International law is prohibitive law and no conventional prohibitions have been invoked to outlaw this barbarous practice. The extent to which the practice has been employed by the Germans exceeds the most elementary notions of humanity and justice. They invoke the plea of military necessity, a term which they confuse with convenience and strategical interests. Where legality and expediency have coincided, no fault can be found insofar as international law is concerned. But where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, international law provides a protective mantle against the abuse of the right.

Generally, it can be said that the taking of reprisal prisoners, as well as the taking of hostages, for the purpose of controlling the population involves a previous proclamation that if a certain type of act is committed, a certain number of reprisal prisoners will be shot if the perpetrators cannot be found. If the perpetrators are apprehended, there is no right to kill either hostages or reprisal prisoners.

As in the case of the taking of hostages, reprisal prisoners may not be shot unless it can be shown that the population as a whole is a party to the offense, either actively or passively. In other words, members of the population of one community cannot properly be shot in reprisal for an act against the occupation forces committed at some other place. To permit such a practice would conflict with the basic theory that sustains the practice in that there would be no deterrent effect upon the community where the offense was committed. Neither may the shooting of innocent members of the population as a reprisal measure exceed in severity the unlawful acts it is designed to correct. Excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission.

It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive, or whimsical application of the right to shoot human beings in reprisal. It is a rule of international law, based on these fundamental concepts of justice and the rights of individuals, that the

lives of persons may not be taken in reprisal in the absence of a judicial finding that the necessary conditions exist and the essential steps have been taken to give validity to such action. The possibility is great, of course, that such judicial proceedings may become ritualistic and superficial when conducted in wartime but it appears to be the best available safeguard against cruelty and injustice. Judicial responsibility ordinarily restrains impetuous action and permits principles of justice and right to assert their humanitarian qualities. We have no hesitancy in holding that the killing of members of the population in reprisal without judicial sanction is itself unlawful. The only exception to this rule is where it appears that the necessity for the reprisal requires immediate reprisal action to accomplish the desired purpose and which would be otherwise defeated by the invocation of judicial inquiry. Unless the necessity for immediate action is affirmatively shown, the execution of hostages or reprisal prisoners without a judicial hearing is unlawful. The judicial proceeding not only affords a measure of protection to innocent members of the population, but it offers, if fairly and impartially conducted, a measure of protection to the military commander, charged with making the final decision.

It cannot be denied that the shooting of hostages or reprisal prisoners may under certain circumstances be justified as a last resort in procuring peace and tranquility in occupied territory and has the effect of strengthening the position of a law abiding occupant. The fact that the practice has been tortured beyond recognition by illegal and inhuman application cannot justify its prohibition by judicial fiat.

Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection

between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the willful infliction of suffering upon its inhabitants for the sake of suffering alone.

The issues in the present case raise grave questions of international law. Military men the world over debate both the law and the policy involved in the prosecution for war crimes of the high ranking commanders of defeated armies. This is partially brought about by the possibility of future wars and the further possibility that the victors of the present may be the vanquished of the future. This only serves to impress the Tribunal with the absolute necessity of affording the defendants a fair and impartial trial under the rules of international law as they were at the time the alleged offenses were committed. Unless this be done, the hand of injustice may fall upon those who so vindictively contend for more far reaching pronouncements, sustained by precedents which we would hereby establish.

Strict discipline is necessary in the organization of an army, and it becomes hard for many to believe that a violation of the orders of a superior may bring about criminal liability. Love of country and adherence to duty intervene to palliate unlawful conduct. The passage of time and the thankfulness for a return to peaceful pursuits tend to lessen the demand that war criminals answer for their crimes. In addition thereto, there is a general feeling that excesses occur in all armies, no matter how well disciplined, and that military trials are held to convict the war criminals of the vanquished while those of the victor are cleansed by victory. Unless civilization is to give way to barbarism in the conduct of war, crime must be punished. If international law as it applies to a given case is hopelessly inadequate, such inadequacy should be pointed out. If customary international law has become outmoded, it should be so stated. If conventional international law sets forth an unjust rule, its enforcement will secure its correction. If all war criminals are not brought to the bar of justice under present procedures, such procedures should be made more inclusive and more effective. If the laws of war are to have any beneficent effect, they must be enforced.

The evidence in this case recites a record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman's noose, people who had the same inherent desire to live as do these defendants. Wherever the German armed forces were

found, there also were the SS (Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei), the SD (Der Sicherheitsdienst des Reichsfuehrer SS), the Gestapo (Die Geheime Staatspolizei), the SA (Die Sturmabteilungen der Nationalsozialistischen Deutschen Arbeiterpartei), the administrators of Goering's Four Year Plan, and the Einsatzstab Rosenberg, all participating in the administration of the occupied territories in varying degrees. Mass shootings of the innocent population, deportations for slave labor, and the indiscriminate destruction of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will. It is clear, also, that this had become a general practice and a major weapon of warfare by the German Wehrmacht. The German attitude seems to be reflected in the introduction to the German War Book, as translated by J. H. Morgan [John Murray, London, 1915] on pages 53-55 wherein it is stated:

"If therefore, in the following work the expression 'the law of war' is used, it must be understood that by it is meant not a *lex scripta* introduced by international agreements, but only a reciprocity of mutual agreement; a limitation of arbitrary behaviour, which custom and conventionality, human friendliness and a calculating egotism have erected, but for the observance of which there exists no express sanction, but only 'the fear of reprisals' decides. * * * Moreover the officer is a child of his time. He is subject to the intellectual tendencies which influence his own nation; the more educated he is the more will this be the case. The danger that, in this way, he will arrive at false views about the essential character of war must not be lost sight of. The danger can only be met by a thorough study of war itself. By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them. It will also teach him how the rules of belligerent intercourse in war have developed, how in the course of time they have solidified into general usages of war, and finally it will teach him whether the governing usages of war are justified or not, whether they are to be modified or whether they are to be observed."

It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the

view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law. Articles 46, 47, and 50 of the Hague Regulations of 1907 make no such exceptions to its enforcement. The rights of the innocent population therein set forth must be respected even if military necessity or expediency decree otherwise. We have hereinbefore pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crime, and protect lives and property. This duty extends not only to the inhabitants of the occupied territory but to his own troops and auxiliaries as well. The commanding general of occupied territory, having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is thereby absolved from responsibility. It is here claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent, or approval of these defendants. But this cannot be a defense for the commanding general of occupied territory. The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defense. The fact is that the reports of subordinate units almost without exception advised these defendants of the policy of terrorism and intimidation being carried out by units in the field. They requisitioned food supplies in excess of their local need and caused it to be shipped to Germany in direct violation of the laws of war. Innocent people were lodged in collection and concentration camps where they were mistreated to the everlasting shame of the German nation. Innocent inhabitants were forcibly taken to Germany and other points for use as slave labor. Jews, gypsies, and other racial groups were the victims of systematized murder or deportation for slave labor for no other reason than their race or religion, which is in violation of the express conventional rules of the Hague Regulations of 1907. The German theory that fear of reprisal is the only deterrent in the enforcement of the laws of war cannot be accepted here. That reprisals may be indulged to compel an enemy nation to comply with the rules of war must be conceded.

It is not, however, an exclusive remedy. If it were, the persons responsible would seldom, if ever, be brought to account. The only punishment would fall upon the reprisal victims who are usually innocent of wrongdoing. The prohibitions of the Hague

Regulations of 1907 contemplate no such system of retribution. Those responsible for such crimes by ordering or authorizing their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if international law is to be anything more than an ethical code, barren of any practical coercive deterrent.

That the acts charged as crimes in the indictment occurred is amply established by the evidence. In fact, it is evident that they constitute only a portion of the large number of such acts which took place as a part of a general plan for subduing the countries of Yugoslavia and Greece. The guilt of the German occupation forces is not only proved beyond a reasonable doubt but it casts a pall of shame upon a once highly respected nation and its people; The defendants themselves recognize this situation when they decry the policies of Hitler and assert that they continually protested against orders of superiors issued in conformity with the plan of terrorism and intimidation.

It is the determination of the connection of the defendants with the acts charged and the responsibility which attaches to them therefor, rather than the commission of the acts, that poses the chief issue to be here decided.

Objection has been made that the documents offered in evidence by the prosecution are not the original instruments but photostatic copies only. No objection of this character was made at the time the exhibits were offered and received in evidence. In view of the fact that this objection was not timely made, it cannot receive the consideration of the Tribunal.

The record is replete with testimony and exhibits which have been offered and received in evidence without foundation as to their authenticity and, in many cases where it is secondary in character, without proof of the usual conditions precedent to the admission of such evidence. This is in accordance with the provisions of Article VII, Ordinance No. 7, Military Government, Germany, which provides—

“The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming

authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.”

This Tribunal is of the opinion that this rule applies to the competency of evidence only, and does not have the effect of giving weight and credibility to such evidence as a matter of law. It is still within the province of the Tribunal to test it by the usual rules of law governing the evaluation of evidence. Any other interpretation would seriously affect the right of the defendants to a fair and impartial trial. The interpretation thus given and consistently announced throughout the trial by this Tribunal is not an idle gesture to be announced as a theory and ignored in practice; it is a substantive right composing one of the essential elements of a fair and impartial adjudication.

The trial was conducted in two languages, English and German, and consumed 117 trial days. The prosecution offered 678 exhibits and the defendants 1,025 that were received in evidence. The transcript of the evidence taken consists of 9,556 pages. A careful consideration of this mass of evidence and its subsequent reduction into concise conclusions of fact is one of the major tasks of the Tribunal.

The prosecution has produced oral and documentary evidence to sustain the charges of the indictment. The documents consist mostly of orders, reports, and war diaries which were captured by the Allied armies at the time of the German collapse. Some of it is fragmentary and consequently not complete. Where excerpts of such documents were received in evidence, we have consistently required the production of the whole document whenever the defense so demanded. The Tribunal and its administrative officials have made every effort to secure all known and available evidence. The prosecution has repeatedly assured the Tribunal that all available evidence, whether favorable or otherwise, has been produced pursuant to the Tribunal's orders.

The reports offered consist generally of those made or received by the defendants and unit commanders in their chain of command. By the general term “order” is meant primarily the orders, directives, and instructions received by them or sent by them by virtue of their position. By war diaries is meant the records of events of the various units which were commanded by these defendants, such war diaries being kept by the commanding

officer or under his direction. This evidence, together with the oral testimony of witnesses appearing at the trial provides the basis of the prosecution's case.

The defense produced much oral testimony including that of the defendants themselves. Hundreds of affidavits were received under the rules of the Tribunal. All affidavits were received subject to a motion to strike if the affiants were not produced for cross-examination in open court upon demand of the opposite party made in open court.

In weighing and evaluating this evidence, it was necessary to ascertain the nature of the chains of command and the general military structure in the involved territory. The correct subordination of military units as to time and place was sometimes important. Orders given and received had to be tested as to claimed literal or general meanings often made in accordance with the interest of the claimant. We have been confronted repeatedly with contentions that reports and orders sent to the defendants did not come to their attention. Responsibility for acts charged as crimes have been denied because of absence from headquarters at the time of their commission. These absences generally consisted of visitations to points within the command area, vacation leaves and leaves induced by illness. It is claimed also that many of the acts charged were committed by units not subordinated to them or by independent units subordinated to agencies other than the German Wehrmacht. It is contended generally by these defendants that they signed no orders for the performance of specific acts which are charged as war crimes, a fact which is undoubtedly due to their high rank and their indirect control only of troops in the field.

We desire to point out that the German Wehrmacht was a well equipped, well trained, and well disciplined army. Its efficiency was demonstrated on repeated occasions throughout the war.

There is some evidence that the troops in the Southeast were overage and not as well fitted for duty there as they might have been. The evidence shows, however, that they were led by competent commanders who had mail, telegraph, telephone, radio, and courier service for the handling of communications. Reports were made daily, sometimes morning and evening. Ten-day and monthly reports recapitulating past operations and stating future intentions were regularly made. They not only received their own information promptly but they appear to have secured that of the enemy as well. We are convinced that military information was received by these high ranking officers promptly, a conclusion prompted by the known efficiency of the German armed forces.

An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt such occurrences result occasionally because of unexpected contingencies, but they are the unusual. With reference to statements that responsibility is lacking where temporary absence from headquarters for any cause is shown, the general rule to be applied is dual in character. As to events occurring in his absence resulting from orders, directions, or a general prescribed policy formulated by him, a military commander will be held responsible in the absence of special circumstances. As to events, emergent in nature and presenting matters for original decision, such commander will not ordinarily be held responsible unless he approved of the action taken when it came to his knowledge.

The matter of subordination of units as a basis of fixing criminal responsibility becomes important in the case of a military commander having solely a tactical command. But as to the commanding general of occupied territory who is charged with maintaining peace and order, punishing crime, and protecting lives and property, subordination are relatively unimportant. His responsibility is general and not limited to a control of units directly under his command. Subordinate commanders in occupied territory are similarly responsible to the extent that executive authority has been delegated to them.

Much has been said about the participation of these defendants in a preconceived plan to decimate and destroy the populations of Yugoslavia and Greece. The evidence will not sustain such a charge and we so find. The only plan demonstrated by the evidence is one to suppress the bands by the use of severe and harsh measures. While these measures progressively increased as the situation became more chaotic, and appeared to have taken a more or less common course, we cannot say that there is any convincing evidence that these defendants participated in such measures for the preconceived purpose of exterminating the population generally.

Neither will the evidence sustain a finding that these defendants participated in a preconceived plan to destroy the economy of the Balkans. Naturally there was a disruption of the economy of these countries but such only as could be expected by a military occupation. There were unlawful acts that had the effect of

damaging the economy of Yugoslavia and Greece, possibly the result of a preconceived plan, but the evidence does not show the participation of these defendants therein.

There is evidence to the effect that certain reports and entries in the war diaries do not reflect the truth and were not intended to do so. The explanation is made that certain orders received from the High Command were so harsh and severe that resort was had to subterfuge to appease the insistent demands of superiors. It is asserted, for example, that the number of reprisals taken against the population was increased above the actual number for this purpose and that the number of killings was inflated for the same reason. In this connection we desire to point out that the records of the German Army are mute evidence of the events and occurrences which they themselves made. Statements contained therein which are adverse to the interests of the defendants approach the status of admission against interest. If the evidence and circumstances sustain such an assertion of falsity, we will of course give credence to it, but there are limitations beyond which the most credulous court cannot go.

In determining the guilt or innocence of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced. Unless this be true, a crime could not be said to have been committed unlawfully, willfully, and knowingly as charged in the indictment.

In making our findings of fact, we shall give effect to these general statements except where a contrary application is specifically pointed out. We shall impose upon the prosecution the burden of proving its case beyond a reasonable doubt. We shall also adhere to the rule that the defendants will be presumed innocent until proven guilty by the required quantum of competent evidence. With these general statements in mind, we shall turn to a consideration of the charges against the individual defendants.

A brief historical background is helpful in dealing with issues here involved. The troubles of the German Wehrmacht in the Balkans began in October 1940 with the commencement of the war on Greece by Italy. Until that occurrence, Greece was a neutral nation and immune to invasion by the Allied powers without the violation of fundamental concepts of the rights of neutrals. The attack on Greece by Italy, an ally of Germany, transformed that country into an active belligerent which welcomed the aid of the Allied powers. The failure of the Italian forces to subjugate Greece opened the way to possible invasion of continental Europe by Allied forces. To prevent such a con-

tingency, Germany deemed it necessary to occupy Greece. Arrangements were made for the passage of troops through Bulgaria for the attack on Greece and a treaty was made with the then existing government of Yugoslavia which insured nonaction on its part. A few days after the making of the treaty with Yugoslavia, strong opposition developed in that country which resulted in the overthrow of the government and a disavowal of the treaty. The Germans, deeming it a military necessity to protect against the possibility of an attack from the rear and a disruption of its supply lines, determined to crush Yugoslavia as a part of the campaign against Greece. Once again international law gave way to military expediency on the part of the German Wehrmacht and neutral Yugoslavia was invaded. As we have heretofore shown, both countries were overrun and the German Wehrmacht became occupants within the meaning of international law.

The territory was particularly favorable to the guerrilla warfare which soon broke out. Local political, religious, and racial conflicts had provided a training ground for this sort of fighting. The various conflicting elements of the population, over a period of time, were gradually welded into a common partisan front. The guerrilla fighting methods of the partisans and the attempts of the German armed forces to eliminate them by a campaign of intimidation provides the basis for the prosecutions here brought.

A similar situation developed in Greece after the capitulation of the Greek armies. While it is true that the partisans of Greece were never able to organize a common front to the extent it was done in Yugoslavia, the methods of the various partisan organizations were very much the same. Guerrilla tactics were employed. German troops were ambushed; transportation and communication systems sabotaged. The capture of the perpetrators was next to impossible. Again draconic measures of terrorism and intimidation were indulged in in an attempt to subjugate the country. It was with this situation that List, Kuntze, Loehr, and von Weichs had to deal in their capacities as over-all commanders in the southeastern area.

PRESIDING JUDGE WENNERSTRUM: Judge Burke will continue reading the opinion.

JUDGE BURKE: The defendant Wilhelm List was the fifth ranking field marshal in the German Army. He was a thoroughly trained and experienced military commander. He was the commander in chief of the 12th Army during the invasion of Yugoslavia and Greece, and in addition thereto in June 1941 became the Armed Forces Commander Southeast, a position he retained until illness compelled his temporary retirement from active service on

15 October 1941. From July to September 1942, he was returned to active service as commander in chief of Army Group A, an army group operating on the Russian front. He stands charged on all four counts of the indictment.

On 9 June 1941, Hitler appointed the defendant List to be armed forces commander in the Southeast with headquarters in Salonika. His commission provided that the Armed Forces Commander Southeast is the supreme representative of the armed forces in the Balkans and exercises executive authority in the territories occupied by German troops. Directly subordinated to him were the "Commander Serbia," the "Commander Salonika-Aegean," and the "Commander of Southern Greece." Among the duties assigned was the safeguarding of the unified defense of those parts of Serbia and Greece, including the Greek Islands, which were occupied by German troops, against attacks and unrest. The defendant Foertsch, who had become chief of staff of the 12th Army on 10 May 1941, continued on as chief of staff to the defendant List in his new capacity as Armed Forces Commander Southeast.

The record shows that attacks on German troops and acts of sabotage against transportation and communication lines progressively increased throughout the summer of 1941. Even at this early date, the shooting of innocent members of the population was commenced as a means of suppressing resistance. Excerpts from the war diaries and orders of the participating units reveal, for example, that on 5 July 1941, 13 Communists and Jews were killed in reprisal; on 17 July 1941, 16 Communists were killed in reprisal in Belgrade; on 20 July 1941, 52 Communists, Jews, and members of families of band members were killed in reprisal for the attack on General Lontschar; on 25 July 1941, 100 Jews were killed in Belgrade because a 16-year-old Serbian girl threw a bottle of gasoline at a German motor vehicle at the alleged instigation of a Jew; on 29 July 1941, 122 Communists and Jews were killed in Belgrade in reprisal for acts of sabotage; and many other orders and reports showing the shooting of hundreds of the inhabitants in reprisal. On 5 September 1941, the resistance movement had developed to such a point that the defendant List put out an order on the subject of its suppression. In this order he said in part (NOKW-084, *Pros. Ex. 42*)*:

"In regard to the above the following aspects are to be taken into consideration:

* * * * *

* Document reproduced in section VB.

