2-9-1948

Einsatzgruppen Case: Closing Argument (Summation) (Von Stein for Sandberger)

International Military Tribunal

THE PRESIDENT: Dr. Lummert, I wish to congratulate you on the excellent manner in which you have presented your plea in English, although that is not your native language.

DR. LUMMART: Thank you so much, Your Honors.

THE PRESIDENT: Who is ready now? Do we have the final summation of Dr. von Stein's? I don't hav it.

You may proceed.

Your Honor, Members of the Court:

May I at the start of my final plea refer to the trial-brief which I have submitted. Where I have summarized the essential results of the evidence. Principally I wish to repeat here once more what I have particularly emphasized at the close of this trial-brief: That it is necessary to oppose in the strongest possible way the contention expressed by the Prosecution that they need carry only a minor part of the burden of proof in regard to the culpable participation of the defendants in the criminal acts alleged in large outline by the Prosecution. The more grievous the misdeeds are with which a defendant is charged the more conscientiously and indubitably must it be proven that he really committed these acts. May I refer here to the statements of the Military Tribunal No. IV in the judgment of Case V. (Quoted in the JOST-Doc. Book IV, Page 7, JOST Doc. No. 36). At the close of the trial-brief it is explained what remains of proven criminal acts on the part of the defendant Dr. SANDBERGER after the results of the evidence have been appraised. Therefrom it follows that essentially 2 questions are relevant for the decision of this Case:

1.) How are SANDBERGER's measures against Communist activists and

2.) how are SANDBERGER's measures against the Esthonia Jews to be judged?

SANDBERGER's measures against Communist activists.

1.) The reasons for the Fuehrer - Order.

The measures which SANDBERGER took against Communist activists were based on the Fuehrer-order. Inasfar as the order deals with Communist activists it is essentially based on the following considerations:

For HITLER the close connection between the Russian Bolshevist System of Government and the political movement of Communism was a fact. For him the Bolshevic State apparatus was the most important representative of the Communist movement and carrier of an active Imperialism, which was a mixture of Panslavism and the aim of Communistic world revolution.

Wherever Communism has come to power, the existing political and social leadership was rooted out. All experiences since 1917 showed this clearly, at least in the Baltic countries, which in 1940 were incorporated into the Bolshevist Federation of States. The witness MAE has also confirmed this specifically for Estonia. A clear example, true for all Baltic States, is given in the liquidation-list of the NKWD, published by the Canadian University Professor MIRCHCONELL and which I inserted in the Doc. Book SANDBERGER II.

Bolshevism also developed new types of warfare, the partisan war, the nature of which is depicted by the Bolshevists themselves in the brochure of the Press-Dep. of the Soviet Embassy in London "We are Guerillas" contained in OHLENDORF Document Book II, from this very description the illegality and criminality of this form of struggle in view of international law becomes evident. (Comp. also the opinion of University professor MAURACH submitted for OHLENDORF). This form of struggle consisted in preparation and execution of an illegal levee en masse on territory effectively occupied by enemy troops.

THE PRESIDENT: Dr. von Stein, you don't contend that partisan warfare was originated by the Bolshevists do you? You know that in the Napoleonic invasion of Russia partisan warfare was quite common. You know that historically, don't you?

DR. VON STEIN: Yes, Your Honor, I only want to contend that this

partisan war developed in a particularly crass manner in the Eastern campaign.

THE PRESIDENT: But you say here, "Bolshevism also developed new types of warfare, the partisan war." Well, it certainly was not new.

DR. VON STEIN: No, Your Honor, I am not trying to say it was new. I am merely trying to say that the manner of fighting which had been developed by the Bolschevists was new, that is to say, fighting became more cruel all the time. It cannot be compared with the beginnings of the partisan war which you have just described.

THE PRESIDENT: Very well. Proceed.

DR. VON STEIN: It was a war to the knife; which was conducted by the partisans in the bitterest and cruelest manner. It threatened the reinforcements, replacements-and supply-communications in the rear of the troops. Particularly dangerous was this warfare in such vast an area as Russia. In regard to the Estonian area there was a very special danger in the fact that most important communication lines of the German Army Group North ran through Estonia, namely from the naval port of Reval over Narva and Pleskau to the front end from the Reichs-border over Dorpat in direction Leningrad. To nip such movements in the bud, or to keep them to as small a size as possible, severe measures were necessary for the sake of preservation of the whole fighting front. To this came the particular type of enemy. The Eastern man is capable of a fanatical toughness, almost unlimited endurance and simply limitless faith. For him the fight against the "fascist German troops" was a crusade. The idea of the Bolshevist State of the future was an idol for him, which he worshipped as he did the Icons in former times.

HITLER as Supreme War Lord had to decide what measures necessitated by the war he regarded as essential.

HITLER expected a total war in the East, as did indeed develop. That such a war would to a greater part upset the existing principles of international law was clear to him, faced with an enemy like Bolshevism.

For he knew its attitude toward international Law, which meant nothing else but to keep its hands essentially free in case of a collision with a "capitalist state". (Compare also the opinion of University professor MAURACH, Document BOOK OHLENDORF II and SANDBERGER II-A).

