10 Aug. 48-M-BK-1 & 2-1-Arminger (Int. Weber)
Court V, Case 12

THE MARSHAL: The Honorable, the Judges of Military Tribunal V.

Military Tribunal V is now in session. God save the United States of America and this Honorable Tribunal.

There will be order in the Court.

THE PRESIDENT: Mr. Marshal, are all the defendants present this morning?

THE MARSHAL: May it please Your Honors, all the defendants are present in the Courtroom with the exception of defendants Hollidt and Sperrle, who are absent, due to illness.

THE PRESIDENT: The orders hereto fore made with respect to the absence of these defendants, these orders will be continued in force.

Are there any other matters of course?

If not, then the Tribunal understands that we are ready for the argument of the prosecution in this case. The prosecution may proceed with its argument.

BRIGADIER GENERAL TAYLOR: Mr. President, Members of the Tribunal--

THE PRESIDENT: General Taylor.

BRIGADIER GENERAL TAYLOR: In summing up at the conclusion of this long and profoundly important trial, the prosecution is anxious to observe the utmost economy of words and means. The burdens which this trial has imposed, on the Tribunal and counsel for the prosecution and defense alike, have been very heavy. The record of the testimony is lengthy, and the documentary exhibits are voluminous; the analysis of the entire record is formidable undertaking. On the part of the prosecution,

we intend to embody our detailed analysis of the record, and our summation of the evidence as it relates to each defendant, in the briefs which we will file. It is our plan to file briefs with respect to each defendant covering the charges under Counts Two and Three of the Indictment, and over-all brief under Count One of the Indictment, and in this brief to include a summation of the evidence under Count One relating to each defendant.

In this oral summation, accordingly, we do not propose to deal exhaustively with each charge of the Indictment nor with each defendant. To undertake a full and detailed exposition of this sort would, we think, prolong this statement unnecessarily and needlessly duplicate much of what will appear in our briefs. Today we propose only to deal, as compactly as possible, with some of the more salient features of this trial and to endeavor to achieve a synthesis and emphasis which will be helpful to the Tribunal in striking a final balance.

Several defenses which have been urged in this case are common to nearly all of the trials which have been held in Nurnberg [sic]. For the most part, these defenses have been argued on numerous occasions by both prosecution and defense, and have been determined and re-determined in a succession of judgments. With these defenses, we do not propose to deal at length again on this occasion. For example, counsel for the defendant Leeb, in his opening statement, challenged the entire concept of the crime against peace as invalid on the basis that it is ex post facto law.[1] As to this argument, the prosecution finds itself quite unable and, indeed, feels it quite unnecessary, to add anything to what it has urged on numerous prior occasions or to what has been set forth

1. Opening Statement of Dr. Hans Laternser, p. 30.

in the judgment of the International Military Tribunal and the judgments of Military Tribunals III and VI in the Farben case and the Krupp case. Likewise, it has been repeatedly suggested that the so-called defense of "superior orders" is a complete bar to the prosecution of these defendants. This argument, also, has been extensively briefed and argued in all the previous Nurnberg [sic] trials, and has been discussed and rejected in the judgments. We will have considerable to say concerning the extent to which this plea should be given weight by way of mitigation, but we do not propose to deal with it again as a defense. On such matters, we will content ourselves by submitting appendices to the Court containing references to or quotations from the relevant portions of previous judgments.

We will deal first with the charges in Counts One and Four of the Indictment relating to the crime against peace, which the International Military Tribunal described as [1] "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole". Similarly, Presiding Judge Anderson, in his concurring opinion in the Krupp case, declared [2]"that aggressive war is the supreme crime and no penalty is too severe for those who are responsible for it". And Judge Wilkins, in his special concurring opinion in the same case, stated: [3]

"The accusation to have committed a crime against peace is the gravest that can be raised against any individual. It transcends any other crime, as far as regards the sinister character of the

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1. Vol. I, Trial of the Major War Criminals, p. 186

2. Concurring Opinion of Judge Anderson, in United States v. Alfried Krupp (Case No. 10), p. 1-2.

3. Special Concurring Opinion of Judge Wilkins, in United States v. Alfried Krupp (Case No. 10), p. 38.

criminal intent, the amount, magnitude and duration of harm and evil which it necessarily involves and the disregard for the sufferings of persons and entire nation, including the wrongdoer's own fellow-citizens and own country."