“Ruthless and immediate measures against the insurgents, against their accomplices and their families (hangings, burning down of villages involved, seizure of more hostages, deportation of relatives, etc., into concentration camps).”

On 16 September 1941, Hitler in a personally signed order (NOKW-1492, *Pros. Ex. 49*)¹ charged the defendant List with the task of suppressing the insurgent movement in the southeast. This resulted in the commissioning of General Franz Boehme with the handling of military affairs in Serbia and in the transfer of the entire executive power in Serbia to him. This delegation of authority was done on the recommendation and request of the defendant List to whom Boehme remained subordinate.

On 16 September 1941, Field Marshal Keitel, Chief of the High Command of the Armed Forces, issued a directive pertaining to the suppression of the insurgent movement in occupied territories. The pertinent parts of this order are (NOKW-258, *Pros. Ex. 53*)²—

“Measures taken up to now to counteract this general Communist insurgent movement have proved themselves to be inadequate. The Fuehrer now has ordered that severest means are to be employed in order to break down this movement in the shortest time possible. Only in this manner, which has always been applied successfully in the history of the extension of power of great peoples, can quiet be restored.

“The following directives are to be applied here:

“(a) Each incident of insurrection against the German Wehrmacht, regardless of individual circumstances, must be assumed to be of Communist origin.

“(b) In order to stop these intrigues at their inception, severest measures are to be applied immediately at the first appearance, in order to demonstrate the authority of the occupying power, and in order to prevent further progress. One must keep in mind that a human life frequently counts for naught in the affected countries and a deterring effect can only be achieved by unusual severity. In such a case the death penalty for 50 to 100 Communists must in general be deemed appropriate as retaliation for the life of a German soldier. The manner of execution must increase the deterrent effect. The reverse procedure—to proceed at first with relatively easy punishment and to be satisfied with the threat of measures of increased severity as a deterrent—does not correspond with these principles and is not to be applied.”

¹ *Ibid.*

² *Ibid.*

This order was received by the defendant List and distributed to his subordinate units.

On 25 September 1941, General Boehme issued an order to his subordinate units in part as follows (*NOKW-1048, Pros. Ex. 63*):

“After dissemination, destroy!

“In March of this year, Serbia shamefully broke the friendship treaty with Germany, in order to strike in the back the German units marching against Greece.

“German revenge stormed across the country.

“We must turn to new, greater goals with all our forces at hand. For Serbia, this was the sign for a new uprising, to which hundreds of German soldiers have already fallen in sacrifice. If we do not proceed here with all means and the greatest ruthlessness, our losses will climb to immeasurable heights.

“Your mission lies in carrying out reconnaissance of the country in which German blood flowed in 1914 through the treachery of the Serbs, men and women.

“You are avengers of these dead. An intimidating example must be created for the whole of Serbia, which must hit the whole population most severely.

“Everyone who wishes to rule charitably sins against the lives of his comrades. He will be called to account without regard for his person and placed before a court martial.”

On 28 September 1941, Field Marshal Keitel directed the following order to the defendant List (*NOKW-458, Pros. Ex. 69*)¹:

“Because of the attacks on members of the armed forces which have taken place lately in the occupied territories, it is pointed out that it is opportune for the military commanders to have always at their disposal a number of hostages of the different political persuasions, i.e., (1) Nationalists, (2) democratic middle-class, and (3) Communists.

“It is of importance that among these are leading personalities or members of their families. Their names are to be published.

“In case of an attack, hostages of the group corresponding to that to which the culprit belongs are to be shot.

“It is requested that commanders be informed in this sense.”

On 4 October 1941, the defendant List directed the following order to General Bader, the Plenipotentiary Commanding General in Serbia (*NOKW-203, Pros. Ex. 70*)²:

¹ Ibid.

² Ibid.

"The male population of the territories to be mopped up of bandits, is to be handled according to the following points of view:

"1. Men who take part in combat are to be judged by court martial.

"2. Men in the insurgent territories who were not encountered in battle are to be examined and—

"a. If a former participation in combat can be proved of them to be judged by court martial.

"b. If they are only suspected of having taken part in combat, of having offered the bandits support of any sort, or of having acted against the armed forces in any way, to be held in a special collecting camp. They are to serve as hostages in the event that bandits appear, or anything against the armed forces is undertaken in the territory mopped up or in their home localities, and in such cases they are to be shot."

On 10 October 1941, General Boehme issued an order to military units under his command relative to the crushing of the insurgent movement, the applicable parts of which are (*NOKW-557, Pros. Ex. 88*)*:

"2. In all garrison towns in Serbia all Communists, male residents suspicious as such, all Jews, a certain number of Nationalistic and democratically inclined residents are to be arrested as hostages, by means of sudden actions. It is to be explained to these hostages and to the population that the hostages will be shot in case of attacks on Germans or on ethnic Germans.

"3. If losses of German soldiers or ethnic Germans occur, the territorially competent commanders up to the regimental commanders are to decree the shooting of arrestees according to the following quotas:

"a. For each killed or murdered German soldier or ethnic German (man, woman, or child), 100 prisoners or hostages;

"b. For each wounded German soldier or ethnic German, 50 prisoners or hostages.

"The shootings are to be carried out by the troops.

"If possible, the execution is to be carried out by the part of the unit suffering the loss.

"In each individual case of losses a statement is to be made in the daily reports, whether and to what extent the reprisal measure is carried out or when this will be finished.

"4. In the burying of those shot, care is to be taken that no Serbian shrines arise. Placing of crosses on the graves,

* *Ibid.*

decorations, etc., is to be prevented. Burials are, accordingly, to be carried out best in distant localities.

"5. The Communists captured by the troops in combat actions are to be hanged or shot as a matter of principle at the place of crime [Tatort] as a frightening measure.

"6. Localities which have to be taken in combat are to be burned down, as well as farms from which troops were shot at."

After the issuance of the foregoing orders, the shooting of innocent members of the population was stepped up. Acts of sabotage increased and attacks on German military personnel continued unabated. The evidence is conclusive that a large number of reprisals against the population were carried out on the basis of the 100 to 1 order. Space will not permit a detailed account of each of these actions. We shall content ourselves with a recitation of the facts of one incident that bears similarity to many others shown by the record.

On 2 October 1941, at a small village near Topola, a troop unit of the 521st Army Signal Regiment consisting of 2 officers and 45 men was ambushed from the cornfields along the road on which they were traveling. A few dead and wounded were found at the scene of the attack. In a small valley nearby, other dead soldiers were found. A survivor who escaped being killed by feigning death gave information that these men had been lined up and killed by the partisans by machine gun fire. The total casualties consisted of 22 dead, 3 wounded, and 15 or 16 missing. The incident was reported through regular channels to higher commanding officers.

On 4 October 1941, General Boehme issued an order of reprisal for the killing near Topola which was in part as follows (NOKW-192, *Pros. Ex. 78*):*

"Twenty-one soldiers were tortured to death in a bestial manner on the 2d of October in a surprise attack on units of the signal regiment between Belgrade and Obrenovac. As reprisal and retaliation, 100 Serbian prisoners are to be shot at once for each murdered German soldier. The Chief of the Military Administration is requested to pick out 2,100 inmates in the concentration camps Sabac and Belgrade (primarily Jews and Communists) and to fix the place and time as well as burial place. The detachments for the shooting are to be formed from the 342d Division (for the Sabac concentration camp) and from the 449th Corps Signal Battalion (for the Belgrade concentration camp). * * *"

* *Ibid.*

On 9 October 1941, General Boehme informed the defendant List as follows [*NOKW-1211, Pros. Ex. 79*] :

“Execution by shooting of about 2,000 Communists and Jews in reprisal for 22 murdered of the 2d Battalion of the 521st Army Signal Communication Regiment in progress.”

Another report distributed to the 12th Army commanded by the defendant List stated 180 men were executed on 9 October 1941, and an additional 269 were executed on 11 October 1941. After the killing of the 449 men, the psychological effect upon the participating units was such that a transfer of the mission was made to another unit.

On 9 October 1941, the Chief of the Security Police and of the SD reports [*NO-3156, Pros. Ex. 81*] : “In reprisal for the 21 German soldiers shot to death near Topola a few days ago 2,100 Jews and gypsies are being executed. The execution is carried out by the German armed forces. The task of the Security Police is merely to make available the required number. Eight hundred and five Jews and gypsies are taken from the camp in Sabac, the rest from the Jewish transit camp Belgrade.” On 20 October 1941, the Chief of the Security Police and of the SD in Berlin reported to the Armed Forces Commander Southeast as follows [*NO-3404, Pros. Ex. 82*] : “In reprisal for 21 dead German army soldiers 2,100 Jews from the Jewish camp were made available for execution by order of XVIII Corps Headquarters. The Wehrmacht is carrying out the execution.”

On 21 October 1941, the Chief of the Security Police and the SD reported to the Armed Forces Commander Southeast in part as follows [*NO-3402, Pros. Ex. 83*] :

“After ruthless action by the troops was bound to fail up to the time of the employment of the Plenipotentiary Commanding General in Serbia because of the lack of corresponding orders, Lieutenant General Boehme’s order, according to which 100 Serbs will be executed for every soldier killed and 50 for every soldier wounded, has established a completely clear-cut line for action. On the strength of this order, for instance, 2,200 Serbs and Jews were shot in reply to an attack on a convoy near Topola, during which 22 members of the Wehrmacht perished, while in return for the soldiers killed in the fight for Kraljevo so far 1,736 inhabitants and 19 Communist women from Kraljevo have been executed.”

The evidence shows that after the capitulation of the armies of Yugoslavia and Greece both countries were occupied within the meaning of international law. It shows further that they

remained occupied during the period that List was Armed Forces Commander Southeast. It is clear from the record also that the guerrillas participating in the incidents shown by the evidence during this period were not entitled to be classed as lawful belligerents within the rules hereinbefore announced. We agree, therefore, with the contention of the defendant List that the guerrilla fighters with which he contended were not lawful belligerents entitling them to prisoner of war status upon capture. We are obliged to hold that such guerrillas were *francs-tireurs* who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans in Yugoslavia and Greece during the time he was Armed Forces Commander Southeast.

We find that the "Commissar Order" of 6 June 1941, (NOKW-484, *Pros. Ex. 13*) requiring the killing of all captured commissars was not issued, distributed or executed in the occupied territory under the command of List while he held the position of Armed Forces Commander Southeast. The charge that such order was issued, distributed, and executed by him while serving on the Russian front as commander in chief of Army Group A, is not established by the record. The evidence fails to show beyond a reasonable doubt that List was in any way responsible for the killing of commissars merely because they were such. Consequently, the defendant List is found to be not guilty of any crime in connection with the Commissar Order.

The defendant List contends that he never signed an order for the killing of hostages or other inhabitants, or fixed a ratio determining the number of persons to be put to death for each German soldier killed or wounded. The record sustains this contention. It will be observed, however, that as a high ranking commanding general no such act was ordinarily within the scope of his duties. It discloses, however, that List caused the Keitel order of 16 September 1941, (NOKW-258, *Pros. Ex. 53*)* containing the 100:1 ratio to be distributed to his subordinate commanders. This order provided, among other things, that 100 reprisal prisoners should be shot for each German soldier killed and 50 killed for each German soldier wounded. It is urged that the order was worded in such a way that literal compliance was not required. We do not deem it material whether the order was mandatory or directory. In either event, it authorized the killing of hostages and reprisal prisoners to an extent not permitted by international law. An order to take reprisals at an arbitrarily fixed ratio under any and all circumstances constitutes

* *Ibid.*

a violation of international law. Such an order appears to have been made more for purposes of revenge than as a deterrent to future illegal acts which would vary in degree in each particular instance. An order, directory or mandatory, which fixes a ratio for the killing of hostages or reprisal prisoners, or requires the killing of hostages or reprisal prisoners for every act committed against the occupation forces is unlawful. International law places no such unrestrained and unlimited power in the hands of the commanding general of occupied territory. The reprisals taken under the authority of this order were clearly excessive. The shooting of 100 innocent persons for each German soldier killed at Topola, for instance, cannot be justified on any theory by the record. There is no evidence that the population of Topola were in any manner responsible for the act. In fact, the record shows that the responsible persons were an armed and officered band of partisans. There is nothing to infer that the population of Topola supported or shielded the guilty persons. Neither does the record show that the population had previously conducted themselves in such a manner as to have been subjected to previous reprisal actions. An order to shoot 100 persons for each German soldier killed under such circumstances is not only excessive but wholly unwarranted. We conclude that the reprisal measure taken for the ambushing and killing of 22 German soldiers at Topola were excessive and therefore criminal. It is urged that only 449 persons were actually shot in reprisal for the Topola incident. The evidence does not conclusively establish the shooting of more than 449 persons although it indicates the killing of a much greater number. But the killing of 20 reprisal prisoners for each German soldier killed was not warranted under the circumstances shown. Whether the number of innocent persons killed was 2,200 or 449, the killing was wholly unjustified and unlawful.

The reprisal measures taken for the Topola incident were unlawful for another reason. The reprisal prisoners killed were not taken from the community where the attack on the German soldiers occurred. The record shows that 805 Jews and gypsies were taken from the collection camp at Sabac and the rest from the Jewish transit camp at Belgrade to be shot in reprisal for the Topola incident. There is no evidence of any connection whatever, geographical, racial, or otherwise between the persons shot and the attack at Topola. Nor does the record disclose that judicial proceedings were held. The order for the killing in reprisal appears to have been arbitrarily issued and under the circumstances shown is nothing less than plain murder.

It is further contended that the basic order for the taking of reprisals was issued by the High Command of the Armed Forces to whom the defendant List was subordinate and that this has the effect of relieving him of responsibility. Such a defense is not available to him. An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature. That he did know of it is evidenced by the fact that he opposed its issuance and, according to his own statement, did what he could to ameliorate its effect.

The defendant List also asserts that he had no knowledge of many of the unlawful killings of innocent inhabitants which took place because he was absent from his headquarters where the reports came in and that he gained no knowledge of the acts. A commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command. He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprise him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense. Absence from headquarters cannot and does not relieve one from responsibility for acts committed in accordance with a policy he instituted or in which he acquiesced. He may not, of course, be charged with acts committed on the order of someone else which is outside the basic orders which he has issued. If time permits he is required to rescind such illegal orders, otherwise he is required to take steps to prevent a recurrence of their issue.

Want of knowledge of the contents of reports made to him is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.

The reports made to the defendant List as Armed Forces Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown

members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility. Instead of taking corrective measures, he complacently permitted thousands of innocent people to die before the execution squads of the Wehrmacht and other armed units operating in the territory. He contends further that many of these executions were carried out by units of the SS, the SD, and local police units which were not tactically subordinated to him. The evidence sustains this contention but it must be borne in mind that in his capacity as commanding general of occupied territory, he was charged with the duty and responsibility of maintaining order and safety, the protection of the lives and property of the population, and the punishment of crime. This not only implies a control of the inhabitants in the accomplishment of these purposes, but the control and regulation of all other lawless persons or groups. He cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators.

The record shows that after the capitulation of Yugoslavia and Greece, the defendant List remained as the commanding general of the occupied territory. As the resistance movement developed, it became more and more apparent that the occupying forces were insufficient to deal with it. Repeated appeals to the High Command of the Armed Forces for additional forces were refused with the demand for a pacification of the occupied territory by more draconic measures. These orders were protested by List without avail. He contends that although such orders were in all respects lawful, he protested from a humanitarian viewpoint. It is quite evident that the High Command insisted upon a campaign of intimidation and terrorism as a substitute for additional troops. Here again the German theory of expediency and military necessity (*Kriegsraison geht vor Kriegsmanier*) superseded established rules of international law. As we have previously stated in this opinion, the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation. What then was the duty of the Armed Forces Commander Southeast? We think his duty was plain. He was

authorized to pacify the country with military force; he was entitled to punish those who attacked his troops or sabotaged his transportation and communication lines as *franc-tireurs*; he was entitled to take precautions against those suspected of participation in the resistance movement, such as registration, limitations of movement, curfew regulations, and other measures herebefore set forth in this opinion. As a last resort, hostages and reprisal prisoners may be shot in accordance with international custom and practice. If adequate troops were not available or if the lawful measures against the population failed in their purpose, the occupant could limit its operations or withdraw from the country in whole or in part, but no right existed to pursue a policy in violation of international law.

The record establishes that List was an officer of the "old school" which quite generally resented the control of the National Socialist Party over the Wehrmacht. That Adolf Hitler in his capacity as Commander in Chief of the Armed Forces was generally considered a rank amateur in military matters by this group seems to be quite well established. The subsequent retirement of List "by request" because of a difference of opinion with Hitler on tactical matters during the Russian campaign further sustains his claimed viewpoint with respect to his relations with Hitler and the National Socialist Party. List states that his views on political matters were not inconsistent with his subsequent military service. It was his opinion that Hitler came to power in a lawful manner and that his obligation as a soldier and his loyalty to his country required him to continue in military service. That he was not in accord with many of the orders of the High Command of the Armed Forces with reference to the pacification of Yugoslavia and Greece is shown by the record. That his appeals for more troops for the subjugation of the growing resistance movement were met with counterdirectives and orders by Hitler and Keitel to accomplish it by a campaign of terrorism and intimidation of the population is amply established. That his orders and directives were more moderate than those of his superiors cannot be questioned. It is clear also that he was continually plagued with the operations of organizations receiving orders direct from superiors in Berlin, such as the SS, the SD, the SA, and emissaries of Goering in the administration of his Four Year Plan.

That German prisoners captured by the resistance forces were tortured, mutilated, and killed is shown by the evidence. In this connection, we point out the extent to which unlawful reprisals and counterreprisals may lead. Excesses on the part of troops are bound to occur in any way but certainly they will be more

vicious and barbarous if cruelty and harshness constitute the policy of the commanding officers. It is almost inevitable that the murder of innocent members of the population, including the relatives and friends of the *francs-tireurs*, would generate a hatred that was bound to express itself in counterreprisals and acts of atrocity. As the severity of the draconic measures of the Wehrmacht were stepped up, so also were the reprisals in answer thereto. There could be but one result, a completely chaotic condition with an absolute disregard of the laws of war on the part of the fighters of both forces with acts of atrocity progressively increasing. The situation provides adequate proof for the necessity of enforcing the laws of war if torture and barbarity are to be restrained. The failure of the nations of the world to deal specifically with the problem of hostages and reprisals by convention, treaty, or otherwise, after the close of World War I, creates a situation that mitigates to some extent the seriousness of the offense. These facts may not be employed, however, to free the defendant from the responsibility for crimes committed. They are material only to the extent that they bear upon the question of mitigation of punishment.