The well-known British authority on international law LAUTERPACHT, by the way, expressed a similar opinion for the case of total war (British Yearbook of International Law 1944, P. 72):

> "But original proceeding before the municipal courts of the victors 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 rules. At a time when the "scorched earth"policy with regard to the belligerents own territory has become part of a widespread practice, general destruction of property ordered as an incident of broad military strategy will not property form the subject matter of a criminal indictment."

And further in 1941 HITLER may have been convinced that in such a war strong shock effects may be obtained by certain draconic measures, which as a final result may cause the weakening or disintegration of the enemy's will to resistance. Measures of such effect were regarded as admissible in the war against Japan.

Henry L. STIMSON, 1940 - 1945 secretary of War reports in his article: The decision to use the atomic bomb (Excerptly):

> "to extract a genuine surrender from the emperor of Japan and his military advisors, a tremendous shock must be administered which should carry convincing proof of our power to destroy the Empire. Such an effective shock would save more lives, both American and Japanese, than it would cost."

Transferring these conditions to the war in the East, HITLER was of the conviction by such measures to nip the partisan war in the bud or to

suppress it effectively. The welfare of the whole front was menaced by the unrestricted partisan war. HITLER may have expected a shock effect from the measure he ordered, which in the end would save the lives of an infinitely greater number of German soldiers. I have proven that just in the Estonian Territory the Soviet leadership put great importance to partisan movements in the widest sense of the word. It even left the most important officials back in Estonia in order to organize as extensive and effective an underground movement against the Germans as possible.

2.) Was the Fuehrer-order to that extent admissible according to international law.

The Fuehrer-order had as its first objective the safeguarding of the territory occupied effectively by the German Wehrmacht. Inasmuch as Communist functionaries actually distrubed or threatened the security, as active directors of sabotage or espionage organizations, or by sabotage, incitements and other hostile acts, murder, espionage, possession and use of weapons, they could be shot according to the law of war (war rebels). Here the same principles would apply as have been developed for the illegal levee en masse in the occupied rear of the troops.

So says i.e. OPPENHEIM Vol. II, Par. 116, Page 278/279:

"What kinds of violent means may be applied for these purposes, is in the discretion of the military authorities.

But there is no doubt, that if necessary, capital punishment and imprisonment are lawful means for those purposes."

Inasmuch as Communist functionaries actually committed acts of insurrection and resistance or other serious crimes and inasmuch as such acts were proven to them, they could be shot in accordance with international law.

Obviously the same principles are applied in the struggle on the Greek northern border.

These principles correspond also to the American practices of war.

The Basic Field Manual, Rules of Land Warfare states in No. 12:

"Uprising 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."

It states further in No. 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 by 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 ("the event of conspiracy for rebellion shall have matured a conspiracy of the kind by overt act of hostility".)

And in No. 350:

War treason: Examples of acts which, when committed by inhabitants of territory under hostile military occupation, are punishable by the occupying belligerent as treasonable under laws of war, are as follows: Espionage, supplying information to the enemy: damage to railways, war material, telegraphs or other means of cummunications, aiding prisoners of war to escape; conspiracy against the occupying forces or members thereof;....and circulating propaganda in the interests of the enemy."

3. What has Sandberger done?

The defendant Sandberger was active only to this extent. In so far as Communist functionaries were shot in his area and under his command or on his responsibility, this did not take place in the form of mass executions, but only when the serious guilt had been established in regular proceedings and after the person arrested had been able to defend himself in these proceedings. Special courts had been excluded for the Russian campaign and in view of his subordinate position he

he was not able to establish such. Nor was it necessary. According to No. 356 of the Rules of Land Warfare, too, regular proceedings are adequate to establish the lapse and guilt of "war rebels". The more detailed arrangements for these proceedings must naturally be made in accordance with circumstances and possibilities at the time.

The defendant proved authentically that regular and lawful proceedings were carried through. Over and beyond that, however, it has been proved by numerous depositions that Sandberger always behaved correctly, decently and fairly.

From the series of affidavits which I have submitted for judging the behavior as a whole of Dr. Sandberger in Esthonia, I quote as especially typical, one part from the deposition of the Swedish Major Mothander who was in Esthonia for a long time as a representative of the Swedish government. The latter says among other things about Sandberger: "He was generally regarded as a decent fellow. A natural tendency to human kindness and justice was often evident in his nature. Therefore he was always open to what is called 'Argumentum ad hominem'. He showed himself to be a gentleman through and through both as official and as man".

4.) Sandberger acted in full consciousness of the legality.

Sandberger was fully convinced, too, that he was acting legally in this. For every state it is an elementary precept of self-preservation to suppress resistance in the actually occupied area in all circumstances. The Supreme Commander decides what measures are to be taken in the individual case. He alone can decide what military necessities command him to do. This is the conception too of the expert on International Law, Hyde. (International Law chiefly as interpreted and applied by the United States 1945 Vol. II, section 655, War Dept. Rules of Land Warfare 1940).

"If the term military necessity implies great latitude and is invoked by way of excuse in justification of severe measures, it is because the law of nations itself permits in case of great emergency and allows a belligerant commander to be the judge of the existence and

'sufficiency of the need".