The general principles to be applied in determining the built [sic] or innocence of the individual defendants in this case are principles well-known and generally accepted in the penal law systems of civilized nations generally. The most elementary and basic prinicple is that original guilt always requires two elements - action and state of mind. Both are essential. The fact that a man thinks, desires, or concludes is not in itself criminal, no matter how vicious or depraved these thoughts, desires, or conclusions may be. Nor is an act, standing alone, ordinarily to be judged criminal, regardless of the actor's concomitant state of mind or knowledge.

That this basic principle is applicable in the field of international penal law, just as in domestic penal law, is abundantly apparent from the judgment of the International Military Tribunal and the judgments in the Farben and Krupp cases. Thus, with respect to the necessary element of "action" or "participation", in the case before the IMT the defendant Kaltenbrunner was acquitted of the charge of planning and preparing aggressive war because the evidence against him was not thought to "show his direct participation in any plan to wage such a war."[1] The defendant von Shirach was acquitted of the same charge because "it does not appear....that he participated in the planning or preparation of any of the wars of aggression."[2] And the defendant Schacht was acquitted of part of the charge of conspiracy to wage aggressive war because "his partipation

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1. Vol. I, Trial of the Major War Criminals, p. 291.

2. Idem, p. 318

in the occupation of Austria and the Sudetenland....was on such a limited basis that it does not amount to participation in the common plan."[1] With respect to the requirement of "knowledge", or "state of mind, we find that the defendant Streicher was acquitted by the IMT because "there is no evidence to prove that he had knowledge' of Hitler's plans.[2] The same is true of the defendants Fritzsche (for lack of showing "that he was informed of the decisions taken")[3] and Bormann (for lack of showing "that Bormann knew of Hitler's plans to prepare, initiate, or wage aggressive wars").[4] And, apart from Austria and the Sudetenland, the acquittal of Schact was also expressly based on lack of knowledge:

"The case against Schacht, therefore, depends on the inference that Schacht did in fact know of the Nazi aggressive plans....The Tribunal has...come to the conclusion that this necessary inference has not been established beyond a reasonable doubt."

The Krupp and Farben judgements follow the IMT decision in importing into international penal law, with respect to crimes against peace, this dual requirement of participation and knowledge. Thus, in the Farben judgment, the IMT decision is construed as supporting a finding of guilt "only where the evidence of both knowledge and active participation was conclusive".[6] Judge Anderson, in his concurring opinion in the Krupp judgment, expressed

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1. Vol. I, Trial of the Major War Criminals, p. 309.

2. Idem, p. 302.

3. Idem, p. 338.

4. Idem, p. 339.

5. Idem, p. 310.

6. United States v. Krauch (Case No. 6), p. 29

7. Concurring Opinion of Judge Anderson, United States v. Alfried Krupp (Case No. 10), p. 47.

"The requisite knowledge, I think, can be shown either by direct or circumstantial evidence...Such knowledge being shown, it must be further established that the accused participated in the plan...."

Judge Wilkins' opinion is to the same effect.[1] He said:

"The principles of criminal liability applicable with respect to the Crime Against Peace are the same elementary and basic principles applicable generally with respect to other crimes. The basic principle is that criminal guilt requires two essential elements, namely, action constituting a participation in the crime, and criminal intent."

The observance of these principles is especially important in connection with the charge of aggressive war. The concept of the crime against peace is of grave import to the world and every nation in it, and we must insure that the doctrine is neither extended beyond the bounds of reason, justice, and common sense, nor contracted into a meaningless legal stereotype. The elementary legal requirement that both participation and knowledge be clearly established is the best safeguard against killing off the concept of the crime against peace either by dropsy or malnutrition. It will benefit no one, least of all the prosecution, to urge a definition of the crime against peace which would sweep within its purview thousands of more or less ordinary mean and women. The prosecution would be the last to suggest a rule which would incriminate the ordinary soldier whose participation in those gigantic ventures was infinitesimal, or anyone who lacked the intelligence or opportunity to realize the aggressive character of the wars of conquest launched by the Third Reich.