We conclude therefore that the evidence establishes the guilt of the defendant List beyond a reasonable doubt on counts one and three.

On or about 24 October 1941, the defendant Kuntze was appointed Deputy Armed Forces Commander Southeast and commander in chief of the 12th Army. It is evident from the record that the appointment was intended as a temporary one for the period of the illness of Field Marshal List. He assumed the command on his arrival in the Balkans on 27 October 1941. He was superseded by General Alexander Loehr in June 1942, but remained in the position until the arrival of General Loehr on 8 August 1942.

The record shows that in June 1940, before coming to the Balkans, the defendant Kuntze became the commander of the XLII Army Corps. In June 1941, this corps was transferred to East Prussia where it was subordinated to the 9th Army in the fighting against the Russians. From the middle of July 1941 to October 1941, the corps was subordinated to the 18th Army. Pursuant to orders previously received, the corps, on or about 8 October 1941, commenced operations for its transfer to the Crimea which were concluded on 20 October 1941. It was upon the arrival of Kuntze in the Crimea that he received the order to report to Hitler that resulted in his appointment as Deputy Armed Forces Commander Southeast.

The defendant Kuntze is charged with issuing, distributing, and executing the Commissar Order of 6 June 1941, wherein Hitler

ordered the killing of captured commissars. In this connection, evidence was offered that from 1 July 1942 to 4 July 1942 captured commissars were killed by the 217th Infantry Division. The evidence shows that this division was subordinated to the XLII Corps from August 1941 until the corps was transferred to the Crimea. Consequently, the defendant Kuntze is not chargeable with the acts of the 217th Infantry Division that occurred prior to August 1941. Evidence was also offered showing that units of the 61st Infantry Division killed a number of captured commissars between 26 September 1941 and 28 October 1941. It is evident that the killing of political commissars after 6 October 1941 cannot be charged to the defendant Kuntze for the reason that the XLII Corps was on that date moving to the Crimea. The 61st Infantry Division remained behind and in the very nature of things was no longer subordinate to the XLII Corps. There appears in the war diary of the 61st Infantry Division, however, under date of 26 September 1941, a recitation of the shooting to death of saboteurs and commissars by the Field Gendarme Squad 161a, a unit subordinate to the 61st Infantry Division. The defendant Kuntze admits that the 61st Infantry Division was subordinate to him from the middle of September 1941 to the first part of October, of the same year. He denies that he ordered any such action or authorized anyone to carry it out. He states that he had never heard of this incident and had no knowledge of the shooting of any commissar by any unit subordinate to him. He states further that the army commander to whom he was subordinate had specifically directed him to treat commissars as prisoners of war and that he complied in all respects with that order. We do not think the foregoing evidence is sufficient to hold the defendant criminally responsible for the issuance, distribution, or execution of the Commissar Order. Nor does the evidence establish that the Commissar Order was made effective in the Balkan area. It will not sustain a finding that this order was issued, distributed, or executed by the defendant Kuntze during the time he was Deputy Armed Forces Commander Southeast.

This defendant is also charged with issuing, distributing, and executing the Commando Order of 18 October 1942, (*C-81, Pros. Ex. 225*) during the period of his command in the Balkans. By this order, issued by Hitler in person, all sabotage troops generally referred to as commandos were to be shot immediately upon capture. The record shows that Kuntze was relieved of his command by General Loehr on 8 August 1942. Consequently, the order was not issued until after Kuntze had left the southeastern area. The prosecution has not attempted to disprove

this fact and it must be treated as established. The defendant Kuntze has not been shown to have violated any duty with reference to his treatment of commandos or other groups mentioned in the Commando Order.

We hold also that the resistance forces with which we are here concerned were not entitled to be classed as lawful belligerents during the period the defendant Kuntze was Deputy Armed Forces Commander Southeast. The reasons stated in the treatment of this subject in its relation to the defendant List apply as well to the defendant Kuntze and they will not be repeated here. No criminal responsibility can therefore attach to him because of the killing of captured members of the resistance forces, they being *francs-tireurs* subject to such punishment.

The defendant Kuntze contends that a right exists to take reprisals by killing hostages and reprisal prisoners in retaliation for the criminal acts of the resistance forces and other unknown persons. He asserts also that members of bands and those supporting them were used for reprisal purposes and that he knew of no instance where a contrary course was pursued. He denies that excessive and disproportionate reprisals were taken and claims to have had little or no knowledge of the harsh measures taken as shown by the war diaries, orders, and reports offered in evidence. He further contends that the measures taken were prescribed by superiors whose orders he was bound to follow. The legal questions thus raised have been dealt with in disposing of the case against the defendant List and will not for reasons of brevity be repeated here. The factual situation will however be examined.

The defendant Kuntze assumed command in the Southeast on 27 October 1941, a month which exceeded all previous monthly records in killing innocent members of the population in reprisal for the criminal acts of unknown persons. On 9 October 1941, 2,200 Communists and Jews were shot in reprisal for 22 German soldiers of the 521st Army Signal Communication Regiment murdered at Topola; on 18 October 1941, 1,736 men and 19 Communist women were shot in reprisal for German losses sustained in the fight for Kraljevo; on 19 October 1941, 182 men were shot to death in Meckovac and 1,600 men from Valjevo were shot to death in reprisal for 16 Germans killed and 24 wounded; on 21 October 1941, 2,300 Serbs of various ages and professions were shot to death; on 27 October 1941, 101 arrestees were shot to death with further killings to be carried out after more arrestees had been turned in; and on 28 October 1941, 2,200 Serbs were shot for 10 German soldiers killed and 24 wounded in action. It seems highly improbable that Kuntze could step into the command

in the Southeast in the midst of the carrying out and reporting of these reprisal actions without gaining knowledge and approval. Reports made to the defendant Kuntze, shown in the evidence, reveal that on 29 October 1941, 76 persons were shot in reprisal in Serbia; on 2 November 1941, 20 persons were shot to death near Loznica; on 2 November 1941, 125 persons were shot to death at Valjevo; and on 27 November 1941, 265 Communists were shot as a reprisal measure at Valjevo. Under date of 31 October 1941, the commanding general in Serbia, General Boehme, recapitulated the shootings in Serbia in a report to Kuntze as follows: "Shootings—405 hostages in Belgrade (total up to now in Belgrade 4,750), 90 Communists in Camp Sabac, 2,300 hostages in Kragujevac, 1,700 hostages in Kraljevo." In a similar report under date of 30 November 1941, General Boehme reported to Kuntze as follows: "Shot as hostages (total) 534 (500 of these by Serbian auxiliary police)." Many other similar shootings are shown by the record. Included was a report covering the whole period of the resistance movement up to and including 5 December 1941, wherein it is shown that 31,338 reprisal prisoners were to be shot on the basis of the 100 to 1 order, that 11,164 had been shot and that 20,174 remained to be shot in reprisal to fulfill the quota fixed on the 100 to 1 basis.

On 5 December 1941, the new commanding general in Serbia, General Bader, ordered the basic reprisal ration reduced to 50 reprisal prisoners for each German killed and 25 for each German wounded. The defendant Kuntze asserts that this reduction of ratio was in a large part due to his insistence and effort in that direction. Thereafter, the killing of hostages and reprisal prisoners continued. In a daily report to the defendant Kuntze, General Bader stated that 449 reprisal prisoners were shot to death in January 1942, and the 3,484 additional shootings had been ordered to commence immediately to balance the reprisal killings against the Germans killed and wounded on the fixed ratio. On 21 February 1942, General Bader reported the shooting of 570 Communists by the Serbian auxiliary Gendarmerie, on 23 February 1942, the shooting of 403 reprisal prisoners, and on 25 February 1942, the shooting of 110 Communists in reprisal.

On 19 March 1942, the defendant Kuntze issued an order regarding the combating of insurgents which stated in part (*NOKW-835, Pros. Ex. 184*):

"I expect troop leaders of all ranks to show special energy and ruthless action as well as to commit fully their own person for the duty with which they are charged, which is to preserve quiet, order, and security by all means. All soldiers who do

not follow orders and who do not act decisively are to be called to account.

“By means of brutal police and secret police measures, the formation of insurgent bands is to be recognized in its inception and to be burnt out. Captured insurgents are to be hanged or to be shot to death as a matter of principle; if they are being used for reconnaissance purposes, it merely means a slight delay in their death.”

In the directives accompanying the foregoing order, it was stated:

“The more unequivocal and the harder reprisal measures are applied from the beginning the less it will become necessary to apply them at a later date. No false sentimentalities! It is preferable that 50 suspects are liquidated than one German soldier lose his life * * *. Villages with Communist administration are to be destroyed and men are to be taken along as hostages. If it is not possible to produce the people who have participated in any way in the insurrection or to seize them, reprisal measures of a general kind may be deemed advisable, for instance the shooting to death of all male inhabitants from the nearest villages, according to a definite ratio (for instance, 1 German dead—100 Serbs; 1 German wounded—50 Serbs).”

The shooting of large numbers of reprisal prisoners and hostages was reported to Kuntze after the issuance of the foregoing order and directive.

Although he was advised of all these killings of innocent persons in reprisal for the actions of bands or unknown members of the population, Kuntze not only failed to take steps to prevent their recurrence but he urged more severe action upon his subordinate commanders. Not once did he attempt to halt these disproportionate reprisals. He directed the burning down of all villages having a Communist administration and the taking of all the male inhabitants as hostages. He directed the taking of reprisal measures against the population generally such as the shooting to death of all the male inhabitants of the nearest village on the basis of 100 for each German killed and 50 for each German wounded. In many cases persons were shot in reprisal who were being held in collecting camps without there being any connection whatever with the crime committed, actual, geographical, or otherwise. Reprisal orders were not grounded on judicial findings. The order and directives which brought about the killing of these innocent members of the population constitute violations of international law which are punishable as crimes.

The orders he issued and his subsequent failure to take steps to end these unlawful killings after they had been reported to him makes him criminally responsible under the law previously announced and applied in this opinion to the defendant List.

With reference to the alleged mistreatment of Jews and other racial groups within the area commanded by the defendant Kuntze during the time he was Deputy Armed Forces Commander Southeast, the record shows the following: On 3 November 1941, the chief of the administrative staff, an official subordinate to General Boehme, who was in turn subordinate to the defendant Kuntze, ordered the immediate arrest of all Jews and gypsies as hostages and the deportation of their wives and children to an assembly camp near Belgrade. On 4 November 1941, a detailed report concerning the shooting of Jews and gypsies between 27 and 30 October 1941, is shown in the war diary of the 433d Infantry Regiment [704th Infantry Division]. (*NOKW-905, Pros. Ex. 143.*)* The lurid details of the shooting of these 2,200 persons is graphically recited in this report. A report under date of 5 December 1941 containing the notes of the Armed Forces Commander Southeast (Kuntze) made on a tour of inspection says in part: "All Jews and gypsies are to be transferred into a concentration camp at Semlin (at present there are about 16,000 people there). They were proved to be the bearers of the communication service of the insurgents." On 4 February 1942, the 704th Infantry Division reported to General Bader that it had delivered 161 partisans, 17 Jews, and 2 Jewesses to the SD—Belgrade. On 19 March 1942, General Bader reported to the defendant Kuntze that 500 Jews had been transported from Metrovica to Semlin. On 10 March 1942, General Bader reported to Kuntze that in the Jewish camp of Semlin there were 5,780 persons, mostly women and children. On 20 April 1942, General Bader reported to the defendant Kuntze that in the concentration camps there were 182 hostages, 3,266 reprisal prisoners, and 4,005 Jews.

The foregoing evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies shortly after the defendant assumed command in the Southeast by units that were subordinate to him. The record does not show that the defendant Kuntze ordered the shooting of Jews or their transfer to a collecting camp. The evidence does show that he had notice from the reports that units subordinate to him did carry out the shooting of a large group of Jews and gypsies as hereinbefore mentioned. He did have knowledge that troops subordinate to him were collecting and trans-

* Ibid.

porting Jews to collecting camps. Nowhere in the reports is it shown that the defendant Kuntze acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence. We think his responsibility for these unlawful acts is amply established by the record.

There is some evidence in the record that portions of the population were being deported for labor service in Germany, Norway, and other territories subjected to German influence. We are of the opinion that Kuntze's responsibility therefor, if such deportations were in fact carried out, has not been established beyond a reasonable doubt.

There is also some evidence concerning an improper use of the population in labor service in clearing mines and building military establishments. In this respect, the language of the reports is not definite and the testimony offered is not clear that such alleged acts were unlawful ones for which this defendant could be held responsible.

The defendant Kuntze denies that he was in any way responsible for the commission of unlawful acts by troops subordinate to him. While the record does not show that he ever ordered a ratio to be applied in the execution of reprisal measures, the record does show that he urged more severe measures and a direction that a ratio of 100:1 for each German killed and 50:1 for each German wounded be applied where the perpetrators could not be found. Reports made to him show that he was not without knowledge of the reprisals being taken and the ratios being applied. His claim of a lack of knowledge of the crimes being committed cannot be sustained.

It is true, as shown by the record, that the acts complained of were ordered by his superiors. While this is not a defense, it is a matter for consideration in mitigation of punishment. He says, and it is not disputed, that he objected to the high command because of the harshness of orders received. That he was not in high favor with Hitler and the Nazi Party is borne out by the record. That he was continually pressed by his superiors to invoke more severe measures is clearly shown. He was plagued with the operations of organizations receiving their orders direct from Berlin in the same manner as was the defendant List. He was faced with a type of unlawful warfare that presented many difficult problems for solution by the commanding general. While many extenuating circumstances are shown by the record, his guilt in permitting the killing of innocent members of the population and the transportation of Jews to concentration camps is amply shown.

The defendant Kuntze, at the time of the commission of the acts charged, was a professional soldier with forty years experience. He knew or ought to have known that the killing of thousands of the population under the guise of carrying out reprisal measures when such reprisal measures were legitimate in no sense of the word made them crimes no matter what name was applied to them.

The defendant says that order and security was the objective sought by him in the Southeast and that reprisal measures were taken for the purpose of deterring attacks upon German soldiers and the sabotaging of communication lines and military installations. But this is only a partial explanation. It appears from the record that the High Command was endeavoring to secure order and security in the Southeast without adequate troops and equipment. It is evident that order and security was sought by applying intimidating measures against the population in lieu of adequate troop commitments. This led to the barbarous abuses of the law of hostages and reprisals which we have set forth. The contention that military expediency or necessity justifies the acts cannot be accepted as valid. There are certain acts otherwise unlawful which are proper when military necessity requires their doing, but the killing of great numbers of the population in the manner here shown is not one of them. The collection of Jews and gypsies in collection or concentration camps merely because they are such is likewise criminal. The defendant says that he never heard of any such action against Jews or gypsies in the Southeast. The reports in the record which were sent to him in his capacity as Armed Forces Commander Southeast charge him with knowledge of these acts. He cannot close his eyes to what is going on around him and claim immunity from punishment because he did not know that which he is obliged to know. We conclude therefore that the guilt of the defendant Kuntze is shown by the evidence beyond a reasonable doubt on counts one, three, and four.

The defendant Foertsch participated in the invasion of Yugoslavia and Greece as liaison officer with the 12th Army for OKH, the High Command of the Army. On 9 May 1941, he was made chief of staff of the 12th Army, then commanded by Field Marshal List. With the appointment of Field Marshal List as Armed Forces Commander Southeast, he became chief of staff to the Armed Forces Commander Southeast and served in this position during the tenures of Field Marshal List and Lieutenant General Kuntze. In August 1942, he became chief of staff, Army Group E, then commanded by General Alexander Loehr. In August 1943, he became chief of staff, Army Group F, then com-

manded by Field Marshal von Weichs, a position he held until 4 March 1944 at which time his service in the Southeast came to an end. It will be observed that the whole period of his stay in the Southeast was in the capacity of chief of staff of the army group commanding the territory.

The chief of staff was in charge of the various departments of the staff and was the first adviser of the commander in chief. It was his duty to provide all basic information for decisions by the commander in chief and was responsible for the channeling of all reports and orders. He had no troop command authority. Neither did he have any control over the legal department which was directly subordinate to the commander in chief. As chief of staff he was authorized to sign orders on behalf of the commander in chief when they did not contain any fundamental decision and which did not require the exercise of judgment by the subordinate to whom it was directed.

From the time Foertsch became chief of staff to the Armed Forces Commander Southeast until late August 1941, the population remained comparatively quiet. Signs of insurrection began to appear during the latter part of August which caused considerable concern. It was the opinion of Field Marshal List that additional troops were needed to cope with the situation. His requests along this line were refused by the High Command [of the Armed Forces]. About 20 September 1941, Foertsch called upon Field Marshal Keitel, Chief of the High Command [of the Armed Forces], and set forth the views of Field Marshal List concerning the situation in the Balkans. The views advanced by Foertsch were unequivocally rejected by Keitel who asserted that List's responsibility was to obey that which had been ordered. It appears therefore that the High Command [of the Armed Forces] had fixed upon a campaign of severity and intimidation as a substitute for an adequate number of troops. The contention had been advanced that with adequate troops, the shootings of hostages and reprisal prisoners would not have been necessary from any standpoint. The defendant Foertsch asserts, however, that with adequate troops, reprisals against the population would still have been necessary. This view is based on the fact that reprisal measures are dependent upon the attitude of the population which, in any event would have been incited to commit acts of sabotage and other senseless actions by certain hostile influences within and without the country. It is the opinion of this defendant that reprisal measures against the population were unavoidable under such circumstances.

On 5 September 1941, (*NOKW-084, Pros. Ex. 42*) * Field Mar-

* Ibid.

shal List's order on the suppression of the Serbian insurrection movement, which was quoted in part in the portion of the opinion dealing with the defendant List, was issued. On 16 September 1941, the Keitel order fixing reprisal ratios of 50 up to 100 to 1 (*NOKW-258, Pros. Ex. 53*)¹ was issued and distributed. Also on 16 September 1941, Lieutenant General Boehme was placed in charge of military operations in Serbia. During the occurrence of these events, the defendant Foertsch was on leave and became familiar with them upon his return in the latter part of September 1941.