The measures against Communist activists were severe. But in view of the general war situation and the special position in Esthonia, they were, the defendant was convinced, justified. The resistance which naturally became manifest on receiving the Hitler Order was connected in the first place with the extensive measures timed simply at the Jews, that is, regardless of whether they had become active as partisans, war rebels, or war traitors or belonged merely to the civilian population, it was connected also however with all collective measures against other people who had no individual guilt as far as acts endangering security were concerned. Now when he came to Esthonia and had convinced himself on the spot of the horrows which the Communist activists had perpetrated there, he was also convinced that such measures were in the end unavoidable against war rebels and war traitors of the kind. This was an elementary precept of self-preservation, the self-preservation, which in particular is fully recognized in Anglo-Saxon international law. For the conviction of having acted in defense against a state of emergency which actually existed - a conviction to be claimed for Dr. Sandberger as for all defendants - reference is made to the detailed statements of Prof. Dr. Maurach in his Counsel's Opinion in the Ohlendorf Document Book II and in the Sandberger Document Book IIA. The Prosecution has not proved that Sandberger, in the measures against Communist activists, behaved contrary to the principles of International Law. Instead, it has the onus probandi the more so because I have proved that Sandberger was judged to be correct, fair and upright in general and even in Esthonia.

II
Measures against the Esthonian Jews.

Sandberger moreover gave the order to intern the Esthonian Jews.

1.) Was the Internment an international offence?

The general Fuehrer Order and the orders of his superior Stahlecker issued on the basis of this order, to proceed against the Jews in the

occupied territory, were the basis of his order. The inner opposition which had arisen naturally in the defendant Sandberger when the Fuehrer Order was made known was connected above all with this part of the order. Sandberger was, as I have proved by countless affidavits, a morally pure personality who, from the beginning, had adopted a humane attitude in the Jewish question, which deviated from the official Nazi doctrine. He condemned, too, the measures hostile to the Church and protected a number of prohibited student institutions in the religious sphere. In view of these facts, what Sandberger stated about his inner attitude to the Fuehrer Order is credible without more ado. He said: The contents of this Order were so completely foreign to anything I could previously have imagined that I simply could not conceive its realisation. In particular I could not imagine that I myself could be capable of doing it and, on the other hand, I did not believe that I could demand something of my man that I could not do myself.....I considered the Order inhuman .....I resolved to evade this Order as far as my Kommando and myself were concerned, in so far as ever was possible without however offering open resistance which would certainly have been senseless.

This also explains all the subsequent action of Sandberger's. He disapproved, too, the collective internment of the Jews and did not order the internment as a preliminary measure either for the killing measure which he disapproved of all the more but as a substitute measure enforced by his order in place of the far worse measure. He ordered the less far-reaching even if equally disapproving of measure of deprivation of freedom which was nevertheless bearable rather than the destruction of human life. This internment cannot be disapproved of from the point of view of international law as the result of the enforced weighing up and down. When, for example, in the Boer War, a general laying waste of the country was started, innumerable women and children of the Boers were brought into the concentration camps which were newly created at that time, to avoid something worse.

I quote from Oppenheim, Page 324'

"It is also lawful when, after the defeat of his main forces and occupation of this territory an enemy disperses his remaining forces into small bands, which carry on guerilla tactics and receive food and information, so that there is no hope of ending the war except by a general devastation which cuts off supplies of every kind from the guerilla bands.....

It would be more human to aken them away into captivity rather than let them perish on the spot. The practice resorted to during the South African War of housing the victims of devastation in concentration camps must be approved."

Thus, a measure in itself inadmissible and in violation of the International law, was sanctioned here because it was apt to prevent worse things, or because worse things were to be prevented.

The very same applies also to the case of Sandberger. The measure of internment was to prevent worse things, namely death. Therefore, no objection against this measure can be raised from the point of international law. Besides that, it represented an emergency measure to prevent the Jews from being killed and, Sandberger, in order to ward off the violation of the right to live, was compelled to violate the right to liberty even if this was done only under compulsion.

2). Why has Sandberger confined his measures to the internment?

When Sandberger issued the order for internment he was hoping that he could prevent the execution of the Jews. He was convinced of the fact that the lawless order for execution of the Jews would lead to enormous difficulties or even complications in the occupied territory. At a time when the United States of North America had not yet entered the war, he was right in assuming that the lawless execution of the Fuehrer order

would lead to an aggravation of the international situation and that HITLER, in spite of all, might yet decide to mitigate or limit the order. This hope was by no means unjustified. For in the following period it also occurred repeatedly that Fuehrer orders were limited. In the course of 1942, for example, the treatment of the Soviet prisoners of war was considerably eased. Moreover, inmates of concentration camps were, contrary to the original tendency, assigned to an increasing extent to economically essential work. The prisoners taken in the fights against partisans were used later on predominantly as workers.