But by the same token we must not adopt a standard which would exculpate those whose participation and knowledge are clearly established. It is both unnecessary and impossible, and indeed it would be presumptuous, to attempt any ultimate

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1. Special Concurring Opinion of Judge Wilkins, United States v. Alfried Krupp (Case No. 10), pp. 38-39.

detailed statement of what must be shown by way of participation and knowledge in order to establish guilt on the charge of committing crimes against peace. It is the very essence of "customary" or "common" law, such as international penal law is, to bring about the refinement and perfection of legal concepts in application case by case. As to the requirement of "participation", we suggest that it is necessary to establish substantial activity in a responsible capacity, directly connected with building up the power of a country to wage war, or with the actual waging of war. As to "state of mind", we believe that there must be showing of knowledge that military power would be used to carry out a policy of conquest by war or threat of war. When we speak of "knowledge", we mean knowledge based on information of such amount and kind as must have brought conviction to a man in the position and circumstances of the defendant. We submit that these standards are as precise as general standards in the law can ever be, and that they are conservative in their scope.

We have stressed these legal requirements because we believe them fundamental to a wise and just application of the concept of crimes against peace. We think that the evidence in this case fully meets these requirements, and is more than adequate to establish guilt beyond a reasonable doubt. And it will greatly aggravate the risks to which civilization stands exposed - grave indeed as they are now - if this concept is withered at the roots, by the exoneration of those who are truly guilty of this terrible crime.

I come now to Count One and Count Four of the Indictment in this case each of which embodies a charge of the commission of crimes against peace as defined in Par. 1 (a) of Article II of Control Council Law No. 10. Count One charges

the initiation of invasions and wars of aggression in violation of international law, including the planning, preparation, initiation, or waging of wars of aggression or wars in violation of international agreements. Count Four charges the defendants with participating in a common plan or conspiracy for the accomplishment of the matters charged in Count One. Count One of the Indictment in this case corresponds, in general, to Count Two of the Indictment before the International Military Tribunal; Count Four of the Indictment in this case corresponds to Count One of the Indictment before the IMT. Count One of of the Indictment in this case corresponds to Count One of the Indictments in the Krupp and Farben cases, and Count Four of this Indictment corresponds to Count Four in the Krupp case and Count Five in the Farben case. The relation - involving both differences and similarities - between the charge of planning of waging aggressive wars on the one hand, and conspiracy to that end on the other hand, has been discussed or touched on in the IMT, Krupp and Farben judgments, in numerous arguments before the Nurnberg Tribunals, and in many speeches and articles concerning the Nurnberg trials.

The classical definition of conspiracy at English common law is that it is a confederation to effect an unlawful object, or to effect a lawful object by unlawful means.[1]

Within the scope of this definition, conspiracy is little more than an elaboration of the of the law of attempts, in cases where the conspiracy was unsuccessful in attaining its object, or of the law of principals and accessories and accomplices, if the conspiracy succeeded in attaining an unlawful object. Within this sphere, the law of conspiracy

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1. Vol. II, Wharton's Criminal Law, (12th Ed.), p. 1853, and cases there are cited.

is, in essence, merely another manifestation of the problem, common to all legal systems, of how closely or in what way an individual must be connected with a crime in order to render him criminally responsible.

It should be noted that the mention of "conspiracy" in Paragraph 1 (a) of Article II of Control Council Law No. 10 is not the only provision of Law No. 10 dealing with this question of the degree of connection with crime. Paragraph 2 of Article II is solely concerned with this same question and declares that a person is to be deemed guilty if he was a "principal" or an "accessory", or was connected with the crime in certain other specific respects. This paragraph does not employ the word "conspiracy", but its scope is, we suggest, at least as broad as that of the doctrine of conspiracy.

In dealing with the charge of conspiracy in Count Four of this Indictment, therefore, we are dealing only with the question of what degree of connection with the crime against peace a defendant must be shown to have had in order to render him criminally liable. In this field, Anglo-Saxon jurisprudence uses the terminology of principals and accessories, accomplices and confederates, conspiracies and attempts. In other judicial systems, these words and other words are used. There are some differences between the various systems, but the basic purpose of these concepts is common to all systems.