It is the testimony of Foertsch that the Keitel order of 16 September 1941 fixing reprisal ratios from 50 up to 100 to 1 was the basic order under which reprisal measures were carried out in the Southeast. The evidence shows the following reprisal measures which were executed prior to the Keitel order and on the reports of which the signature or initials of the defendant Foertsch appear: On 16 July 1941, for sabotage in Obrenovac, 10 Communists shot to death. In Palanka, Communists were caught while putting up posters, one was shot and two arrested. On 25 July 1941, two attempts to destroy German motor vehicles with bottles filled with gasoline were reported in reprisal for which 100 Jews were to be shot. On 28 July 1941, 80 were shot to death in reprisal for an attack on a police patrol, and 122 Communists and Jews were shot in Belgrade for previously reported sabotage acts. On 1 August 1941, as reprisal for previously reported unrest near Petrovgrad, 90 Communists were shot there. On 6 August 1941, 4 plotters and 90 Communists and Jewish hostages were shot in Zagreb. On 7 August 1941, the shooting of an additional 87 Communists and Jewish hostages was reported. Other similar reports appear in the record. These occurrences came to the attention of Foertsch as chief of staff before the High Command [of the Armed Forces] had issued any orders to the Armed Forces Commander Southeast pertaining thereto. In other words, these killings took place before any basic order had been issued by any officer superior to Field Marshal List.

On 28 September 1941, Keitel's order (*NOKW-458, Pros. Ex. 69*)² on the taking of hostages was distributed. Parts of this order are quoted in the portion of the opinion dealing with the defendant List. This order was passed on to subordinate commanders at the direction of his commanding general. The signature of Foertsch appears on the order in his capacity as chief of staff.

¹ *Ibid.*

² *Ibid.*

The evidence clearly shows that the reports of units subordinate to the Armed Forces Commander Southeast invariably came to the attention of the defendant Foertsch if they had strategic or operational importance. It was only when he was on leave or absent on outside assignments that such reports did not come to his notice. For all practical purposes, he had the same information as the defendants List and Kuntze during their tenures as Armed Forces Commanders Southeast. He knew of the incidents held to be crimes that are recited in the portions of the opinion dealing with the defendants List and Kuntze. He was informed of the killing of hostages and reprisal prisoners. He was familiar with the illegal orders of Hitler and Keitel prescribing reprisal ratios of 50 up to 100 to 1. He gained information through reports that such ratios were being applied against the innocent members of the population. He had information that concentration or collection camps were established. He gained information through reports that Jews were transported to concentration camps for no other reason than that they were Jews, although he did not know by whose order this was done. He knew of the burning down of villages as reprisal measures. It is not necessary that all these specific acts be recapitulated here. The defendant Foertsch did not participate in any of them. He gave no orders and had no power to do so had he so desired. He did distribute some of the orders of the OKW, the OKH, and of his commanding generals. These orders will be reviewed as to their content and legality.

The order of 16 September 1941, generally referred to as the Keitel order of that date, which directed the killing of 50 to 100 members of the population for each German soldier killed was received by the Armed Forces Commander Southeast at a time when the defendant Foertsch was on leave. On his return he became acquainted with the order but the evidence is clear that he had no connection with its issuance or distribution.

The defendant Foertsch admits that he distributed Field Marshal Keitel's order of 28 September 1941, wherein it is ordered that hostages of different political persuasions such as Nationalists, Democrats, and Communists be kept available for reprisal purposes and shot in case of an attack. He contends that this order was a legal one and that his distribution of it invokes no criminal responsibility.

The order of General Boehme under date of 10 October 1941 providing for the killing of 100 prisoners or hostages for each German killed and 50 for each German wounded was known to Foertsch through the reports made to the Armed Forces Com-

mander Southeast. That it was repeatedly applied was also evident to him from General Boehme's reports to List and Kuntze.

The defendant Foertsch admits that he distributed General Kuntze's order of 19 March 1942 (*NOKW-835, Pros. Ex. 184*) wherein it was ordered that more severe reprisal measures be taken and directed that reprisals be taken in accordance with a definite ratio "for instance, 1 German dead—100 Serbs; 1 German wounded—50 Serbs." It is the contention of Foertsch that this order which is more fully set forth in the portion of the opinion dealing with the defendant Kuntze was advisory only because of the use of the words "for instance" and "might" in connection with the figure 100. He contends that this order was consistent with his position that reprisals were lawful although he personally did not approve of the high ratios to be uniformly applied.

The Commando Order of 18 October 1942 (*C-81, Pros. Ex. 225*) was distributed by Army Group E, commanded by General Alexander Loehr and of which Foertsch was then chief of staff. As to this order Foertsch states that he considered this order unlawful in that it called for the commission of offenses and crimes under international law but that he assumed that the issuance of the order was in answer to similar actions by the enemy in contravention of international law. It has not been shown that the defendant knew this order was in fact carried out in the territory in which he served.

The record further shows that in July 1943, the defendant distributed a Hitler order providing that partisans should no longer be killed but treated as prisoners of war and sent to the Reich for forced labor in mines. The defendant states that as such persons were subject to the death penalty, it was not unlawful to deport them for labor service. He closes his comments on this order with the statement that he had no power to rescind, modify, or palliate this order in his capacity as chief of staff.

The prosecution contends that Foertsch as chief of staff of the various army groups successively in command in the Southeast, was a powerful and influential figure. It is insisted that he exercised this power and influence upon his various commanders in chief in such a manner as to incriminate himself irrespective of the fact that he had no command responsibility. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of various racial and religious groups finds support in the record but it fails utterly to establish that the defendant Foertsch, or any of the armed forces officers jointly charged with him, ever became a party to any such

preconceived plan. We think the evidence shows that insofar as the defendant is concerned the actions in the Southeast were motivated by a desire to attain peace and order among the civilian population—a matter that was essential to an adequate program of defense against an Allied invasion.

The nature of the position of the defendant Foertsch as chief of staff, his entire want of command authority in the field, his attempts to procure the rescission of certain unlawful orders and the mitigation of others, as well as the want of direct evidence placing responsibility upon him, leads us to conclude that the prosecution has failed to make a case against the defendant. No overt act from which a criminal intent could be inferred, has been established.

That he had knowledge of the doing of acts which we have herein held to be unlawful under international law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was. Many of these acts were committed by organizations over which the armed forces, with the exception of the commanding general, had no control at all. Many others were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of an unlawful act which was the result of any action, affirmative or passive, on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be one who orders, abets, or takes a consenting part in the crime. We cannot say that the defendant met the foregoing requirements as to participation. We are required to say therefore that the evidence does not show beyond a reasonable doubt that the defendant Foertsch is guilty on any of the counts charged.

The defendant von Geitner became chief of staff to the commanding general in Serbia (General Paul Bader) on 10 July 1942. He continued in this position until August 1943. He thereupon became chief of the general staff to the Military Commander Serbia and Military Commander Southeast (General Hans Felber), a newly established position. He continued in this position until October 1944. During the entire period of his service in the Balkans, the defendant von Geitner served only as chief of staff. His duties generally had to do with operations, supplies, training, and organization of troops. In addition to this staff, there existed an administrative staff which dealt directly with matters pertaining to the administration of Serbia and a third staff headed by the Plenipotentiary for Economy. While the persons in charge of the latter two staffs were per-

sonally subordinate to the military commander, the first received orders direct from superiors in Berlin and the second received orders from the administrators of the Goering Four Year Plan. In addition, there was a Higher SS and Police Leader in the territory who had charge of police units and the police security program. He, too, was subordinate to the military commander personally, but received his general orders from the Reich Leader SS directly. The police troops were subordinate to the commanding general only when needed for tactical commitment. These devious command channels with their overlapping powers were a constant source of trouble to the commanding general. A complete understanding of the nature of the subordination of each to the armed forces commander is necessary to the fixing of the responsibility, if any, that may be charged to the officers of the Wehrmacht. The burden rests upon the prosecution to establish the responsibility of the defendant von Geitner in ordering, aiding, abetting, or taking a consenting part in the crimes charged against him.

The general allegations against the defendant von Geitner follow the pattern of those charged against the defendant Foertsch and insofar as identical situations are concerned, the discussion will not be repeated here. There is one situation here involved that was not discussed at length in the case against the defendant Foertsch. The evidence shows that defendant von Geitner initialed or signed orders issued by his commanding general for the shooting of hostages and reprisal prisoners which were unlawful when viewed in the light of the applicable international law. We shall therefore determine the effect of such actions and the criminal responsibility that may grow out of it.

The evidence shows that General Bader reserved unto himself the authority to issue orders for the arrest of hostages and the execution of all reprisal measures. It appears that the commanding general handled these matters with the aid of a special officer who had been trained in the law. It was the duty of this officer to examine the particular problem with regard to the correctness of the description of events and submit his conclusion to the military commander who made the decision. The defendant von Geitner was necessarily informed of the order made by virtue of his position. It became his duty to prepare the order and approve its form which he usually did by placing his signature or initials on it. This he contends is the extent of his participation in the issuing and distributing of reprisal orders.

The applications for reprisal actions were generally made by (1) the administrative area headquarters, (2) by troop com-

manders, or (3) the Higher SS and Police Leader. They were then referred to the special legal officer who worked on them and submitted the result to the commander. The commander then made the decision and delivered it to the defendant von Geitner for preparation and approval as to form. The latter was generally indicated by his initials or signature. The order then was sent on its way through regular channels by von Geitner. No doubt exists that the order was that of the military commander and that the defendant von Geitner lacked the authority to issue such an order on his own initiative. He contends that he was opposed to the reprisal policy carried out in this area, a statement sustained by the record. He does not say that reprisal killings against the population were not necessary or that he considered it unlawful to carry out such measures under certain conditions. The question posed is whether the stated participation of the defendant von Geitner in his capacity as chief of staff is sufficient to establish criminal liability.

The evidence fails to show beyond a reasonable doubt that he aided, abetted, or took a consenting part in acts which were crimes under international law. No responsible act is shown to have been committed by him from which a guilty intent can be inferred. The charge that a conspiracy existed which had for its purpose the decimation and annihilation of racial and religious groups is not established by sufficient evidence insofar as this defendant is concerned. The record does not show his participation in slave labor programs or concentration camp activities, although he knew of them. His testimony that he opposed all such measures is not effectively disputed. These things, coupled with the nature and responsibilities of his position and the want of authority on his part to prevent the execution of the unlawful acts charged, serve to relieve him of criminal responsibility. We find the defendant von Geitner not guilty.

PRESIDING JUDGE WENNERSTRUM: The defendant Rendulic became commander in chief of the 2d Panzer Army on 26 August 1943, and remained in the position until June 1944. In July 1944, he became the commander in chief of the 20th Mountain Army, a position which he held until January 1945. In December 1944, he became the Armed Forces Commander North in addition to that of commander in chief of the 20th Mountain Army. In January 1945, he became commander in chief of Army Group North, a position which he held until March, 1945. These are the assignments during which the crimes set forth in the indictment are alleged to have occurred. At the time he assumed command of the 2d Panzer Army, the LXIX Corps, the XV Corps, the XXI Corps, the V SS Corps, and two Croation corps

constituted the greater portion of the 2d Panzer Army. The headquarters of the army was in Croatia and its principal task was the guarding of the coast against enemy attacks and the suppression of band warfare in the occupied area. The Italians also had several army corps stationed in the immediate territory. The danger of the collapse of the Italian Government and the possibility that the Italians might thereafter fight on the side of the Allies was a constant threat at the time of his assumption of the command of the 2d Panzer Army.

The Hitler order of 15 September 1941 providing for the killing of 100 reprisal prisoners for each German soldier shot and 50 for each German soldier wounded had been distributed to the troops in the Southeast and, in many instances, carried out before the defendant Rendulic assumed command of the 2d Panzer Army. The order was invalid and one who executed an order to kill reprisal prisoners under all circumstances at the ratio therein set forth performed a criminal act. The reasons for this have hereinbefore been set out in this opinion. It is claimed, however, that the order was never carried out by troops of the 2d Panzer Army and that consequently no duty arose on the part of this defendant to take measures to prevent the enforcement of the order. It appears, however, that on 18 August 1943, Keitel issued an order containing the following [NOKW-509, *Pros. Ex. 340*]: "Commanders having the rank of at least that of divisional commander are empowered in cases of particularly malicious procedure on the part of bandits or their accomplices to issue precautionary directives not to take any prisoners or, respectively, that prisoners and the population captured in the combat area may be shot. Without adequate orders, local commanders will act according to their own responsibility." On 15 September 1943, this defendant issued an order which in part stated:

"Attacks on German members of the Wehrmacht and damages to war important installations are to be answered in every case by the shooting or hanging of hostages and the destruction of surrounding villages, which is to take place, if possible, after the arrest of the male population which is capable of bearing arms. Only then will the population inform the German authorities if bandits collect, so as to avoid reprisal measures.

"Unless in individual cases different orders are issued the rule for reprisal measure is: 1 German killed, 50 hostages, 1 German wounded, 25 hostages shot or hanged. Kidnapping of a German will be considered equal to killing a German unless the kidnapped person does not return within a definite period. According to the severity of the attack 100 hostages will be

hanged or shot for each attack against war essential installations. These reprisal measures are to be executed if the culprit is not caught within 40 hours."

The reports of corps commanders subordinate to the defendant reveal that reprisals were taken against the population for attacks upon troops and military installations. On 11 November 1943, the 173d Reserve Division reported the hanging of 20 hostages and the shooting of 20 hostages for railroad sabotage. On 21 September 1943, 10 hostages were hanged by the 187th Reserve Division for an attack on a truck. On 4 October 1943, the 173d Reserve Division reports the execution of 40 hostages in reprisal for railroad sabotage. On 10 October 1943, the 187th Reserve Division reported the killing of 20 people suspected of belonging to the bands. On 31 October 1943, the 187th Reserve Division reports the killing of 9 people suspected of being bandits. On 7 November 1943, the 173d Reserve Division hanged 19 Communists at scene of an explosion on a railroad in reprisal. On 8 November 1943, the 173d Reserve Division shot 21 hostages as reprisal for an attack on a freight train. On 30 November 1943, the 187th Reserve Division reports killing 15 people suspected of belonging to bands in reprisal, the offense for which the reprisal was taken not being stated. The foregoing constitute a partial list of reprisal and hostage killings as shown by the reports of the LXIX Reserve Corps, commanded by the defendant Dehner, and to whom the 173d and 187th Reserve Divisions were subordinate. These reports were made to the 2d Panzer Army, commanded by the defendant Rendulic and to whom the LXIX Reserve Corps was subordinate.

They carried little or no information in addition to that which we have stated. The defendant made no attempt to secure additional details. All attempts to apprehend the guilty persons were abandoned. Public proclamations upon the taking of hostages were not made. Previous notice was not given the public that reprisals by shooting would be taken if unlawful acts were repeated. Court martial proceedings were not held as required. Hostages, reprisal prisoners, and partisans were killed without even the semblance of a judicial hearing.

On occasion interrogations were held but these were primarily to gain information rather than an attempt to give the persons interrogated a fair and impartial hearing. It is evident that the taking of reprisal measures by shooting members of the population became so common that the German commanders became indifferent to the seriousness of the acts. They appear to have been accepted as legitimate acts of war with the extent of their use limited only by the whim or judgment of divisional com-

manders. The records further indicate that arrested persons whose guilt could not be established were generally held as reprisal prisoners. This resulted, of course, in the death of the arrestee in any event. There was no requirement that hostages or reprisal prisoners killed should be connected with the offense committed, either passively, actively, or by proximity. The practice employed in the killing of hostages and reprisal prisoners was not one of last resort. The general notion seems to have been expressed by General Alexander Loehr in an order bearing the date 22 December 1943, while acting as Commander in Chief Southeast for Field Marshal von Weichs, wherein he said (NOKW-172, *Pros. Ex. 379*):

“The reprisal, penal, and retaliation measures practiced up to now must in the future take into account the new political objectives. The first principle has to be, in cases of attacks, acts of sabotage, etc., to seize the perpetrator himself and to take reprisal measures only as a second course, if through reprisal measures the prevention of future attacks is to be expected.”

The order of 15 September 1943, signed and issued by the defendant Rendulic indicates his advocacy of these excessive and irregular hostage and reprisal measures. It is true, as he contends, that they were consistent with and directed by his superiors. It is also true that the record does not indicate that he ever issued an order directing the killing of a specific number of hostages or reprisal prisoners as retaliation for any particular offense. The issuance of such orders was delegated to divisional commanders. Their activities were known to him through reports. He acquiesced in them and took no steps to shape the hostage and reprisal practices in conformity with the usages and practices of war. While mitigating circumstances exist which must receive the careful consideration of the Tribunal, the defendant must be held guilty of ordering, furthering, and acquiescing in the unlawful killing of innocent inhabitants of occupied territory.

The evidence further shows that on 3 September 1943, Italy surrendered unconditionally to the Allies. The surrender was announced publicly on 8 September 1943. The defendant testifies that this event was anticipated by him as well as the possibility that Italy would become an enemy of the Germans. His testimony is to the effect that the German Army in performing its task of guarding the coast to prevent an Allied landing, could not tolerate the presence of hostile Italians in these coastal areas. Holding these definite views of the necessities of the situation,

the defendant set about removing the Italians from the coastal areas by making them prisoners of war.

It appears that the Italian troops stationed in Greece, Yugoslavia, and Albania were subordinated to Army Group Este, commanded by General of the Army Rossi. The Italian troops within the area occupied by the 2d Panzer Army, with the exception of one army corps, were subordinated to the Italian 9th Army under the command of General Dalmazzo. The defendant, knowing General Rossi to be hostile to the desires of the German command, caused him to be taken into custody. General Dalmazzo was thereupon taken to Belgrade by the Germans and "assigned" to the command of Army Group Este in the place of General Rossi. It was with the latter general that the defendant negotiated for the surrender of the Italian troops within the area of the 2d Panzer Army. Even though outnumbering the Germans at least 20 to 1 and without orders to so do, General Dalmazzo entered into an agreement with the defendant for the surrender of the 9th Italian Army. The defendant thereupon caused Italian commanders to be notified that they would be shot as francs-tireurs if they continued to resist and failed to order their troops to surrender to the Germans. In case of destruction or looting of arms, ammunition, fuel, and supply depots, it was ordered by defendant that one staff officer and 50 men from each division concerned would be shot. Death was threatened to all Italian soldiers who failed to turn in their guns, for selling or giving away or destroying their arms, and many similar acts too numerous to mention here. The defendant Rendulic states that no Italians were shot pursuant to these sanctions.

On 11 and 13 September 1943, and subsequent to the issuance of the preceding sanctions, the defendant received Fuehrer orders directing that the officers of all Italian units who had cooperated with insurgents or permitted their arms to fall into the hands of insurgents, were to be shot and that the officers of resisting units who continued their resistance after receipt of a short ultimatum also were to be shot. The record discloses that the defendant Rendulic was insistent that his corps commanders carry out these orders "without any scruples." In this connection it is shown that troops subordinated to the XV Mountain Corps captured 300 Italian officers and 9,000 men who resisted capture at Split. On 6 October 1943, it was reported to the 2d Panzer Army by the XV Mountain Corps that three generals and 45 officers had been sentenced to death by a general court martial and executed. The report further states that nine additional Italian officers had been found guilty of treason and shot. Under date

of 9 October 1943, the XXI Mountain Corps reported to the 2d Panzer Army that reprisal measures were carried out against 18 Italian officers.