The fact that attempts were made again and again by the highest executive authorities to achieve a change or cancellation of the execution order, is also shown in the statement by Erwin LAHOUSEN which the Prosecution itself presented in the rebuttal document-book 5 D under Doc. No. 2894, Exhibit 228. SANDBERGER's intention to intern the Jews is also substantiated in the situation report No. 111 submitted by SANDBERGER's deputy in the latter's absence. According to that report all Estonian Jews were to be housed in camps. At the same time arrangements were made for the permanent financing and feeding of the camp inmates. If Sandberger, however, intended to arrange for a long term financing and supply with food, he certainly did not order the internment as a preparatory measure for an execution following shortly thereafter. If an early execution would have been contemplated it would have been quite unnecessary for him to make any efforts for furnishing and enlargement of an internment camp.....When in Sandberger's absence, without his knowledge and consent, Stahlecker ordered the execution of a part of the Esthonian Jews, the former, after his return, had the rest of the Jews transferred to the Pleskau camp. If he had approved in his innermost of Stahlecker's aim to make Esthonia free of Jews, he then would have carried out the execution immediately and would not have arranged for the transfer of the Jews to the Pleskau camp which was

located beyond the borders of Esthonia. This in addition to the fact that, according to human foresight, the life for the interned Jews in Pleskau was by far safer than in Reval. The Headquarters of the Army Group North was in Pleskau. No reasonable person could expect that such an execution would be ordered in the immediate neighborhood of the headquarters as this was then ordered by JECKELIN, again without SANDBERGER's knowledge and consent, for the Jews interned in Pleskau.

3. In carrying out the executions SANBERGER's subordinates acted under irresistable compulsion.

In both cases the execution was ordered by SANDBERGER's superiors and carried out by subordinates of SANDBERGER. In one case the chain of command led from Stahlecker to Carstens, in the other case from Jeckeln to Bleymehl. This order was absolutely binding for both. Active or passive resistance, or any kind of disobedience would have entailed capital punishment for desertion, insubordination or undermining the permit of the armed forces. The same principles were enforced in the SS. In consequence of a special decree, issued on 9 April 1940, the entire security police including the SD were alerted for special operations. If the penalties, pronounced by the Wehrmacht court martials, were harsh, those of the SS-courts were draconic. The simple death penalty was comparatively mild. Intensified kinds of death led to certain death by way of the concentration camp or special probationary units. Compare Doc. Book I for the defendant Blume.

Thus, they were under compulsion which once before the Military Tribunal II had to deal with in the case of Milch. There the Tribunal stated:

> "It has never been our intention nor did we ever suggest that he ought to have chosen any way which could have resulted in the loss of his life."

No person can be punished for a crime which he was forced to commit. But then, is a punishment admissible for acts which were ordered or

committed under the compulsion of a dictated order? Is a punishment admissible if a violation of such an order was threatened by such draconic penalties that "no other choice was left"?

The Military Tribunal No. IV has stated in Case No. V that the Reich was "ubiquitous", "ready for action and in a position to inflict cruel punishment immediately on everyone who did something which could have been interpreted as sabotage or opposition against the execution of decrees or regulations issued by the government." (German record, page 10736)

In such cases the Military Tribunal has admitted the plea of acting under compulsion.

This state of emergency exculpates Carstens and Bleymehl to a large extent. How should Sandberger then be held responsible for ations in which he did not participate, of which he was hot informed, which he did not want, and the perpetrators of which are besides exculpated to a large extent by the state of emergency in which they were?

4) Sandberger had no criminal intent either.

The witness Strauch confirmed that objections had been raised for the reason that the Fuehrer Order was not yet carried through within Sandberger's sphere of command, although the number of Jews was only small. This is explicable. For it was declared to the defendant Sandberger, especially by his superior Stahlecker, that he was not severe enough for the things in the East and that he showed no understanding for the requirements of the time and space (Transcript of the sessions, page 2223 of the German text). Sandberger did not order the internment as a preparatory measure for the killing of the Jews, but, on the contrary, in order not or not yet to have to order their being killed.

It cannot be said: Jews were killed within Sandberger's sphere of command, therefore he is responsible. This mere responsibility for the result of a crime is not recognized in criminal law, it is on the contrary rejected. A crime exists only where a serious guilt exists. If the mere responsibility for the result of a crime is not even recognized in criminal law, the less so in International Law. The International Law hitherto existing declined the criminal liability of individual persons. It was introduced on this scale and to this extent by the Nuernberg Verdicts only. It will also in future remain an exception and will probably be applied partially only, that means not against members of the victorious powers. Thus it is an exception. Now, according to an old legal principle, valid for millenniums, exceptions are to be interpreted restrictively. If thus the responsibility for the result of a crime is not recognized by criminal law, the less so by International Law, if it is indeed intended to punish individual persons for delicts within the meaning of International Law. Also for that reason a liability of Sandberger within the meaning of criminal law must be declined.

5) Sandberger was not connected either with the killing.

It could be said that the killing of the Jews was facilitated by the internment. Thus, Sandberger had "been connected" with their being killed. If this term of the Control Council Law claims to have a reasonable meaning, a merely external connection with a committed crime is not sufficient. Whoever supplies the weapons with which prisoners are shot, contrary to International Law, is not connected with the crime of killing. He knows indeed that the weapons are suitable and destined for the killing of men. He creates a not at all unessential prerequisite to the killing. This condition is, however, not taken into consideration in connection with the crime, since the supplier could not prevent the misuse and, considering it reasonably, the person alone is responsible who commits the criminal action.