The distinctions and subtleties which have been woven around the concepts of attempt, necessary, and conspirator in Anglo-Saxon law are somewhat refined and surely there is much overlapping, as has been pointed out in a leading text on Anglo-Saxon criminal law.[1] Judge Anderson, in his

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1. Vol. II, Warton's Criminal Law (12th Ed.), p. 1861.

concurring opinion in the Krupp case, observed that:[1]

"Conspiracies differ from attempts only in that in the former it is not necessary that the act of the accused shall approach as near to the consummation of the criminal objective as in the latter and in conspiracy, as distinguished from attempt, two or more persons are necessarily involved."

Where, as in this case, many more than two persons are involved and the criminal objective was actually consummated, the distinction between criminal guilt as a conspirator, or as a principal, accessory, or confederate, becomes well-night imperceptible.

Is there, then, any real distinction between the charges in Counts One and Four of this Indictment? Judge Anderson has expressed the view that the offense of "conspiracy" is identical with the offense of "planning, preparation, or initiation" of aggressive war, but that "waging" is a distinct offense. As he put it:[2]

"As already pointed out, the IMT seems to have regarded the 'planning, preparation, initiation and waging' of aggressive wars as constituting two separate offenses, one consisting of the acts of 'planning, preparation and initiation', and the other of 'waging' aggressive war. To repeat, the offense of planning, preparation and initiation of aggressive wars is, in practical effect, the same as the conspiracy."

Very likely Judge Anderson was led to this conclusion by the circumstance that the IMT acquitted the defendant Doenitz of conspiracy to wage aggressive wars, and expressly found that he did not plan, prepare, or initiate such wars, but nonetheless convicted him of wagon aggressive wars.[3] And, at first glance, one might find further support for Judge Anderson's conclusion in the following language from the IMT judgment:[4]

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1. Concurring opinion of Judge Anderson in United States v. Alfried Krupp (Case No. 10), p. 36

2. Idem, p. 57.

3. Vol. I, Trial of the Major War Criminals, p. 310.

4. Idem, p. 224.

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"Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offense as planning, preparation, initiation, or waging of a war of aggression ' or participation in a Common Plan or Conspiracy for the accomplishment....of the foregoing.' The Indictment follows this distinction. Count One charges the Common Plan or Conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both Counts. We shall therefore discuss both Counts together, as they are in substance the same. The defendants have been charged under both Counts, and their guilt under each Count must be determined."

Indeed, this language on its face seems to go even further than the Doenitz decision, and to remove the distinction between the charge of conspiracy and the charge of "waging" aggressive war.

But, despite the language quoted above, when it came to determining the guilt or innocence of the individual defendants, the IMT came to very different conclusions under Count One of that Indictment - charging conspiracy - than it did under Count Two, which charged with the planning, preparation, initiation and waging of aggressive wars. Eight defendants were convicted under Count ONe, charge for conspiracy, and fourteen were acquitted. Twelve defendants were convicted under Count Two. What a judgment actually stands for is to be determined much more by what it finally holds than by two or three sentences taken from an opinion 170 pages long. And the actual holdings of the IMT judgment show that the IMT treated the charge of conspiracy very differently from the charge of planning and waging aggressive war. Nor do the actual holdings conform any better to Judge Anderson's conclusion that "waging" is to be treated separately, but that "planning, preparing, and initiation of aggressive wars" is, in practical effect, the same as the conspiracy.

This is clearly shown by the decision with respect to the defendant Funk, who was acquitted on the charge of conspiract, but was nevertheless convicted on the charge of planning and preparing aggressive war. The judgment with respect to Funk stated that:

"Funk....took office as Minister of Economics and as Plenipotentiary for War Economy in early 1938, and as President of Reichsbank in January 1939.....

Funk became active in the economic field after the Nazi plans to wage aggressive war had been clearly defined.....On 30 May 1939, the Under Secretary of the Ministry of Economics attended a meeting at which detailed plans were made for the financing of war.