It is the contention of the defendant Rendulic that the surrender of the 9th Italian Army, commanded by General Dalmazzo, brought about *ipso facto* the surrender of the Bergamo Division in Split, and that elements of this division by continuing to resist the German troops became *francs-tireurs* and thereby subject to the death penalty upon capture. An analysis of the situation is required for clarification.

The evidence shows that the 9th Italian Army was occupying the coastal area jointly with the German Armed Forces as an ally until the collapse of Italy. That danger existed in the possibility of the area becoming an enemy bridgehead cannot be denied. Even though the German troops were outnumbered as much as 20 to 1, the defendant Rendulic saw the necessity of controlling the area. By cleverly maneuvering his numerically inferior troops and taking advantage of the uncertainties of the situation in which the Italian commanders found themselves, the defendant Rendulic was able to coerce a surrender of the 9th Italian Army by its commander, General Dalmazzo. Most of the troops of the 9th Army complied with the terms of the surrender. Among those which refused to comply was the Bergamo Division of the 9th Army stationed at Split, a seaport on the Adriatic Sea. The defendant was able to marshal forces sufficient to capture the troops of the Bergamo Division. Thereafter, the order to shoot the guilty officers of the Bergamo Division after summary court martial proceedings was carried out.

It must be observed that Italy was not at war with Germany, at least insofar as the Italian commanders were informed, and that the Germans were the aggressors in seeking the disarmament and surrender of the Italian forces. The Italian forces which continued to resist met all the requirements of the Hague Regulations as to belligerent status. They were not *francs-tireurs* in any sense of the word. Assuming the correctness of the position taken by the defendant that they became prisoners of war of the Germans upon the signing of the surrender terms, then the terms of the Geneva Convention of 1929, regulating the treatment of prisoners of war were violated. No representative neutral power was notified nor was a 3-month period allowed to elapse before the execution of the death sentences. Other provisions of the Geneva Convention were also violated. The coercion employed in securing the surrender, the unsettled status of the Italians after their unconditional surrender to the Allied forces, and the lack of a declaration of war by Germany

upon Italy creates grave doubts whether the members of the Bergamo Division became prisoners of war by virtue of the surrender negotiated by General Dalmazzo. Adopting either view advanced by the defense, the execution of the Italian officers of the Bergamo Division was unlawful and wholly unjustified. It represents another instance of the German practice of killing as the exclusive remedy or redress for alleged wrongs. The execution of these Italian officers after the tense military situation had righted itself and the danger had passed cannot be described as anything but an act of vengeance.

The defendant is charged also with passing on to troops subordinate to him the Fuehrer order of 6 June 1941, providing that all commissars captured must be shot. Defendant admits that all commissars captured must be shot. Defendant admits the receiving and passing on of this order in July 1941 when he was in command of the 52d Infantry Division on the Russian front. He admits that the legality and correctness of this order was discussed and that it was generally considered illegal. He testifies that he considered the order as a reprisal measure, the purpose of which was unknown to him. But a mere assertion of this nature, unaccompanied by evidence which might justify such an assumption, is not a defense. Such an assertion could be made as an excuse for the issuance of any unlawful order or the committing of any war crime, if it were available as a defense *ipso facto*. We do not question that circumstances might arise in such a case that would require a court to find that no criminal intent existed but it must be based upon something more than a bare assertion of the defendant, unsupported by facts and circumstances upon which a reasonable person might act. The order was clearly unlawful and so recognized by the defendant. He contends, however, that no captured commissars were shot by troops under his command. This is, of course, a mitigating circumstance but it does not free him of the crime of knowingly conditionally passing on a criminal order.

Defendant is also charged with issuing, distributing, and passing into execution the Commando Order of 18 October 1944. The record discloses, however, that this order had been issued and distributed prior to his assignment in the Balkans. The Hitler order of 30 July 1944 (537-PS, Pros. Ex. 488) making the Commando Order applicable to members of foreign military missions, was not in existence during his assignment in the Balkans. It is evident that defendant Rendulic did not issue or pass on the Commando Order while commander in chief of the 2d Panzer Army.

Proof of any acts connecting him with this criminal order has not been produced. We hold, therefore, that the evidence is insufficient to sustain a finding of guilt as to this charge.

The defendant is charged with the wanton destruction of private and public property in the province of Finmark, Norway, during the retreat of the 20th Mountain Army commanded by him. The defendant contends that military necessity required that he do as he did in view of the military situation as it then appeared to him.

The evidence shows that in the spring of 1944, Finland had attempted to negotiate a peace treaty with Russia without success. This furnished a warning to Germany that Finland might at any time remove itself as an ally of the Germans. In June 1944, the Russians commenced an offensive on the southern Finnish frontier that produced a number of successes and depressed Finnish morale. On 24 June 1944, the defendant Rendulic was appointed commander in chief of the 20th Mountain Army in Lapland. This army was committed from the Arctic Ocean south to the middle of Finland along its eastern frontier. Two army corps were stationed in central Finland and one on the coast of the Arctic Ocean. The two groups were separated by 400 kilometers of terrain that was impassable for all practicable purposes.

On 3 September 1944, Finland negotiated a separate peace with Russia and demanded that the German troops withdraw from Finland within 14 days, a demand with which it was impossible to comply. The result was that the two army corps to the South were obliged to fight their way out of Finland. This took 3 months time. The distance to the Norwegian border required about 1,000 kilometers of travel over very poor roads at a very inopportune time of year. The Russians attacked almost immediately and caused the Germans much trouble in extricating these troops. The XIX Corps located on the Arctic coast was also attacked in its position about 150 kilometers east of Kirkenes, Norway. The retreat into Norway was successful in that all three army corps with their transport and equipment arrived there as planned. The difficulties were increased in middle October when the four best mountain divisions were recalled to Germany, thereby reducing the strength of the army by approximately one-half.

The evidence shows that the Russians had very excellent troops in pursuit of the Germans. Two or three land routes were open to them as well as landings by sea behind the German lines. The defendant knew that ships were available to the Russians to make these landings and that the land routes were available to them. The information obtained concerning the intentions of the Russians was limited. The extreme cold and the short days made air reconnaissance almost impossible. It was with this

situation confronting him that he carried out the "scorched earth" policy in the Norwegian province of Finmark which provided the basis for this charge of the indictment.

The record shows that the Germans removed the population from Finmark, at least all except those who evaded the measures taken for their evacuation. The evidence does not indicate any loss of life directly due to the evacuation. Villages were destroyed. Isolated habitations met a similar fate. Bridges and highways were blasted. Communication lines were destroyed. Port installations were wrecked. A complete destruction of all housing, communication, and transport facilities took place. This was not only true along the coast and highways but in the interior sections as well. The destruction was as complete as an efficient army could do it. Three years after the completion of the operation, the extent of the devastation was discernable to the eye. While the Russians did not follow up the retreat to the extent anticipated, there are physical evidences that they were expected to do so. Gun emplacements, fox holes, and other defense installations are still perceptible in the territory. In other words there are mute evidences that an attack was anticipated.

There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

The Hague regulations prohibited:* "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." The Hague Regulations are mandatory provisions of international law. The prohibitions therein contained, control, and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy may constitute a situation coming within the exceptions contained in Article

* Annex to Hague Convention No. IV, 1907, Article 23g. (Treaties Governing Land Warfare, United States Army Technical Manual 27-251, 1944, p. 25.)

23g. We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.

The evidence establishes the guilt of the defendant Rendulic on counts one, three, and four.

The defendant Dehner was assigned as the commander of the LXIX Reserve Corps in the last days of August 1943. He held this command until 15 March 1944. The corps was stationed in northern Croatia and occupied about one-third of that country. The corps consisted of the 187th Reserve Division, the 173d Reserve Division, and other units which were subordinate to it for varying periods of time. The chief task of this corps was to suppress the guerrilla bands operating in the territory and particularly to guard the Zagreb-Belgrade railroad and the communication lines in the assigned area. There was no coastline to guard in the area of this corps.

The defendant is charged primarily with the unlawful killing of hostages and reprisal prisoners, and with the wanton destruction of towns and villages contrary to international law. With reference to the alleged unlawful killing of hostages and reprisal prisoners, we point out that all the incidents set forth in the portion of the opinion dealing with the defendant Rendulic were committed by troops of the 173d and 187th Reserve Divisions both of which were directly subordinated to this defendant. No necessity exists to reiterate these incidents here. They will be incorporated as a part of the case against the defendant Dehner

by reference. Numerous occurrences took place in addition to the foregoing.

In the daily report of the LXIX Reserve Corps to the 2d Panzer Army for 5 November 1943, it is shown that the 173d Reserve Division hanged 100 bandits for an attack on railroad installations and on certain police forces. This action from the language used appears to have been a retaliation measure and not a shooting of *francs-tireurs*. That is was excessive as such is self evident. In a similar report dated 7 November 1943, it shows that the 173d Reserve Division hanged 19 Communists at the scene of a railroad explosion in reprisal for the act. On 8 November 1943, this same division shot 21 hostages as a reprisal for railroad sabotage. A similar report shows that the 187th Reserve Division on 21 December 1943, shot 25 people "suspected of being bandits" and hostages as a reprisal for band attacks.

The reports made are hopelessly inadequate. The defendant appears to have made no effort to require reports showing that hostages and reprisal prisoners were shot in accordance with international law. Killings by shooting and hanging took place for railroad sabotage out of all proportion to the nature of the offense. Retaliation was taken against special groups such as Communists and bandit suspects. The population does not appear to have been warned of the intention to kill hostages and innocent members of the population in the event of the recurrence of offenses against the occupying power. The reprisals appear to have been taken without regard to any possible connection of the population with the offense committed. Hostages were shot and reprisal prisoners killed when it was well known that the offenses for which retaliations were ordered, were committed by organized bands having no connection whatever with the immediate population. Innocent members of the population were shot in reprisal for German losses sustained in combat after the Fuehrer order of 18 August 1943, [NOKW-509, *Pros. Ex. 340*] authorizing the treatment of band members as prisoners of war. No more glaring injustice can be pointed to, it being a case where the guilty escape and the innocent are put to death. Court martial proceedings do not appear to have been held. The defendant excuses his indifference to all these killings by saying that it was the responsibility of the division commanders. We agree that the divisional commanders are responsible for ordering the commission of criminal acts. But the superior commander is also responsible if he orders, permits, or acquiesces in such criminal conduct. His duty and obligation is to prevent such acts, or if they have been already executed, to take steps to prevent their recurrence.

The records show that this defendant had full knowledge of these acts. On 24 December 1943, his corps headquarters called attention to the fact that the order of the commander in chief of the 2d Panzer Army of 15 September 1943, was in force. This order was described in the portion of the opinion dealing with the defendant Rendulic and will not be reiterated here. It appears to us from an examination of the evidence that the practice of killing hostages and reprisal prisoners got completely out of hand, legality was ignored, and arbitrary action became the accepted policy. The defendant is criminally responsible for permitting or tolerating such conduct on the part of his subordinate commanders.

There is much that can be said, however, in mitigation of the punishment to be assessed from the standpoint of the defendant. Superior orders existed which directed the policy to be pursued in dealing with the killing of hostages and reprisal prisoners. Such superior orders were known by his subordinate commanders, a situation that made it difficult for him to act. That the defendant recognized certain injustices and irregularities and attempted to correct them is evident from the record. As an example, in an order of 19 December 1943, his corps headquarters stated (*NOKW-657, Pros. Ex. 376*) :

“Measures of the unit have repeatedly frustrated propaganda for the enemy as planned by the unit leadership. It must not happen that bandits who arrive at the unit with leaflets asking them to desert and which should be valid as passes, are shot out of hand. This makes any propaganda effort in this direction nonsensical. Even our own confidential agents bringing important news from band territory and notwithstanding their repeated assurances that they are in the service of the German Armed Forces have been shot down ‘to simplify matters’, i.e., without any investigation.”

The order goes on to say that under such circumstances it is not surprising that notwithstanding the discomforts of living in the woods in winter that the band nuisance increases steadily and that the fight increases in severity and stubbornness. The same order further states :

“It must be absolutely avoided that innocent people are kept in hostage camps and that they possibly atone with their lives for an affair with which they had no connection. With the exception of case [paragraph] 1a hostages are to be made responsible for the misdeeds of bands only in the neighborhood nearest to their own villages. It is not permitted, for instance, that hostages from Karlovci be used

for retaliation measures in case a surprise attack by bands or a demolition occurs near Ruma."

The order further says:

"It is impossible to make use of hostages for the execution of reprisal measures for the German soldiers killed in the fight against bands. It would be contradictory on the one hand to treat active members of bands, captured during battle, as prisoners of war (Fuehrer Order, 18 August 1943), that is, to let them live; and on the other hand, to hang hostages from the next hostage camp for our own losses in the fight against bands."

The foregoing approaches closely the correct course to be pursued insofar as it bears upon the subject of hostages and reprisals. It indicates an attempt to correctly apply the rules of warfare as they apply to guerrilla warfare in occupied territory. Such examples of conscientious efforts to comply with correct procedure warrant mitigation of the punishment.

The defendant is charged, also, with responsibility for the destruction of numerous towns and villages by troops subordinate to him without military necessity existing for their so doing. The record establishes that on 16 October 1943 the 187th Reserve Division arrested the majority of the populations of the villages of Paklonica and Vocarica as hostages and then burned down the villages. The record further shows that on 24 September 1943 the 173d Reserve Division burned down the villages of Grgeteg and Bukavac. It shows also that on 26 November 1943 [NOKW-049, *Pros. Ex. 356*] the village of Grgurevci was burned down by troops of the 173d Reserve Division in reprisal for an attack on police from the village. Other cases of a similar character are shown by the record. Under some circumstances, the destruction of villages is a legitimate reprisal measure. The reports of these incidents are very fragmentary and give little or no details surrounding the actions. They do indicate that the acts were taken as reprisal measures and not from military necessity as that term is ordinarily used. We are obliged to say that the evidence is not sufficient to sustain a finding that these destructions were in violation of the laws of war.

We find the defendant guilty under count one of the indictment.

The defendant von Leyser was appointed to command the XXI Mountain Corps on 1 August 1944, and continued in the position until April 1945. Immediately previous thereto he had been in command of the XV Mountain Corps, a position he had held since 1 November 1943. Other assignments involved in the

present case are in regard to his command of the 269th Infantry Division in Russia in 1941 and his command of the XXVI Corps in Russia in 1942.

The XXI Corps was committed in Albania and assigned the task of guarding the coast against Allied invasion and the suppression of the resistance movement. Directly subordinate to him as commander of the XXI Corps were the 297th Infantry Division, the 100th Light Division, and other units assigned for particular operations. The XV Corps was committed in Croatia and was likewise assigned the task of guarding the coast and suppressing band activities. Directly subordinate to the corps were the 114th Light Division which was subsequently replaced with the 264th Infantry Division, the 373d Infantry Division, and the 392d Infantry Division. Other units appear to have been subordinated to the corps for specific operations.

The defendant is charged with responsibility for the unlawful killing of hostages and reprisal prisoners, with ordering and carrying out the evacuation of the male population of Croatian towns for deportation to Germany for forced labor, and the killing of commissars pursuant to the Commissar Order of 6 June 1941.

The reprisal practice as carried out in this corps area and the alleged deportation of inhabitants for slave labor is so interwoven with the powers of the alleged independent state of Croatia that its status and relationship to the German armed forces must be examined. Prior to the invasion of Yugoslavia by Germany on 6 April 1941, Croatia was a part of the sovereign state of Yugoslavia and recognized as such by the nations of the world. Immediately after the occupation and on 10 April 1941, Croatia was proclaimed an independent state and formally recognized as such by Germany on 15 April 1941. In setting up the Croatian Government, the Germans, instead of employing the services of the Farmers' Party which was predominant in the country, established an administration with Dr. Ante Pavelic at its head. Dr. Pavelic was brought in from Italy along with others of his group and established as the governmental head of the state of Croatia even though his group represented only an estimated 5 percent of the population of the country. This government, on 15 June 1941, joined the Three Power Pact and, on 25 November 1941, joined the Anti-Comintern Pact. On 2 July 1941, Croatia entered the war actively against the Soviet Union and on 14 December 1941, against the Allies. The military attaché became the German Plenipotentiary General in Croatia and was subordinated as such to the chief of the High Command of the Armed Forces. The territorial boundaries of the

new Croatia were arbitrarily established and included areas that were occupied by Serbians who were confirmed enemies of the Croats.

The Croatian Government, thus established, proceeded to organize a national army, the troops of which are referred to in the record as Domobrans. Certain Ustasha units were also trained and used. The Ustasha in Croatia was a political party similar to the Nazi Party of Germany. Similar to the Waffen SS, divisions of the Ustasha were trained and used. In addition, by an alleged agreement between Germany and Croatia, the Croatian Government conscripted men from its population for compulsory labor and military service. Many of these men were used in German organized Croat divisions and became a part of the German Armed Forces under the command of German officers.

It is further shown by the evidence that all matters of liaison were handled through the German Plenipotentiary General. It is evident that requests of the Germans were invariably acceded to by the Croatian Government. It is quite evident that the answers to such requests were dictated by the German Plenipotentiary General. Whatever the form or the name given, the Croatian Government during the German war time occupation was a satellite under the control of the occupying power. It dissolved as quickly after the withdrawal of the Germans as it had arisen upon their occupation. Under such circumstances, the acts of the Croatian Government were the acts of the occupation power. Logic and reason dictate that the occupant could not lawfully do indirectly that which it could not do directly. The true facts must control irrespective of the form with which they may have been camouflaged. Even international law will cut through form to find the facts to which its rules will be applied. The conclusion reached is in accord with previous pronouncements of international law that an occupying power is not the sovereign power although it is entitled to perform some acts of sovereignty. The Croatian Government could exist only at the sufferance of the occupant. During the occupation, the German military government was supreme or its status as a military occupant of a belligerent enemy nation did not exist. Other than the rights of occupation conferred by international law, no lawful authority could be exercised by the Germans. Hence, they had no legal right to create an independent sovereign state during the progress of the war. They could set up such a provisional government as was necessary to accomplish the purposes of the occupation but further than that they could not legally go. We are of the view that Croatia was at all times here involved an occupied country and that all acts performed by it

were those for which the occupying power was responsible. With the expression of these views, we pass to the consideration of the charges made against the defendant von Leyser.

There is evidence in the record that innocent members of the population were killed in reprisal for attacks on troops and acts of sabotage committed by unknown persons by troops subordinate to the defendant von Leyser. That the defendant knew of many such killings, he admits. He denies that he ever issued an order to carry out any specific reprisal measure. He contends that this was the responsibility of divisional commanders in conjunction with Croatian Government authorities. The record discloses, however, that on 10 August 1944 the defendant issued an order containing the following:

“In case of repeated attacks in a certain road sector, Communist hostages are to be taken from the villages of the immediate vicinity, who are to be sentenced in case of new attacks. A connection between these Communists and the bandits may be assumed to exist in every case.”