Whoever is connected with a crime knows of the crime, wishes the crime, and co-operates in connection with the crime by any legally essential actions or omissions. His responsibility is either constituted by the fact that he

a) actively participates in the crime

b) or inactively tolerates the crime, although it would be within his power to prevent it.

Joint commission and rendering assistance as an accomplice within the meaning of the Control Council Law refer to active actions. The "being connected" with a crime refers, however, to those forms of co-operation in which an active participation does not exist, but still an objectionable passive participation. Such a participation is to be presumed in those cases in which a commander does not supervise his subordinates sufficiently or does not prevent excesses, although he can foresee them. This is probably also meant by the Prosecution in stating (German Transcript of the sessions, page 64):

"The rank and the position held by these defendant comprises the authority to supervise their subordinates. This authority together with the knowledge of the intended crime and of the subsequent commitment of the crime during the time of their command renders them unequivocally penally responsible."

In criminal law a distinction is made between preparatory activity and acts pertaining to the execution. Penally relevant are all acts pertaining to the execution, and that from the first commencement until the completion of the crime. Preparatory activity is, however, not punishable, unless it constitutes a punishable act in

itself. The thief who brings a ladder to a certain place in order to commit a burglary prepares by this the burglary. In so far he cannot yet be punished. He only renders himself punishable in the very moment in which he begins to execute the burglary, that means to climb the ladder, in order to execute the burglary then in immediate connection with this. The act pertaining to the execution thus is an unbroken chain of events with regard to time.

THE PRESIDENT: Dr. Von Stein, in order that we may not misunderstand you argument in this respect, do you contend that if Mr. X is aware that a burglary is to take place and then does nothing further that he is not liable criminally for having taken the ladder to the place of the crime? Is that your illustration?

DR. VON STEIN: What I meant was - if I want to stick to this example - if the person concerned knows what action others intend and he assists them in some manner, however, and assists them to such an extent that it makes it easier for the perpetrator to commit a crime, then he is punishable.

THE PRESIDENT: Then your illustration is not correctly put in your summation because you say here he only renders himself punishable at the very moment in which he begins to execute the burglary, that means to climb the ladder, be he doesn't have to climb the ladder if he has taken the ladder there so that it may be used in a burglarious enterprise.

DR. VON STEIN: Your Honor, the example may not quite apply here. With a ladder it would be like this; if the person concerned only places a ladder there but knows nothing about the plan and does not commit any other action then he is not liable to punishment--

THE PRESIDENT: If he --

DR. VON STEIN: --but the example was as follows:

THE PRESIDENT: Just a moment, Dr. Von Stein. If you contend that he knew nothing about the burglary and took the ladder with the understanding that it was to be used for painting a house, certainly

there is no crime committed, but we didn't understand your illustration to be that. If you say now that he knew nothing about a burglary then the illustration is of no consequence whatsoever.

DR. VON STEIN: Your Honor, I merely wanted to determine a preparatory work from the point of view of time. Preparatory work can have been done so much earlier that it can no longer be considered a punishable act from a legal point of view. What I wanted to say is when preparatory work is liable to punishment. I said principally that preparatory work is irrelevant from a legal point of view unless this preparatory work as such constitutes a criminal act. That was my principle statement.

THE PRESIDENT: It does not constitute a criminal act unless the preparatory work is done knowingly, that it is part of a criminal act.

DR. VON STEIN: Your Honor, there are certain crimes according to the German law which refer to preparatory work, and they are only liable to punishment because the legislature determines them as a punishable act expressly. Apart from that preparatory work is not liable to punishment from a legal point of view. The example I have chosen with the ladder, it is like this, that because of the preliminary work an action arises which can be described at the beginning of the commission of the crime, that is the getting up on the ladder. That is what I was trying to explain.

THE PRESIDENT: Well, we understand that you understand that if an individual obtains and carries a ladder to a certain place knowing that a burglary is to be committed with the use of that ladder and the burglary then does actually take place that he is particeps criminis. That is correct statement, is it not, from your point of view?

DR. VON STEIN: Well, your Honor, may I repeat? I will stick to the example of the ladder. If somebody merely brings a ladder and that is all he does, and he knows nothing about a crime apart from

that, that the ladder is to be used for a burglary, then he is not liable to punishment.

THE PRESIDENT: Very well.

DR. VON STEIN: Although the ladder was perhaps necessary in order to enable the criminal to commit a crime this preparatory work is of no importance from a legal point of view. But if the person concerned himself climbs the ladder but the burglary is not committed then this preparatory task is an attempt to commit burglary. That is why it is of importance from a legal point of view because something is added.

THE PRESIDENT: Yes, but carrying your illustration further, if the man did not know that the ladder was to be used for burglary and he climbed the ladder not knowing that he was going to commit a burglary then, of course, he is not guilty. He could have climbed the ladder to elope with his sweetheart, and that is not considered a crime in any country.

DR. VON STEIN: Your Honor, I want to say something to this example.

THE PRESIDENT: Let's take it up after recess. The Tribunal will be in recess fifteen minutes.

(A recess was taken.)

(The hearing reconvened at 1530 hours.)

THE MARSHAL: The Tribunal is again in session.