On 25 August 1939, Funk wrote a letter to Hitler expressing his gratitude that he was able to participate in such world shaking events; that his plans for the 'financing of the war', for the control of wage and price conditions and for the strengthening of the Reichsbank had been completed; and that he had inconspicuously transferred into gold all foreign exchange resources available to Germany. on 14 October 1939, after the war had begun, he made a speech in which he stated that the economic and financial departments of Germany, working under the Four Year Plan, had been engaged in the secret economic preparation for war for over a year.

Funk participated in the economic planning which preceded the attack on the USSR. His deputy held daily conferences with Rosenberg on the economic problems which would arise in the occupation of Soviet territory. Funk himself participated in planning for the printing of ruble notes in Germany prior to the attack, to serve as occupation currency in the USSR. After the attack he made a speech in which he described plans for aggressive war....He did, however, participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count Two of the Indictment."

The Tribunal, the IMT, proceeded to acquit Funk of the charge of conspiracy embodied in Count One, but convicted

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1. Vol. I, Trial of the Major War Criminals, p. 304-305.

him under Count Two, and the quotation above shows that it was for planning and preparing aggressive wars. Thus, we submit, clearly establishes that the IMT regarded the evidence against Funk as insufficient to convict him on the charge of conspiracy but sufficient to convict him on the charge of planning and preparing aggressive war, and this decision is therefore inconsistent with Judge Anderson's view that "planning, preparation and initiation of aggressive wars is, in practical effect, the same as the conspiracy". To the same effect is the IMT judgment on Funk with respect to the defendant Frick.[1]

The reason why the IMT construed the concept of "conspiracy" more narrowly than the concept of "planning, preparing, initiating and waging" is clear, I think, if we keep in mind that in these proceedings we are applying international penal law, and that we must not approach these problems solely from the standpoint of any single judicial system. During the last century, continental jurists have regarded the concept of conspiracy as somewhat dangerous and, on the whole, unnecessary in view of the broadening of the concept of attempts. Thus, "conspiracy (Komplott), as a distinct offense, was stricken from the revised codes of many of the German states during the 19th century".[2] Many French jurists also look upon the doctrine of conspiracy with disfavor. The French member of the IMT, Professor Donne-dieu de Vabres, has stated:.[3]

"The general notion of conspiracy is peculiar to British law. The indictment includes in this term

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1. Vol. I, Trial of the Major War Criminals, p. 299-300.

2. Vol. II, Wharton's Criminal Law (12th Ed.), p. 1861.

3. Donnedieu de Vabres, Le Process de Nuremberg, unpublished lecture, spring of 1945, to the Associations des Etudes Internationales et Criminologiques.

the entire Hitlerian enterprise leading to the seizure of power and to aggressive war.....

The danger of such incrimination is to open the door to despotism. The charge of conspiracy is the favorite weapon of tyranny."

The above considerations, we suggest fully explain why the IMT applied the concept of "conspiracy" in international penal law much more narrowly than the concept of "planning, preparing, initiating and waging". Under the IMT holdings, it appears that, in order to be guilty of conspiracy, the defendant must have occupied a more prominent role, or have been in closer contact with the Chief of State, than is necessary in the case of "planning, preparing, initiating and waging". Thus, in the case of the defendant Funk, the IMT found that he was "not one of the leading figures in originating the nazi plans for aggressive war."[1] And with respect to the defendant Frick, who was also acquitted of conspiracy but convicted of "planning, preparing, initiating, and waging", the IMT stated:[2]

The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment.

It is too soon to tell what place the doctrine of conspiracy will eventually occupy in international penal jurisprudence. In the IMT judgment, the views of the continental jurists prevailed. mr. Henry L. Stimson criticized the IMT judgment on precisely this ground:[3]

If there is a weakness in the Tribunal's findings, I believe it lies in its very limited construction of the legal concept of conspiracy. That only eight of the 22 defendants should have been found guilty on the count of conspiracy to commit various crimes involved in the indictment seems to me surprising. I believe that the Tribunal would have been justified in a broader construction of the law of conspiracy....