This order is, of course, not lawful. Reprisals taken against a certain race, class, or group irrespective of the circumstances of each case sounds more like vengeance than an attempt to deter further criminal acts by the population. An assumption of guilt on the part of a particular race, class, or group of people in all cases also contravenes established rules. This is a matter which a judicial proceeding should determine from available evidence. We must assert again, in view of the defendant's statement that the responsibility for the taking of reprisal measures rested with the divisional commanders and the Croatian Government, that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.

The evidence concerning the killing of hostages and reprisal prisoners within the corps area is so fragmentary that we cannot say that the evidence is sufficient to support a finding that the measures taken were unlawful. The killing of hostages and reprisal prisoners is entirely lawful under certain circumstances. The evidence does not satisfactorily show in what respect, if any, the law was violated. This is a burden cast upon the prosecution which it has failed to sustain.

The more serious charge is that pertaining to the evacuation of large areas within the corps command for the purpose of conscripting the physically fit into the Croatian military units and of conscripting others for compulsory labor service.

On 8 March 1944, the XV Mountain Corps reported to the 2d Panzer Army in part as follows: "Operation 'Bergwiese' terminated. Final report not yet available. Another 74 able-bodied men taken into custody." On 9 March 1944, the same division reported 332 able-bodied men in custody from the same operation. On 20 March 1944, the XV Mountain Corps reported in part as follows: "Operation 'Illusion' carried out after refusal by German Navy. No contact with enemy, 100 able-bodied persons brought to Fiume." On 21 March 1944, the XV Mountain Corps reported as follows: "Intention: Harehunt code name 'Lagerleben' (taking into custody of 200 compulsory recruits 6 kilometers east-southeast of Brinje)." This whole question can be disposed of by a consideration of the operation "Panther."

Shortly after taking command of the XV Corps, the defendant formulated a plan for the evacuation of the male population between the ages of 15 and 55 from the area between Una and Korana. This territory was supposed to contain about 7,000 to 8,000 men who were partly equipped with arms procured from the Italians. The area had been under the temporary control of the bands to such an extent that the Croat Government had complained of its inability to conscript men for military service from the area. It was planned to crush the bands and evacuate the men and turn them over to the Croatian Government for use as soldiers and compulsory labor. The operation was designated as operation "Panther" and is so carried in the German army reports. On 6 December 1943, the 2d Panzer Army approved operation "Panther." The order of approval provided that the estimated 6,000 persons fit for military service should be held in camps at Sisak and Karlovac.

The evacuation of persons fit for military service was to be known by the code name "Silberstreifen" (silver stripes). On 2 December 1943, the 2d Panzer Army ordered the operation to commence on 6 December 1943. The last sentence of the order states: "Sending the evacuated population fit for military service to Germany for labor service is considered expedient."

The operation was carried out, but only 96 men fit for military service were captured. It is evident that the inhabitants had been warned before the operation was commenced and had left to escape capture. The defendant attempts to justify his action by asserting that the primary purpose of the operation "Panther" was the suppression of the bands, that the operation was purely a tactical one so far as he was concerned, and that the disposition of the captured population fit for military service was for the decision of the Croatian Government and not his concern.

We point out that the Croatian Government was a satellite government and whatever was done by them was done for the Germans. The captured men fit for military service were turned over to the Croat administration and were undoubtedly conscripted into the Domobrans, the Waffen Ustasha, the Croat units of the Wehrmacht, or shipped to Germany for compulsory labor just as the defendant well knew that they would be. The occupation forces have no authority to conscript military forces from the inhabitants of occupied territory. They cannot do it directly, nor can they do it indirectly. When the defendant as commanding general of the corps area participated in such an activity, he did so in violation of international law. The result is identical if these captured inhabitants were sent to Germany for compulsory labor service. Such action is also plainly prohibited by international law as the evidence shows. See Articles 6, 23, 46 of the Hague Regulations. We find the defendant von Leyser guilty on this charge.

The defendant is also charged with issuing the Commissar Order of 6 June 1941 and causing the same to be carried out while he was in command of the 269th Infantry Division in Russia in 1941. The record shows a report of the 269th Infantry Division under date of 28 September 1941 wherein it is stated: "Special occurrences—one female commissar shot. One woman who was in contact with partisans, likewise shot." Under date of 20 November 1941, this same division reports as follows: "Two Russian prisoners of the 1st Battery were shot upon the order of the battalion commander. These were one commissar and one Russian high ranking officer." On 9 July 1941, the 269th Infantry Division reported to the XLI Infantry Corps to which it was subordinated as follows: "34 Politruks (commissars) liquidated."

This evidence clearly shows that the 269th Infantry Division, commanded by the defendant von Leyser killed commissars pursuant to the Commissar Order. This was a criminal order and all killings committed pursuant to it were likewise criminal. We find the defendant guilty on this charge.

We find the defendant von Leyser guilty on counts three and four.

The defendant Felmy had two assignments in Greece. He was appointed Commander Southern Greece about the middle of June 1941, and continued in the position until August 1942. During this period he had only three battalions of security and police troops subordinate to him. On 10 May 1943, the defendant became commander of the LXVIII Corps and continued in that position until the corps withdrew from Greece, an operation

which was completed on 22 October 1944. In addition thereto on 9 September 1943, he assumed command of Army Group Southern Greece. He had subordinate to him the 1st Panzer Division, 117th Light Division, and a number of fortress battalions. Until the collapse of Italy, two Italian divisions were subordinate to him.

The defendant is charged with responsibility for the unlawful killing of innocent members of the population and the wanton destruction of villages and towns without military necessity existing therefor.

The defendant admits ordering reprisal measures but denies that they were unlawful. A brief review of some of these acts for which the defendant is responsible is therefore necessary. To begin with the defendant admits receiving the basic order of 16 September 1941 relative to reprisal measures up to 100 to 1 which has been often referred to in this opinion. He also received the Keitel order of 28 September 1941, relative to the taking of hostages from all sections of the population which has likewise been quoted herein. He also received and passed on the order of General Loehr, Commander in Chief Southeast, dated 10 August 1943, which states in part (*NOKW-155, Pros. Ex. 306*):

"In territories infested by the bandits, in which surprise attacks have been carried out, the arrest of hostages from *all* strata of the population remains a successful means of intimidation. Furthermore, it may be necessary to seize the entire male population, insofar as it does not have to be shot or hung on account of participation in or support of the bandits, and insofar as it is incapable of work, and bring it to the prisoner collecting points for further transport into the Reich. Surprise attacks on German soldiers and damage to German property must be retaliated in every case with shooting or hanging of hostages, destruction of the surrounding localities, etc. Only then will the population announce to the German offices the collections of the bandits, in order to remain protected from reprisal measures."

The defendant also received and passed on the order regarding reprisal measures issued by General Loehr, deputizing for Field Marshal von Weichs as Commander in Chief Southeast, under date of 22 December 1943, an order which has been previously quoted in this opinion. It says in part (*NOKW-172, Pros. Ex. 379*):

"Reprisal quotas are not fixed. The orders previously decreed concerning them are to be rescinded. The extent of

the reprisal measures is to be established in advance in each individual case. * * * The procedure of carrying out reprisal measures after a surprise attack or an act of sabotage at random on persons and dwellings in the vicinity, close to the scene of the deed, shakes the confidence in the justice of the occupying power and also drives the loyal part of the population into the woods. This form of execution of reprisal measures is accordingly forbidden. If, however, the investigation on the spot reveals concealed collaboration or a conscientiously passive attitude of certain persons concerning the perpetrators, then these persons above all are to be shot as bandit helpers and their dwellings destroyed * * * . Such persons are co-responsible first of all who recognize communism."

The records show the following actions by troops subordinate to this defendant: On 9 September 1943, during mopping up operations of Levadeia "as reprisal measures for one murdered German soldier, 10 Greeks hanged." On 7 November 1943, the LXVIII Corps reports: "18 Communists were shot in Tripolis as reprisal for railroad sabotage committed lately." On 29 November 1943, the LXVIII Corps reports: "As reprisal for band attack on Tripolis-Sparta road, 100 hostages shot at the place of attack." On 5 December 1943, the LXVIII Corps reported "50 hostages were shot in Aighion for attacks committed lately", and on 6 December 1943, "for attack on railroad strong hold east of Tripolis, 50 hostages were hanged." On 6 December 1943, operation "Kalavriitha" was commenced. In reprisal for the killing of 78 German soldiers, the 117th Division under the command of General von Le Suire carried out this attack. More than 25 villages were destroyed, and 696 Greeks are admitted to have been shot in reprisal. There is evidence of an eyewitness that approximately 1,300 Greeks were killed in reprisal. The defendant admits that this reprisal measure was excessive and says that he orally reprimanded General von Le Suire for the severity of this reprisal measure. No reprimand or complaint as to Le Suire's conduct appears in the documentary evidence before the Tribunal.

The diary of the LXVIII Corps reports the following reprisal measures: on 17 January 1944, "In retaliation for an attack on one officer in the Rhizaes area, 20 Communists executed"; on 22 April 1944, "In Tripolis 12 well known Communists were shot as a retaliation measure for the murder of a rural police officer"; on 23 February 1944, "Shooting of 200 hostages from the Tripolis hostage camp at the place of attack." This reprisal was for two truck convoy attacks resulting in 33 German dead and nine wounded. On 11 March 1944, for an attack on an armed German

convoy, General Le Suire asked and was granted permission by this defendant to shoot "200 hostages (Communists) to be taken out of all hostage camps." Defendant contends that only 141 hostages were actually shot. The extent of the reprisals taken in the area of the LXVIII Corps is shown by the testimony of the defendant who says that between July and December 1943, 91 acts of sabotage occurred and 60 reprisals taken, and from January to June 1944 there was a monthly average of 55 acts of sabotage and engagements with bands.

It hardly seems necessary for us to point out that many of these reprisal killings were excessive and many were unlawful because there was no connection between the inhabitants shot and the offense committed. Reprisals were taken against special groups, such as "Communists" and "bandit suspects" without any relationship to the offense being established. The Kalavrittha Operation can only be described as plain murder and a wanton destruction of property. The assertion of the defendant that he orally reprimanded General von Le Suire for the severity of this operation does not appear too convincing in view of the recommendations later made by defendant for the advancement of Le Suire to a higher command. Reprisal measures were carried out in the corps area without rhyme or reason. They became a part of the tactical campaign for the suppression of the bands in the first instance rather than as a last resort. It is plain that deterring the local population at the scene of the offense was not the primary objective. Reprisal prisoners were taken from hostage camps generally and at points distant from the place where the offenses occurred. It was more the case of an eye for an eye than an honest attempt to restrain the population by a use of hostage and reprisal measures as a last resort.

On 5 April 1944, the notorious "blood bath" at Klissura occurred. (*NOKW-469, Pros. Ex. 482.*)* The facts are: On the date in question an engagement between bands and German troops occurred about 2½ kilometers outside the village of Klissura. After the retreat of the bands, the troops moved into the village and began searching for evidence of band support. None was found. Later in the afternoon, units of the 7th SS Panzer Grenadier Regiment entered the village and began almost immediately to kill the inhabitants. At least 215 persons, and undoubtedly more, were killed. Among these killed were 9 children less than 1 year old, 6 between 1 and 2 years of age, 8 between 2 and 3 years, 11 between 3 and 4 years, and 4 between 4 and 5 years. There were 72 massacred who were less

* Part of this document is reproduced in section VB.

than 15 years of age, and 7 people in excess of 80 years. No justification existed for this outrage. It was plain murder.

On 10 June 1944, troops of this same regiment carried out a reprisal measure against the inhabitants of the village of Distomon. (*NOKW-467, Pros. Ex. 484.*) It seems that bands were first engaged near Stiri, 5 kilometers southeast of Distomon. After the defeat of the bands, the troops returned to Distomon and shot approximately 300 of the population, including men, women, and children. It also was plain calculated murder.

A complaint was voiced by the Plenipotentiary of the Foreign Office and an investigation demanded. The defendant Felmy was charged with the duty of having the investigation made. He denies that this regiment was subordinate to him or that he had any disciplinary control over it. For the purpose of this discussion, we will accept his statement as true even though the order to investigate and report through Wehrmacht channels indicates the contrary. The point that is material here is that the investigation was made, the battle report of the commanding officer was found to be false, and the action of the regimental commander found to be in excess of existing orders. Upon the discovery of these facts the defendant Felmy recommended that disciplinary action (the method of trying minor offenses) be taken against the officer in charge in consideration of the sacrifices of the regiment in the combat area at the time. The defendant testified that he never knew what punishment, if any, was assessed against this guilty officer. He seems to have had no interest in bringing the guilty officer to justice. Two of the most vicious massacres of helpless men, women, and children appear to have met with complete indifference on his part. The falsification of the battle report by the regimental commander seems to have been deemed the major offense.

War at its best is a business but under no circumstances can cold-blooded mass murder such as these two cases establish be considered as related remotely even to the exigencies of war. The defendant's attitude toward the innocent population is reflected in his indifference to these unjustified and brutal murders which took place within the area of his command. It is a matter that goes to the question of the defendant's character, intent, and purpose in carrying out the acts for which he is charged. The responsibility of the defendant for the killing of innocent members of the population by the exercise of unlawful hostage and reprisal practices is clearly established. We find the defendant Felmy guilty on counts one and two.

The defendant Lanz was appointed to command the XXII Mountain Corps on 25 August 1943 and actually assumed the

position on 9 September 1943. The corps command was, generally speaking, the Epirus area of Greece. This consisted of the area between the Gulf of Corinth and Albania lying west of the Pindus Mountains. The corps headquarters was in Ioannina. The defendant is charged with the responsibility for killing hostages and reprisal prisoners in violation of international law and with the unlawful killing of Italian officers after the Italian capitulation.

A brief summarization of the evidence against the defendant is required. On 13 September 1943, General Stettner, commander of the 1st Mountain Division, a unit subordinate to the defendant and whose headquarters was at the time also in Ioannina, issued an order in part as follows (*NOKW-1104, Pros. Ex. 451*): "In order to oppose energetically the continued raids on convoys and members of the Wehrmacht, it is ordered that from 20 September 1943 onward for every German soldier wounded or killed by insurgents or civilians, 10 Greeks from all classes of the population are to be shot to death. This order must be carried out consistently in order to achieve a deterrent effect." On 29 September 1943, the XXII Corps reported: "Telephone sabotage in the area of Arta. Poles sawed off at two places. Thirty male civilian suspects arrested and shot." On 3 October 1943, the defendant issued an order reading in part as follows: "On account of the repeated cable sabotage in the area of Arta 30 distinguished citizens (Greeks) from Arta and 10 distinguished citizens (Greeks) from Filipias are to be arrested and kept as hostages. The population is to be notified that for every further cable sabotage 10 of these 40 hostages will be shot to death." The defendant denies that any of these hostages were shot and there is no evidence in the record to the contrary. On 4 October 1943, the 1st Mountain Division reported to the XXII Corps as follows: "Mopping up operations Eisl continue beyond Alomotros. Villages destroyed as reprisal measure. All civilians shot to death." On 18 October 1943, the 1st Mountain Division reported to the XXII Corps as follows: "Shot to death: Paramythia—reprisal measure for 6 murdered German soldiers, 58. Thereakision—reprisal measure for murder of Lieutenant Colonel Salminger, 14. Arta, Klissura—Suspicious elements near the localities where attacks had occurred (about), 30. Ioannina City—4." On 25 October 1943, the 1st Mountain Division issued a special directive to its subordinate units which stated in part: "If a member of the German Wehrmacht is killed by either attack or murder in a territory considered pacified, 50 Greeks (male) are to be shot for one murdered German. * * * The decision regarding executions for losses in band combat

is made by the competent troop commander. Here also the ratio is 1:50. The prerequisite for the order of execution is indubitable proof that the population of a village has participated in hostile action against the German armed forces. In addition, the villages are to be destroyed." This order supercedes that of 13 September 1943. Numerous killings of hostages and reprisal prisoners, in addition to those enumerated, appear in the record. There are reports to the effect that "all the inhabitants" of named villages and "all men capable of bearing arms" were shot to death. Persons designated as "civilians" were shot on numerous occasions.

The orders for the taking of reprisal measures were clearly unlawful. An order to shoot 50 Greeks for each German killed regardless of circumstances meets the legal objections hereinbefore stated in this opinion. Instead of reprisals against innocent inhabitants being taken as a last resort, they were more often taken in the first instance. Reprisal killings were often carried out against the inmates of hostage camps and not against the population having some relationship with the crime committed. Attacks by armed bands having no connection with the local population were avenged by killing innocent inhabitants who had no possible association with the guilty. Many villages were destroyed and the civilian inhabitants shot without any logical reason at all except to wreak vengeance upon the population generally. According to the reports in evidence, court martial proceedings were not held. The killings were had on the order of the competent field commander, the evidence showing that battalion commanders sometimes gave such orders. The defendant says that as a tactical commander he was too busy to give attention to the matter of reprisals. This is a very lame excuse. The unlawful killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army. This defendant, with full knowledge of what was going on, did absolutely nothing about it. Nowhere does an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war. The defendant does not even contend that he did. As commander of the XXII Corps it was his duty to act and when he failed to so do and permitted these inhumane and unlawful killings to continue, he is criminally responsible.

The defendant Lanz is also charged as commander of the XXII Mountain Corps with having ordered or permitted the unlawful execution of Italian officers and soldiers of the surrendered Italian army. He is also specifically charged with ordering troops under his command to execute the captured

Italian General Gandin and all officers of his staff. The general situation regarding the collapse of Italy and the surrender of its armies has been set forth in the portion of the opinion dealing with the defendant Rendulic and it will not be repeated here except as necessity requires.

The record discloses that the defendant Lanz knew when he assumed command of the XXII Mountain Corps that Field Marshal Badoglio had succeeded Mussolini as head of the Italian Government and Commander in Chief of the Italian Army. On 8 September 1943, he heard of the armistice which the Italians had signed with the Allies. On the same day, due to the absence of senior officers from Athens, General Alexander Loehr, commander in chief of Army Group E, commissioned the defendant Lanz to negotiate with General Vecchiarelli, the commander in chief of the 11th Italian Army. After much negotiating, General Vecchiarelli surrendered the 11th Army to the Germans on 9 September 1943. The surrender terms were carried out during the following 14 days, without difficulty insofar as troops stationed on the Greek mainland were concerned. On the islands of Corfu and Cephalonia, however, difficulties arose. These two islands were occupied by one Italian division under the command of General Gandin. The defendant Lanz as commanding general of the XXII Corps demanded that General Gandin surrender his troops and the demand was refused even though General Vecchiarelli had directed him to do so. General Gandin vacillated, contending that his orders were not clear and that he had no right to surrender the division. The situation resulted in fighting between the German and Italian troops on the island of Cephalonia and the eventual surrender of the Italian forces, including General Gandin and his staff, on 21 September 1943.