MR. HOCHWALD: If the Tribunal please, the Tribunal will certainly recall that the prosecution objected against an affidavit by the affiant, Jauer, and asked to cross examine this witness. As far as I am informed by the marshal, the witness will arrive tomorrow afternoon. Up to date the prosecution has not received a copy of the affidavit in question. I have asked Dr. Riediger, who promised it to me, and I have asked his assistant this morning. In order to be able to prepare the cross examination, I respectfully request that the marshal may inform Dr. Riediger to furnish prosecution with a copy of the affidavit on which I am supposed to cross examine the witness.

THE PRESIDENT: Well, Mr. Hochwald, the situation is simply this, that the witness will be in court and since the affidavit has not been introduced in evidence, you may have that affidavit unless Dr. Riediger wishes to give it to you. If he wants to submit it in evidence, then naturally he must present it to you, but if he does not then --

MR. HOCHWALD: If Your Honors please, I understood that the affidavit will be admitted under the circumstances that the prosecution will be permitted to cross examine the witness. If the witness comes here, I am supposed to cross examine the witness on the affidavit. I do think I should have a copy of the document.

THE PRESIDENT: Well, Yes, if Dr. Riediger still intends to submit it, then by all means you should have a copy of the affidavit.

MR. HOCHWALD: The original request of Dr. Riediger's was not for the calling of the witness, the original request was for the introduction of the document. I have requested to cross examine the witness on the contents of the affidavit, nothing else is subject of the --

THE PRESIDENT: Yes. The Secretary General is instructed to

contact Dr. Riediger, counsel for the defendant, Haensch, and instruct him to turn over to the Secretary General the affidavit which is the subject of this discussion so that Mr. Hochwald may have a copy of it for the purpose of cross examining the witness, when the witness takes the witness stand.

MR. HOCHWALD: If I may add, Your Honors, a German copy will be entirely satisfactory to me. Thank you very much.

THE PRESIDENT: The Secretary General will be so informed.

DR. GICK: Gick for Strauch. Your Honor, I have submitted the affidavit of the wife of my client, as an exhibit and after conferring with my client, I have to say that my client agrees to it, if the prosecution wishes to cross examine this affiant.

THE PRESIDENT: Mr. Glancy, I don't know whether you heard the statement of Dr. Gick. It is to this effect, that the defendant, Strauch, has no objection to the calling of Mrs. Strauch as a witness for cross examination in view of the fact that he has submitting in his own behalf the affidavit made by his wife, Mrs. Strauch. The prosecution is so informed.

MR. GLANCY: Thank you, Sir.

THE PRESIDENT: Yes, indeed.

MR. GLANCY: We will take it under consideration later and see whether or not we wish to call the witness.

THE PRESIDENT: Very well, Dr. Gick. Proceed, Dr. Von Stein. And I don't think that you need to elaborate any further on what you have already told us with regard to the ladder episode. We all admit, I think, it is understood that if one is entirely unaware of the purpose to which a ladder is to be put -- unaware of any criminal use, that naturally he can't be charged with any crime. You seem to be still in a state of quandary about it. You don't think that anyone would accuse Romeo of having committed a crime because he went with a ladder to take Juliet away, do you?

DR. GICK: No Your Honor, I agree with you. I just would like

to point out that the example chosen by me was a different one. I merely concerned myself with one person and not with a number of persons who were supposed to be involved in a burglary therefore, the misunderstanding.

THE PRESIDENT: Very well.

DR. GICK: The execution of the crime of killing did not yet begin with the internment of the jews, but in the very moment in which the order to kill was pronounced by the commander who had the authority to do this. Responsible for the killing is that commander who was connected with the order to kill and its execution. He is likewise responsible for such killings which were committed without his express order, which he could, however, have prevented.

In the case under consideration Sandberger gave.. the order to intern the Jews. This can possibly be considered in itself as a delict within the meaning of International Law. On the other hand, the internment is no act pertaining to the execution of the killing which took place at a later date. If Sandberger had approved of the later killing, a (punishable) preparatory activity could perhaps be seen in the internment. Since he disapproved, however, of cases Sandberger did not participate in the execution of the crime of killing. On the one hand not by active commitment. For in both cases he neither participated in the issue, nor in the forwarding, nor in the execution of the order. But he did not either by default as passive participation. For, in both cases he was not in a position to prevent the killing because of his being absent. Moreover, he had expressly declared to Carstens that he did not approve of the Fuehrer Order and that he wanted to do whatever possible in order to keep himself and his Kommando out of this. In the case of Bleymehl, Sandberger did not know at all that Bleymehl was informed of the Fuehrer Order, and besides, in view of Bleymehl's character, he thought he could be sure that the latter would by no means act independently.

THE PRESIDENT: Dr. Von Stein, as we see it now, the issue before the Tribunal is whether Sandberger knew that once he placed the Jews in the internment camp they would probably be executed, and the determination of that issue can only come from all the facts in the case. If it is not reasonable to suppose that he could have anticipated their execution, then there was no crime. If reasonably, as a normal thinking person, he could have anticipated that the act of internment was but one step removed from the act of execution, then there would be criminal knowledge. Does that conform to your view of the law?