During this stage of the proceedings, a Fuehrer order arrived directing that the 6,000 or 7,000 Italians of General Gandin's division were to be shot for mutiny. The defendant Lanz refused to carry out this order for the reason that it was neither feasible nor lawful to do so. The Fuehrer order was then modified providing only that the officers were to be shot for mutiny. The defendant objected to the shooting of all officers and advocated that the order apply only to the guilty. The evidence indicates that the defendant Lanz ordered the German commandant of the islands to determine the guilty officers by court martial proceedings. This was done and on 24 September 1943, General Gandin and his staff officers were shot.

A similar situation developed on the island of Corfu. Fighting ensued, the Italians surrendered, and the officers shot after a sum-

mary court martial. The record shows that a large number of Italian officers were shot in this manner. One instance shows that on 5 October 1943, 58 Italian officers were shot by troops subordinate to the XXII Corps.

The killing of these Italian officers was clearly unlawful. The evidence of the defendant shows that he believed that their killing was unlawful. While his protests to Army Group E, based on the illegality of the Fuehrer order, were successful in reducing the number of Italians to be subjected to the unlawful order, the fact remains that the killing of the reduced number was just as much a criminal act. That he gave the order to the commandant of Cephalonia to execute the guilty officers only, he readily admits. The Italian soldiers were not *francs-tireurs*. They were still allies of Germany, insofar as their commanding officers then knew, although they had notice that an armistice had been signed with the Allied Powers. If they were prisoners of war by virtue of the surrender of the 11th Italian Army by General Vecchiarelli, it is clear that they were entitled to the protection of the Geneva Convention, 1929, regulating the treatment to be afforded prisoners of war. This was not done in any material respect. The reasoning set forth on the same subject in this opinion as it pertains to the defendant Rendulic applies here and is adopted by reference to the present situation. We are obliged to hold that the killing of the Italian officers was a war crime for which the defendant is responsible.

We find the defendant Lanz guilty on counts one and three.

The defendant Speidel assumed the position of Military Commander Southern Greece in early October 1942, and remained in the position until September 1943. From September 1943, until May 1944, he occupied the position of Military Commander Greece. His first assignment extended to a portion of the harbor Pyraeus and the adjoining coastal strip, a small section northeast of Athens and the Islands Salamis and Aegina. The balance of the area, including Athens, was controlled by the Italians. Under the second assignment his authority extended over the whole of Greece although such authority was limited to certain functions. He had no tactical or operational tasks in this position, they being in the hands of Army Group E.

As Military Commander Southern Greece, his chief tasks were the maintenance of public peace and order within the area occupied by German forces, the security of German troops and installations, and jurisdiction over crimes committed against the Germans by the population. As Military Commander Greece, his principal tasks were the maintenance of peace and order, the administration of the judicial authority over the population as

to crimes and offenses committed against the Germans and their military installations and the handling of negotiations with the Greek Government. As in the case of his previous assignment, all tactical and operational matters were in the hands of Army Group E in Salonika.

Subordinated to the defendant were 7 subarea headquarters [administrative area headquarters] units. On and after 22 December 1943, reprisal measures could be ordered only by divisional commanders after agreement with the competent subarea headquarters. This order, promulgated by General Loehr as Acting Commander in Chief Southeast, provided in part: "The revenge for attacks which are directed against the unit and its installation may be ordered only by a German commander with the disciplinary authority to punish of at least a division commander in accord with the competent administrative subarea headquarters. If an agreement is not reached, the competent territorial commander is to decide. Reprisal measures for losses in the air corps, navy, police, and the OT [Organization Todt] are to be ordered principally by the territorial commanders."

That the Military Commander Greece could control the reprisal and hostage practice through the various subarea headquarters which were subordinate to him cannot be questioned. This conclusion is borne out by the testimony of the defendant and charts prepared by him. It is plainly established that all administrative subarea headquarters [administrative area headquarters] and local headquarters of his area of command were subordinated to the Military Commander Greece by the Keitel order of 21 December 1943.

The defendant contends that many of the acts charged against him were committed by or under the direction of the Higher SS and Police Leader, General Schimana. Whether General Schimana was subordinate to the Military Commander Greece insofar as the ordering of reprisal and hostage measures was concerned is directly disputed. We are convinced that the record shows that he was. In this respect the record quite conclusively shows that General Schimana was directly subordinate to Himmler as to matters of discipline, promotions, and matters of similar import. Ordinarily, Himmler insisted that all SS units remain wholly subordinate to him, a matter of which he was very jealous. But in the present instance, the matter is controlled by regulations issued by Fuehrer headquarters under date of 7 September 1943 which in part says [NOKW-1438, *Pros. Ex. 419*]:

"By agreement with the Chief of OKW, the Reich Fuehrer SS and Chief of the German Police appoints a Senior [Higher] SS

and Police Leader for the area of Military Commander Greece. The Senior SS and Police Leader is an office of the Reich Fuehrer SS and Chief of the German Police, which is subordinate to Military Commander Greece for the period of its employment in Greece. * * * The military commander is authorized to issue directives to the Senior SS and Police Leader which are necessary to avoid interference with Wehrmacht operations and duties. They take precedence over any other directives. The Senior SS and Police Leader will receive policies and directives for the execution of these duties from the Reich Fuehrer SS and Chief of the German Police. He will carry them out independently, currently, and opportunely, informing the Military Commander Greece in as far as he does not receive any restrictive directives from the latter."

The defendant admits that General Schimana considered himself subordinate to the Military Commander Greece as to the ordering and carrying out of hostages and reprisal killings. That the Senior SS and Police Leader was a member of the staff of Military Commander Greece is shown by the Keitel order of 21 December 1943. The evidence is clear that the defendant is responsible for the execution of these measures except when they were taken during tactical operations on which occasions, of course, the responsibility rests with the tactical superior.

A review of some of the hostage and reprisal measures taken within area of the defendant's command and for which responsibility attaches, will be necessary. On 3 December 1943, the following report was made: "Nineteen Communist reprisal prisoners shot, as revenge for the murder and wounding of Greek police, by the Senior SS and Police Leader in Athens." On 31 December 1943, the defendant reported: "In December on the Peloponnesus 758 people were shot to death, including reprisal operation 'Kalavritsa'. In the remaining areas hostages were seized, and to a small extent executions have taken place." On 9 January 1944, it was reported: "By (order of) Senior SS and Police Leader, 30 Communists were shot to death in reprisal for the murder of Greek policeman and for 36 attacks." On 10 January 1944, the Military Commander Greece reported: "50 Communists shot as reprisal measure for murdering two German police." On 13 March 1944, it was reported: "On the highway Sparta-Tripolis, truck convoy attacked. Eighteen Wehrmacht members dead, 25 heavily wounded, 19 slightly wounded, and 6 Greeks wounded. As reprisal, state of emergency for southern Peloponnesus. Shooting of 200 Communist hostages." On 18 March 1944, the defendant reported in part as follows: "Tend-

ency to strikes and partial strikes at the railroad and several plants at the beginning of March were suppressed by energetic military measures; 50 Communists were shot immediately while others who were arrested are awaiting their sentence." While the defendant was absent from his command for almost 2 months prior to 17 March 1944, he appears to have known of and approved the action taken by his deputy as shown by the foregoing report. On 22 March 1944, the Military Commander Greece reported: "On the Peloponnesus, five Greeks hanged in reprisal for attack on railroad." On 22 March 1944, the defendant reported: "administrative subarea headquarters [administrative area headquarters] Corinth report 52 hostages in Tripolis and 44 hostages in Sparta were shot as reprisal measure on 21 March." On 1 April 1944, defendant reported: "Up to now—Wehrmacht one dead, 14 wounded. Tracks blocked only for a short while. The execution of 70 Greeks at the locality of the incident has been ordered." On 2 April 1944, defendant reported: "65 Communists in reprisal for railroad sabotage, 10 south La Rissa shot to death at the scene of the incident." On 6 April 1944, defendant reports: "In Verria [Veroia] (60 southeast West Solonika). Fire attack by bandits during roll call of the battalion. Losses of our own—four dead, eleven wounded of which eight are heavily wounded. One hundred and fifty people suspected of belonging to bands shot in Verria as reprisal measures." On 8 April 1944, the defendant reported: "50 Communists shot to death for attack on German soldiers (three dead) North Athens." On 25 April 1944, the defendant reported: "In Tripoli, 12 known Communists shot in reprisal for a murdered Gendarmerie officer." On 26 April 1944, the defendant reported: "Officers of the commander of the Ordnungspolizei [order police] attacked by about 70 bandits while on duty trip on the road Arachova-Amphissa (15 west Levadeia). Major Schulz and Major Krueger dead, Captain Unger and four men missing. Two passenger automobiles and two motorcycles were burned out. Three men found their way to Levadeia. Fifty Communists from Levadeia were shot as reprisal measures. Additional reprisal measures are intended."

That the foregoing killings were excessive in most instances is readily apparent. That no connection existed between the population and the offense committed in many cases is shown. That the reprisal and hostage practice here employed was not one of last resort but one of the first instance in most cases can be seen. The incidents cited show cases where the hostages were taken and killed at a distance from the place of the offense. Court martial proceedings are not mentioned. That the incidents recited, indicating the practice followed, were not in accord with

international law is beyond question. The responsibility of the defendant therefore has been established beyond a reasonable doubt.

We find the defendant Speidel guilty on count one of the indictment.

Evidence has been produced in an attempt to show that the Allied armies, or units thereof, engaged in the practice of taking and killing hostages and reprisal prisoners. There is but one instance cited that even resembles a case of shooting in reprisal. As to this, the evidence shows that four persons were shot by Allied forces in Reutlingen, Germany, during the invasion. The official announcement proclaimed, however, that those responsible for the killing of a French soldier had been apprehended and shot. There is no convincing evidence that it was a hostage or reprisal shooting. It is not shown that a single hostage or reprisal prisoner had been killed by Allied forces throughout the course of the late war. It also has been stated in the evidence and argued to the Tribunal that the rules of war have changed and that war has assumed a totalitarian aspect. It is argued that the atom bombings of Hiroshima and Nagasaki in Japan and the aerial raids upon Dresden, Germany in the final stages of the conflict afford a pattern for the conduct of modern war and a possible justification for the criminal acts of these defendants. We do not think the argument is sound. The unfortunate pattern adopted in the Second World War was set by Germany and its allies when hostilities were commenced. The methods of warfare employed at Rotterdam, Warsaw, Belgrade, Coventry, and Pearl Harbor can aptly be said to provide the sources of the alleged modern theory of total war. It is not our purpose to discuss the lawfulness of any of these events. We content ourselves with the statement that they can give no comfort to these defendants as recriminatory evidence.

Throughout the course of this opinion we have had occasion to refer to matters properly to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed, and the provocation, if any, that contributed to its commission. It must be observed, however, that mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defense. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the Court with reference to the degree of magnitude of the crime.

It has been suggested in the course of the trial that an element of unfairness exists from the inherent nature of the organizational character of the Tribunal. It is true, of course, that the defendants are required to submit their case to a panel of judges from a victor nation. It is unfortunate that the nations of the world have taken no steps to remove the basis of this criticism. The lethargy of the world's statesmen in dealing with this matter, and many other problems of international relations, is well known. It is a reproach upon the initiative and intelligence of the civilized nations of the world that international law remains in many respects primitive in character. But it is a matter with which this Tribunal cannot deal, other than in justifying the confidence reposed in its members by insuring to the defendants a fair, dispassionate, and impartial determination of the law and the facts. A tribunal of this character should through its deliberations and judgment disclose that it represents all mankind in an effort to make contribution to a system of international law and procedure, devoid of nationalistic prejudices. This we have endeavored to do. To some this may not appear to be sufficient protection against bias and prejudice. Any improvement, however, is dependent upon affirmative action by the nations of the world. It does not rest within the scope of the functions of this Tribunal.

B. Sentences

The reading of the opinion and judgment having been concluded, the Tribunal will now impose sentence upon those defendants who have been adjudged guilty in these proceedings. As the name of each defendant is called, he will arise, proceed to the center of the dock and put on the earphones.

The defendant Wilhelm List will arise.

WILHELM LIST, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

WALTER KUNTZE. Walter Kuntze, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to life imprisonment. You will retire with the guards.

LOTHAR RENDULIC. Lothar Rendulic, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to 20 years of imprisonment. It is the order of the Tribunal that you will receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 13 September 1946. You will retire with the guards.

ERNST DEHNER. Ernst Dehner, on the count of the indictment on which you have been convicted, the Tribunal sentences you to 7 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 29 December 1946. You will retire with the guards.

ERNST VON LEYSER. Ernst von Leyser, on the counts of the indictment on which you have been convicted the Tribunal sentences you to 10 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 18 December 1946. You will retire with the guards.

HUBERT LANZ. Hubert Lanz, on the counts of the indictment on which you have been convicted the Tribunal sentences you to 12 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 17 January 1947. You will retire with the guards.

HELMUTH FELMY. Helmuth Felmy, on the counts of the indictment on which you have been convicted the Tribunal sentences you to 15 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 4 January 1947. You will retire with the guards.

WILHELM SPEIDEL. Wilhelm Speidel, on the count of the indictment on which you have been convicted the Tribunal sentences you to 20 years of imprisonment. It is the order of the Tribunal that you receive credit upon your sentence for the time already spent in confinement and pending trial, namely, from 13 December 1946. You will retire with the guards.

The defendants **HERMANN FOERTSCH** and **KURT VON GEITNER** having been acquitted, shall be discharged from custody by the Marshal when the Tribunal presently adjourns. They will retire with the guards.

The Tribunal now stands adjourned without day.

XII. CONFIRMATION OF SENTENCES BY THE MILITARY GOVERNOR OF THE UNITED STATES ZONE OF OCCUPATION

A. Introduction

Under Articles XV and XVII of Ordinance No. 7, the sentences imposed by the Tribunal are subject to review by the Military Governor. On 18 January 1949, General Lucius D. Clay, Military Governor of the United States Zone of Occupation, confirmed by separate orders the life sentences imposed upon the defendants List and Kuntze and the sentences for a term of years imposed upon the defendants Dehner, Felmy, Lanz, von Leyser, Rendulic, and Speidel. The order in the case of defendant List is reproduced below as an example of the confirming orders.

B. Order of the Military Governor Confirming the Life Sentence Imposed Upon the Defendant List

HEADQUARTERS, EUROPEAN COMMAND

Office of the Commander in Chief

APO 742

Berlin, Germany

18 January 1949

Military Tribunal V

Case No. 7

In the Case of The
United States of America

vs.

Wilhelm List, et al.

Order with Respect to Sentence of Wilhelm List

In the case of the United States of America against Wilhelm List, et al., tried by United States Military Tribunal V, Case No. 7, Nuremberg, Germany, the defendant Wilhelm List, on 19 February 1948, was sentenced by the Tribunal to life imprisonment. A petition to modify the sentence filed on behalf of the defendant by Dr. Hans Laternser, his defense counsel, has been referred to me pursuant to the provisions of Military Government Ordinance No. 7. I have duly considered the petition and the record of the

trial, and in accordance with Article XVII of said Ordinance, it is hereby ordered that:

a. The sentence imposed by Military Tribunal V on Wilhelm List be, and hereby is, in all respects confirmed.

b. The defendant be confined in War Criminal Prison No. 1, Landsberg, Bavaria, Germany.

[Signed] Lucius D. Clay

LUCIUS D. CLAY

General, U. S. Army

Military Governor and

Commander in Chief European Command

XIII. EXTRACT OF ORDER OF SUPREME COURT
OF THE UNITED STATES DENYING LEAVE
TO FILE FOR HABEAS CORPUS

SUPREME COURT OF THE UNITED STATES

October Term, 1948

* * * * *

No. 455 Misc. In the Matter of Wilhelm List.
No. 456 Misc. In the Matter of Lothar Rendulic.
No. 457 Misc. In the Matter of Walter Kuntze.
No. 458 Misc. In the Matter of Helmuth Felmy.
No. 459 Misc. In the Matter of Hubert Lanz.
No. 460 Misc. In the Matter of Ernst Dehner.
No. 461 Misc. In the Matter of Ernst von Leyser.
No. 462 Misc. In the Matter of Wilhelm Speidel.

* * * * *

ORDER

“Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. The Chief Justice, Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Burton are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, Section 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch v. United States*, 332 U. S. 789 (1947); *Brandt v. United States*, 333 U. S. 836 (1948); *In re Eichel*, 333 U. S. 865 (1948); *Everett v. Truman*, 334 U. S. 824 (1948). Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge are of the opinion that argument should be heard on the motions for leave to file the petitions in order to settle what remedy, if any, the petitioners have. Mr. Justice Jackson took no part in the consideration or decision of these applications.”

May 2, 1949.

APPENDIX

Table of Comparative Ranks

	U. S. Army	German Army	U. S. Navy	German Navy	SS	Civilian Officials in Legal Departments of German Armed Forces ¹
2nd Lieutenant	Leutnant	Leutnant	Ensign	Leutnant zur See	Untersturmfuehrer	Reichskriegsgerichtssekretaer
1st Lieutenant	Oberleutnant	Oberleutnant	Lieutenant (junior grade)	Oberleutnant zur See	Obersturmfuehrer	Heeresjustizinspektor
						Reichskriegsgerichtsinspektor
						Reichskriegsgerichtsobersekretaeer
Captain	Hauptmann	Hauptmann	Lieutenant (senior grade)	Kapitaenleutnant	Hauptsturmfuehrer	Heeresjustizoberinspektor
						Kriegsrichter
						Reichskriegsgerichtsoberinspektor
Major	Major	Major	Lieutenant Commander	Korvettenkapitaen	Sturmbannfuehrer	
Lieutenant Colonel	Oberstleutnant	Oberstleutnant	Commander	Fregattenkapitaen	Obersturmbannfuehrer	Oberkriegsgerichtsrat
Colonel	Oberst	Oberst	Captain	Kapitaen zur See	Standartenfuehrer	Oberstkriegsgerichtsrat
					Oberfuehrer ²	
Brigadier General	Generalmajor	Generalmajor	Commodore	Konteradmiral	Brigadefuehrer	Reichskriegsgerichtsrat
						Reichskriegsanwalt
Major General	Generalleutnant	Generalleutnant	Rear Admiral	Vizeadmiral	Gruppenfuehrer	Oberreichskriegsanwalt
						Senatspraesident beim Reichskriegsgericht
Lieutenant General	General der Infanterie, der Artillerie, etc.	General der Infanterie, Vice Admiral	Vice Admiral	Admiral	Obergruppenfuehrer	
General	Generaloberst	Generaloberst	Admiral	Generaladmiral	Oberstgruppenfuehrer	
General of the Army	Generalfeldmarschall	Generalfeldmarschall	Admiral of the Fleet	Grossadmiral	Reichsfuehrer	

¹ Oertzenscher Taschenkalender fuer die Offiziere des Heeres (formerly Fircoks), 1942 edition, p. 371 — 373.

Legal officials of the German Armed Forces were nonmilitary members of the armed forces; they wore a uniform with insignia of equivalent rank.

² Equivalent to a senior colonel.

List of Witnesses in Case 7

[Note.—All witnesses in this case appeared before the Tribunal. Prosecution witnesses are designated by the letter “P”, defense witnesses by the letter “D”. The names not preceded by any designation represent defendants, testifying in their own behalf. Designation “1” shows witnesses called by defense although affidavit was submitted by prosecution. Designation “2” shows witnesses called by prosecution although affidavit was submitted by the defense. Extracts from testimonies in this case are listed in the index of documents and testimonies.]

	Name	Dates of testimony	Pages (mimeographed transcript)
D	ALTENBURG, Guenther.....	8, 9 Dec 47.....	7304-7352
P	BACH-ZELEWSKI, Erich von dem.	14 Jan 48.....	8913-9005
D	BEHR, Heinrich von.....	21 Jan 48.....	9416-9450
D	BERGHOFER, Dr. Robert.....	9 Dec 47.....	7352-7370
P	BERNSTEIN, David B.....	20 Jan 48.....	9370-9376
D	BESSER, Dr. Hans Joachim von..	17, 18 Nov 47.....	6207-6239
D	BUB, Dr. Heinrich.....	21, 22 Oct 47.....	4767-4821
P	DAHL, Arne Dagfin.....	25 Aug 47.....	2651-2680
	DEHNER, Ernst Friedrich.....	17-19 Dec 47.....	7866-8081
D	FEINE, Gert.....	23 Sept 47.....	3469-3479
P	FELBER, Gustav Hans.....	11-13 Aug 47; 23 Jan 48.....	1680-1875; 9539-9551
	FELMY, Helmuth Walter Wolfgang	1-5, 8 Dec. 47; 22 Jan 48.....	6888-7303; 9527-9532
P	FINGER, Willy.....	20, 21 Jan 48.....	9377-9399; 9451-9452
	FOERTSCH, Hermann.....	9, 10, 13-17, 20, 21 Oct 47.....	4044-4699
P	FOLLESTAD, Ivar.....	26 Aug 47.....	2739-2742
	GEITNER, Kurt Ritter von.....	22-24, 27, 28 Oct 47	4823-4980; 5061-5123
D	GREIFFENBERG, Hans von.....	8, 9 Oct 47.....	3942-4041
2	HARLING, Franz von.....	16 Jan 48.....	9131-9139; 9144-9164
D	HASSOLD, Paul.....	13 Jan 48.....	8862-8867
D	HIRSCHMANN, Xaver.....	12 Jan 48.....	8775-8790
D	HOELTER, Hermann.....	4, 5 Nov 47.....	5549-5615
2	HOTH, Hermann.....	16 Jan 48.....	9092-9101
D	IBBEKEN, Dr. Rudolf.....	6, 7 Oct 47.....	3761-3836
P	IOVANOVITCH, Zivosin.....	30, 31 July 47.....	1151-1208
P	JODL, Ferdinand.....	22, 25 Aug 47.....	2573-2588; 2593-2625
D	KAISER, Joseph.....	12 Jan 48.....	8791-8800
D	KOBE, Gerd.....	18, 19 Nov 47.....	6239-6318
P	KORN, Ernst.....	20 Jan 48.....	9349-9370
D	KRAEUTLER, Karl.....	8 Oct 47.....	3906-3941
D	KRAGE, Herbert.....	7, 8 Oct 47.....	3854-3906
	KUNTZE, Walter.....	24-26 Sept; 6 Oct 47.....	3526-3760
D	LANGE, Joachim.....	9 Dec 47.....	7371-7420

List of Witnesses in Case 7, Cont'd

	Name	Dates of testimony	Pages (mimeographed transcript)
D	LANZ, Karl Hubert.....	19-21, 24-26 Nov; 1 Dec 47; 8 Jan 48.....	6320-6888; 8663-8664
1	LATTMANN, Erich.....	19 Jan 48.....	9227-9248
	LEYSER, Ernst Hans Ulrich von.....	5-7, 12-14, 17 Nov 47; 22 Jan 48.....	5666-6206; 9520-9522
	LIST, Siegmund Wilhelm Walther.....	16-19, 22, 23, Sept 47; 13, 22 Jan 48	3148-3464; 8824- 8858; 9484-9493
2	MAHLMANN, Paul.....	21 Jan 48.....	9401-9404
P	NERIS, Nicolas Johan.....	14, 15 Aug 47.....	1989-2069
P	PAPPAS, Stephanos.....	18 Aug 47.....	2175-2198
2	PEMSEL, Max.....	21 Jan 48.....	9405-9415
P	REINHARDT, Hans.....	16 Jan 48.....	9177-9182
	RENDULIC, Lothar.....	28-31 Oct; 3 Nov 47; 22 Jan 48.....	5125-5472; 9504-9519
2	REYMANN, Helmuth.....	19 Jan 48.....	9248-9263
D	RUEHM, Julius.....	9, 12 Jan 48.....	8719-8728
P	SCHANCE, Trygve.....	26 Aug 47.....	2693-2734
D	SHELLER, Dr. Georg.....	9 Jan 48.....	8677-8687
2	SCHLESWIG-HOLSTEIN-GLUECK- BERG, Prinz Friedrich Ferdin- and von.....	19, 20 Jan 48.....	9277-9286; 9295-9327
D	SCHMETTOW, Mathias Graf.....	21 Oct 47.....	4700-4705
2	SELCHOW, Hans Harold von.....	21 Jan 48.....	9460-9474
P	SONTIS, Dr. Johannes.....	21 Aug 47.....	2453-2499
	SPEIDEL, Wilhelm.....	10-12, 15-17 Dec 47.....	7483-7862
P	SPILIOPOULES, Takis.....	19, 20 Aug 47.....	2273-2338
D	STADTMUELLER, Dr. Georg.....	9, 10 Dec 47.....	7420-7480
D	SYDOW, Friedrich Adolf von.....	7 Oct 47.....	3836-3854
P	TRIANDAPHYLIDIS, Constantinos.....	15, 16, 18, 20 Aug 47.....	2071-2175; 2339-2352
D	VARNBUEHLER, Ulrich, Freiherr von.....	3, 4 Nov 47.....	5473-5540
D	VOGEL, Emil Wilhelm.....	5 Nov 47.....	5616-5649
D	WINNING, Dietloff von.....	23, 24 Sept 47.....	3479-3525
2	WINTER, August.....	19 Jan 48.....	9187-9218
D	WOLLNY, Gerhard.....	21 Oct 47.....	4712-4766
2	ZORN, Willy.....	20 Jan 48.....	9328-9341

INDEX OF DOCUMENTS AND TESTIMONIES IN CASE 7

(This is not a complete index of evidence submitted in Case No. 7. Only those documents and testimonies which are reproduced herein are listed.)

Document No.	Exhibit No.	Description	Page
NO-2943-----	Pros. Ex. 21-----	Extracts from situation report U.S.S.R., No. 28 of the Security Police and SD, 20 July 1941, concerning reprisal actions in Serbia.	924
NO-2944-----	Pros. Ex. 22-----	Extracts from situation report U.S.S.R., No. 30, 22 July 1941, concerning reprisal actions in Yugoslavia.	925
NO-2952-----	Pros. Ex. 26-----	Extract from situation report U.S.S.R., No. 37, 29 July 1941, concerning reprisal action against Jews in Belgrade.	938
NOKW-076-----	Pros. Ex. 338b----	Teletype from 2d Panzer Army to Plenipotentiary German General in Croatia, 17 September 1943, concerning desertion of Croatian units.	914
NOKW-084-----	Pros. Ex. 42-----	Directive of defendant List, 5 September 1941, concerning suppression of Serbian partisan movement.	964
NOKW-086-----	Pros. Ex. 504-----	Teletype from 20th (Mountain) Army to subordinate units, 29 October 1944, signed by the defendant Rendulic, concerning evacuation of northern Norway.	1114
NOKW-090-----	Pros. Ex. 506-----	Report from evacuation staff to 20th Mountain Army, 25 November 1944, concerning evacuation of northern Norway.	1118
NOKW-154-----	Pros. Ex. 424-----	Order of Military Commander Southeast, 1 January 1944, concerning competency for ordering reprisal measures.	1032
NOKW-155-----	Pros. Ex. 306-----	Order of the Commander in Chief Southeast, 10 August 1943, concerning deportation of prisoners and enemy deserters, and reprisal and evacuation measures.	1027

Document No.	Exhibit No.	Description	Page
NOKW-159-----	Pros. Ex. 417-----	Extract from order of Military Commander Southeast to Higher SS and Police Leader, 23 October 1943, concerning execution of hostages.	931
NOKW-159-----	Pros. Ex. 417-----	Order of Military Commander Southeast to Higher SS and Police Leader, 23 October 1943, directing reprisal executions; report of Military Commander Southeast to 809th Administrative Area Headquarters, 26 November 1943, concerning executions.	1029
NOKW-192-----	Pros. Ex. 78-----	Order of Commanding General Serbia, 4 October 1941, declaring that 2,100 concentration camp inmates be shot for the killing of 21 German soldiers.	976
NOKW-203-----	Pros. Ex. 70-----	Order from defendant List to Commanding General Serbia, 4 October 1941, concerning treatment of male population in clearing areas of partisans.	975
NOKW-235-----	Pros. Ex. 140-----	Order of General Boehme, 2 November 1941, concerning suppression of Serbian resistance.	993
NOKW-258-----	Pros. Ex. 53-----	Keitel Order, 16 September 1941, concerning suppression of insurgents in occupied territories.	971
NOKW-380-----	Pros. Ex. 283-----	Extracts of report from Commanding General Serbia to Commander in Chief Southeast, 18 June 1943, concerning execution of hostages.	1026
NOKW-382-----	Pros. Ex. 263-----	Order of Commanding General Serbia, 28 February 1943, concerning reprisal measures and reducing reprisal ratios.	1020
NOKW-387-----	Pros. Ex. 99-----	Report to Commanding General Serbia, 20 October 1941, concerning severe reprisal measures.	980
NOKW-458-----	Pros. Ex. 69-----	Keitel order concerning taking of hostages, 28 September 1941, and letter of transmittal signed by defendant Foertsch, 4 October 1941.	973

Document No.	Exhibit No.	Description	Page
NOKW-469-----	Pros. Ex. 482-----	Extracts from report of Special Plenipotentiary Southeast, concerning "The Blood Bath of Klissura" (Greece), 15 May 1944, via foreign office to Commander in Chief Southeast for investigation.	1034
NOKW-529-----	Pros. Ex. 35-----	Order of Military Commander Serbia, 21 August 1941, concerning transfer of captured partisans to Einsatzgruppen.	926
NOKW-557-----	Pros. Ex. 88-----	Order of Commanding General Serbia, Boehme, 10 October 1941, directing the shooting of 50 and 100 prisoners or hostages for each German, or ethnic German, soldier wounded or killed.	977
NOKW-830-----	Pros. Ex. 326-----	Extracts from war diary of XV Mountain Corps, 26 October to 31 December 1943, regarding shootings of Italian officers.	1088
NOKW-865-----	Pros. Ex. 452-----	Extracts from messages and order of 1st Mountain Division, 18-24 September 1943, pertaining to operation "Verrat" [Treason].	1086
NOKW-898-----	Pros. Ex. 317-----	Keitel order, 9 September 1943, concerning treatment of Italian soldiers.	1078
NOKW-899-----	Pros. Ex. 250-----	Letter from Commanding General Serbia to Prime Minister Nedic, 22 January 1943, concerning reprisal measures by the Serbian Government.	923
NOKW-905-----	Pros. Ex. 143-----	Report from 734th Infantry Regiment to 704th Infantry Division, 4 November 1941, enclosing report of the shooting of Jews and gypsies. (<i>Photographic reproduction appears in Section VIII.</i>)	995
NOKW-916-----	Pros. Ex. 223-----	Extracts from basic order, 15 September 1943, signed by Keitel, concerning treatment of members of Italian Army.	1081

Document No.	Exhibit No.	Description	Page
NOKW-945-----	Pros. Ex. 174-----	Draft of teletype from Armed Forces Commander Southeast to Commanding General Serbia, 6 February 1942, requesting reports on all reprisal measures. (<i>Photographic reproduction appears in Section VIII.</i>)	999
NOKW-946-----	Pros. Ex. 189-----	Order of Headquarters Armed Forces Commander Southeast, 27 March 1942, concerning designation of partisans and Chetniks.	1006
NOKW-1028-----	Pros. Ex. 197-----	Extracts from Operational Order No. 5 of 718th Infantry Division, 14 April 1942, concerning subordination of Croatian Armed Forces and Ustasha troops under German command.	912
NOKW-1028-----	Pros. Ex. 197-----	Enclosure to Operational Order No. 5 of 718th Infantry Division, titled "Combat Directive," 14 April 1942, concerning identification and treatment of partisans.	1007
NOKW-1052-----	Pros. Ex. 146-----	Activity reports of 342d Infantry Division to Plenipotentiary Commanding General Serbia, 30 October and 18 November 1941, concerning reprisal measures.	997
NOKW-1099-----	Pros. Ex. 251-----	Order of Commander of German Forces in Croatia, 7 January 1943, concerning the exercise of executive power.	915
NOKW-1156-----	Pros. Ex. 229-----	Extracts from report of Commanding General Serbia, 30 October 1942, concerning Tito movement.	1013
NOKW-1202-----	Pros. Ex. 106-----	German proclamation to Serbian population, October 1941, announcing the 100:1 reprisal ratio .	979
NOKW-1246-----	Pros. Ex. 472-----	Extracts from war diary No. 3, LXVIII Army Corps, concerning operations in Peloponnesus Greece, 28 November to 14 December 1943.	1030

Document No.	Exhibit No.	Description	Page
NOKW-1352-----	Pros. Ex. 386-----	Extracts of report from 2d Panzer Army, 14 March 1944, signed by defendant Rendulic, concerning cooperation with SS in northern Croatia.	932
NOKW-1353-----	Pros. Ex. 387-----	Order from 2d Panzer Army to XV Mountain Corps, 17 March 1944, concerning tactical subordination of SS to 2d Panzer Army.	933
NOKW-1354-----	Pros. Ex. 447-----	Extracts of daily reports from Commander in Chief Southeast, 19-28 September 1943, to Operations Section OKH.	1084
NOKW-1379-----	Pros. Ex. 137-----	Extract of intelligence report of 342d Infantry Division, 1 November 1941, concerning insignia worn by Chetniks and partisans.	984
NOKW-1403-----	Pros. Ex. 319-----	Extracts from order and teletype from XV Mountain Corps to subordinate units, 11-12 September 1943, concerning disarmament and evacuation of Italian troops.	1080
NOKW-1424-----	Pros. Ex. 48-----	Request of defendant List to OKW, 13 September 1941, for unification of command in fight against Serbian partisans.	967
NOKW-1438-----	Pros. Ex. 419-----	Letter from Commander in Chief Southeast, Army Group F, 11 October 1943, forwarding Keitel order of 7 September 1943, concerning the appointment and jurisdictional relations of "Higher SS and Police Leader" in Greece.	928
NOKW-1492-----	Pros. Ex. 49-----	Hitler Order, 16 September 1941, charging defendants List and Boehme with the task of suppressing of the insurgent movement in southeastern area.	969
NOKW-1776-----	Pros. Ex. 500-----	Extracts of teletype from Fuehrer Headquarters signed by Jodl to 20th Mountain Army, 4 October 1944, ordering evacuation of northern Norway.	1113

Document No.	Exhibit No.	Description	Page
NOKW-1806-----	Pros. Ex. 539-----	Extracts from report by the High Command of the Army, 9 February 1943, concerning Chetnik (Mihailovic) movement.	1015
Norway 10-----	Pros. Ex. 519-----	Proclamation to Norwegian population, signed by Rendulic and Terboven.	1117
Foertsch 83-----	Foertsch Ex. 72--	Extracts from situation report Balkans, 2 November 1941, issued by intelligence section, Armed Forces Commander Southeast.	985
Kuntze 64-----	Kuntze Ex. 7-----	Extracts of report to Armed Forces Commander Southeast from war diary of Plenipotentiary Commanding General Serbia, March 1942, concerning court martial investigations and care for prisoners of war.	1000
Kuntze 65-----	Kuntze Ex. 10----	Extracts from reports of Commanding General Serbia to Armed Forces Commander Southeast, 10, 20, and 31 March 1942, concerning plans for revolt, sabotage, and recruiting activities of partisans.	1002
Kuntze 66-----	Kuntze Ex. 14----	Extracts from 10-day reports of Commanding General Serbia to Armed Forces Commander Southeast, 30 April 1942.	1009
Kuntze 67-----	Kuntze Ex. 19----	Extracts of reports from Commanding General Serbia to Armed Forces Commander Southeast, 1 and 20 July 1942, concerning revolt in Croatia and situation in other areas.	1010
Lanz 36-----	Lanz Ex. 41-----	Affidavit of Klaus Goernandt, 15 September 1947, concerning actions of Greek "insurgent" units.	1049
Lanz 119-----	Lanz Ex. 45-----	Affidavit of Karlheinz Bensch, 3 October 1947, concerning partisan fighting methods in Greece and Serbia.	1054
Lanz 191-----	Lanz Ex. 142-----	Affidavit of Wolf Christian von Loeben, 7 November 1947.	1110

Document No.	Exhibit No.	Description	Page
List 27c-----	List Ex. 49-----	Affidavit of Theodor Jestrabek, 11 August 1947, concerning the killing of German soldiers by partisans.	1048
List 202-----	List Ex. 46-----	Extracts from daily reports con- tained in war diary of the Mili- tary Commander Serbia, Sep- tember 1941, concerning the actions and difficulties of Ser- bian Government.	917
List 202-----	List Ex. 46-----	Order of 6 September 1941, en- closed in war diary of Military Commander Serbia, concerning police duty of Security Service on troop trains.	928
List 202-----	List Ex. 46-----	Extracts from war diary of Mili- tary Commander Serbia, Sep- tember 1941.	951
List 205-----	List Ex. 45-----	Extracts from activity reports, 704th Infantry Division, 4 April to 30 September 1941.	939

TESTIMONIES

	Page
Extract from testimony of defendant <i>Rendulic</i> -----	934
Extracts from testimony of defendant <i>List</i> -----	1036
Extracts from testimony of defendant <i>Foertsch</i> -----	1039
Extract from testimony of defense witness <i>Dr. Rudolf Ibbeken</i> -----	1056
Extracts from testimony of defendant <i>Lanz</i> -----	1088
Extract from testimony of defendant <i>Rendulic</i> -----	1123