DR. VON STEIN: Yes, but I wish you would consider, Your Honor, that furthermore one must consider the compulsory situation in which Sandberger found himself. Sandberger had received the order, first of all, to carry out the killing. Sandberger did not carry out this order. Afterwards Jeckeln again threatened him that he would have to carry out these matters, and Sandberger always postponed it. In other words, Sandberger was faced by the question of what he would now have to do. He could not always keep on postponing the matter, but once he had to act in some form and then Sandberger weighed the problem what to do. On the one hand, he has to violate the right of liberty, namely, the internment; on the other hand, he would have had to order the execution as per order. While weighing these two problems, Sandberger chose the violation of the law of less legal value. There was no third possibility for him. It was excluded. When Sandberger was faced by this choice he believed that perhaps after all there might be a possibility that beyond that a further execution might perhaps be prevented, be it either that the order might be revoked or that other incidents would happen and this thought of Sandberger had been taken from his finger-tips. He thought that perhaps orders might be changed later on or that they might be revoked.

THE PRESIDENT: Very well. We understand your position thoroughly.

Of course, we have also the other feature as to whether merely interning the Jews was not of itself a crime, depriving these individuals of their human liberty. When we come to that, then we must consider the question of superior orders. The mere fact that he locked up these Jews even without any thought of their execution would not of itself be an innocent act unless he was acting under what you might regard as compulsion and then we come into the field of the determination of the defense of superior orders.

DR. VON STEIN: Yes, Your Honor. Already before I have stated in my plea that perhaps the interment could be an international delict, but I have also pointed out how one could hardly consider internment under international law. I have also cited from the scholars who have commented on this question of the internment and who consider internment as permissible according to international law. But in principle I agree with Your Honor, and I also say that even if one says that Sandberger had made himself liable to punishment because of the internment, one would still have to consider the compulsory situation in which he found himself, especially the superior order under which he acted.

THE PRESIDENT: That is the point we wanted to make. The deprivation of the liberty of any person without justification is a crime. We start out with that premise, the defense is that the human liberty was deprived only because of a compulsion, influence, a superior order, and of course that takes us into another field of discussion which, of course, will be resolved.

DR. VON STEIN: Yes. May I continue?

THE PRESIDENT: Please do.

In both cases, however, he would also for legal reasons not have been in a position to prevent his subordinates from killing. For the order to kill was given by a higher superior directly and was executed by a subordinate of Sandberger.

III

Dr. Sandberger's membership in an organization declared criminal by the I M T.

Dr. Sandberger is charged with having belonged to organizations declared ciminal by the IMT.

1) as a member of the (SS) of the NSDAP

2) as a member of Office III, IV and VI of the Reich Main Security Office.

The Prosecution has alleged that every defendant, consequently Dr. Sandberger too, had been conscious of the criminal character of the organization which he joined.

1. Dr. Sandberger became a member of the SS only as a member of the SD. He was never a member "of the SS" in itself - irrespective of his membership of the SD. He was neither assigned to a unit (A "Sturm", a Standarte, or perhaps a staff of a higher command) of the "General SS", the political force of the SS, not to a unit of the Waffen SS, the Military branch of the SS. He came to the SS only via the SD and his "membership" in the SS is not thinkable and cannot be judged separated from his membership in the SD, above all it cannot be proved with regard to criminal activity and taking an active part therein, or taking a "consenting" part in crimes of others by approval or even by a mere membership, in consciousness of a criminal nature of an organization. He can only therefore as a member of the SD have belonged to an organization declared criminal.

2. Dr. Sandberger joined the SD in 1936. At the beginning he occupied himself there with the reporting on the so-called "spheres of life". It was sufficiently discussed during these proceedings of what nature this activity was.

I may be allowed to refer to all argumentations advanced by other defense counsel with regard to this especially to the exhibits and statements advanced by the defense counsel for the defendant Ohlendorf. Even the presiding judge himself stated in the course of the discussions on the SD reporting activity of a defendant during his activity as Chief of Office III in a Einsatzkommando that the lawfulness (consequently by no means criminal nature) of this activity is acknowledged. It is also shown that the SD most strictly opposed all features of public life which were contrary to an idealistic conception of National Socialist aims, including all kinds of excesses against Jews or other encroachments by the Party, by a disapproving manner of reporting. Neither at the date he joined the SD, nor during his membership could the defendant Sandberger therefore have been conscious of a furtherance of, much less of a participation in crimes. Add to this that from 1937 until February 1940, i.e. just the time during which the Nazis gradually proceeded to a policy of force, Dr. Sandberger really was only a formal member of the SD. He worked during that period in the internal administration of the Land Wuerttemberg and in the Reich Student Leadership, and from October 1939 onwards in the Immigration Center. For the rest, the SD never identified itself with this policy of the NSDAP which resulted in an increasing distrust towards its members, finally - as was shown by the direct examination of the defendant Ohlendorf - even in an actual prescription by these forces which more and more governed the Party machinery (as f.i. Goebbels, Ley and Bormann, finally the formal head of the SD himself, Reichsfuehrer SS Himmler, and the Chief of the Security Police and the SD). Of all things, the later

"abandoning" of the SD and its members by the special top command, which the SD had jointly with the General SS, the Waffen SS, the State Police, the Criminal Police, etc., shows the singularity of the incorporation of this intelligence organization into a formation which had its central agency in the Reich Security Main Office. At all events, the theory of a criminal activity, participation in or furtherance of crimes by Office III (SD Inland) and its subordinate agencies cannot be maintained after the evidence produced in this trial, since these indeed directly opposed and unlawful development of the Party activity.

There is therefore no need to discuss whether possibly other agencies and their subordinated agencies committed or supported any criminal activity or whether their members even without any personal participation had to be or could be aware of any such activity by branches of their agencies. In any case, Dr. Sandberger had not, could not and was not obliged to have become aware of any such activity by other offices even after he had been appointed Referent of Office I in the Reich Main Security Office. Due to lack of any criminal intent and actions of the Security Service, Dr. Sandberger had also no cause to leave same up to the beginning of the second World War, but he endeavored to bring about his release after the war had started in order to serve in the army and to do so he removed first of all the impediment which consisted in his rheumatic ailment. But these endeavors of his were blocked already by the then valid strict order against any withdrawal from service. Membership in the SD was not voluntary any longer; release was now only and alone at the discretion of the common high command, shared also with other semi-military and military organizations, which extended their

compulsory orders intended for organizations of this kind, also to the SD, entirely unsuited to this by its nature. The facts about the impossibility of a withdrawal from this time on, were proven by me in a number of testimonies; I refer in this instance to these exhibits contained in the Document Books. The Einsatzgruppen- and Kommandos were then formed for the campaign against Russia and Dr. Sandberger was ordered to Einsatzgruppe A as Commander of SK 1a. As a member of the SD it was to him in no way discernible or to be expected beforehand, that for a member of the SD every anything else but purely informational, especially police executive functions could come under consideration, for the one reason, that the SD had a common High Command with other organizations. Sandberger had no knowledge at all about the tasks of Einsatzgruppen before he was detailed for duty. Valid for his detail were regulations regarding police units on special duty. Insubordination was threatened with severest penalties by SS and Police Courts. Due to his enforced activity with a Sonderkommando Dr. Sandberger became aware of measures forming the basis of these proceedings. He himself however has refrained from any criminal activity. Actual participation in a crime is therefore not the case. His membership, while aware of criminal plans and acts of others, was nevertheless compulsory, it could not constitute any participation or activity. Despite of this Dr. Sandberger proved his intention to quit his activity. From the end of 1941 Dr. Sandberger tried 7 times to get released for service in the Armed Forces, always without success. In this respect I refer to the testimony of the witness Spengler and to the testimonials in this respect submitted by me as evidence.

As Chief III with the Chief of the Security Police at

Verona, Italy, he was finally able to return to mere SD reporting activity in the scope of which Sandberger acted now as before neither criminally, nor was he able to gain any knowledge about such an activity of others there, the SD had remained true to his rejection of such active or passive participation. He was now in his capacity as an SD member also under the authority of SS and Police jurisdiction, to which also SD agencies were subject.

Dr. Sandberger was finally yet head of a group in Office VI of the Reich Main Security Office, in this position he took care of technical administration tasks, he came into contact with the relevant tasks of the office in connection with the "Egmont Report". But just this contact shows again no characteristics of criminal implication, sanctioning of such an activity or the awareness of participation only by membership. On the contrary it was the aim of this report to make highest quarters well inclined to an immediate cessation of hostilities at the price of capitulation, by giving a clear picture of the Reich's hopeless state.

In Office VI of the Reich Main Security Office in connection with the foreign news service operated by it, should ever have been in contact with criminal intentions or a criminal activity, then this was surely not the case from the year 1944 on, the year in which Dr. Sandberger took over his post there.

All characteristics of any criminal activity, participation in such an activity, favoring, or conscious support due to mere membership while aware of such acts as a member of the SD or the Office VI of the Reich Main Security Office; do therefore not apply to Dr. Sandberger. But mere membership without these characteristics can not be liable to

punishment. His membership after the 1 September 1939 was besides not voluntary, nor his membership of a Sonderkommando either. Valid is in this respect what caused the IMT to exempt certain groups of persons from membership in criminal organizations.

Exempt must be those persons who "are drafted by the State for membership in such a manner that they had no choice left."

According to all of this the defendant Sandberger has not made himself liable to punishment in the sense of Count I, II, and III of the indictment. I beg the honorable Court to pay due consideration to this result of the trial by a just sentence.

THE PRESIDENT: Very well, Dr. Koessl.

DR. KOESSL: Attorney for the defendant Ott.

M a y i t p l e a s e t h e C o u r t !

According to the express statement of the Prosecution this trial is concerned with the crime of genocide, which in the theory of the Prosecution was incited by the fundamental teachings of the Nazi doctrine. The Prosecution logically requests that the Tribunal, by imposing a punishment in accordance with international law, will confirm the fact that human beings have the right to live in peace and dignity, whatever their race or their religious faith may be. The Prosecution, therefore, does not raise the charge of murder within the meaning of the facts constituting this crime in national legislative codes. None of the defendants is charged in the Indictment with the murder or mistreatment of any one specific person. If this were the case the Indictment would doubtless name the presumed victim.

To be sure, the Prosecution also mentions murder as a