In his opinion on the Krupp case, Judge Anderson came to a contrary conclusion:[4]

No less authority than mr. Henry L. Stimson, one of the greatest American statesmen and lawyers, has regretted that the IMT gave a restricted construction to the provisions of the London Charter relating to the crime of conspiracy, but with due deference to all concerned, I have felt bound to disagree.

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1. Vol. I, Trial of the Major War Criminals, p. 305

2. Idem., p. 299.

3. Henry L. Stimson, "The Nuremberg Trial: Landmark in Law, Vol 25 "foreign Affairs" No. 2 (January 1947), p. 187.

4. Concurring Opinion of Judge Anderson in United States v. Alfried Krupp (Case No. 10), p. 72.

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In the present case, at least as to most of the defendants, the distinction drawn by the IMT between "conspiracy" and "planning, preparing, initiating, andwaging [sic]" is, we believe, academic, for most of the defendants attended one or more of the Hitler conferences which Funk and Frick did not attend. As is apparent from the IMT judgment, attendance at these conferences, or other opportunity to learn at first hand of Hitler's intentions, was the test generally utilized by the IMT to determine whether an individual defendant was guilty of conspiracy. Consequently, most of these defendant would fall within the more limited concept of conspiracy adopted by the IMT and Judge Anderson.

Before leaving the subject of conspiracy, a special word should be added with respect to the invations of Austria and Czechoslovakia. In the indictment before the IMT, these invasions were charged as criminal aggressive acts committed in the course of the conspiracy denounded [sic] in Count One, but were not charged as elements of "planning, preparing, initating, and waging" in Count Two. Consequently, although seven of the eight defendants [1] convicted of conspiracy were convicted in part on the basis of the invasions of Austria and Czechslovakia, none of the convictions under Count Two were or could have been based on the Austrian or Czechoslovakian invasions. Thus, although the defendant Kaltenbrunnen was found to have been connected with the invasion of Austria, the IMT pointed out that "the Anschluss, although it was an aggressive act, is not charged as an aggressive war", [2] and the same observation was in the case of Schacht.[3]

In the present case, however, the invasions of Austria and Czechoslovakia are not only charged as components of the conspiracy under Count Four of this indictment, but also as invasions and aggressive acts under Count One. And the Imt found that the seizures of Austria and Czechoslovakia were "invasions" and "acts of aggression"[4] and expressly held that the occupation of Austria was a "crime within the jurisdiction

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1. All but Rosenberg.

2. Vol. I, Trial of the Major War Criminals, p. 291.

3. Idem., p. 309.

4. Idem., pp. 192, 194, and 198.

of the Tribunal".[1] Consequently, whereas the IMT was obliged under the indictment before it to treat the invasions of Austria and Czechoslovakia only under the charge of "conspiracy", no such necessity exists under the indictment in this case.

C. The Responsibility of Military Leaders for Crimes Against Peace.

MR. NIEDERMAN: Throughout the proceedings before this Tribunal and before the IMT, the defense has contended that the military leaders, by virtue of the very nature of their profession, are not susceptible to prosecution for crimes against peace and war crimes. The reasoning in support of this position has been stated in various ways. Sometimes it takes the form of the argument that the doctrine of superior orders is a complete defense to the prosecution of a military leader. Before the IMT, Dr. Laternser declared that the German military leaders were being prosecuted because they served their country as soldiers, and argued that a military man "is not allowed to decide for himself whether the cause for which he fights is good or bad", and that it is "his duty to obey and to ask no questions.[2] Counsel for Leeb took the same position before this Tribunal.[3] In this respect, counsel went further than the defendant Leeb himself, who agreed that the acts of a soldier, as of anyone else, must be limited by his own "human conscience", and that a soldier is underno [sic] duty to commit crime.[4]

This argument of military immunity, which would reduce military men to a sort of sub-human status as men incapable of exercising moral judgment on their own behalf--no more answerable to the laws of God and man than animals and small children--has, fortunately, found no acceptance in international penal law. The same arguments were made on behalf of defendants Keitel, Jodl, Doenitz, and Raeder before

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1. Vol. I, Trial of the major War Criminals, p. 318.

2. Plea before the IMT by Dr. Hans Laternser, p. 3.

3. Opening Statement of Dr. Laternser, p. 41.

4. Testimony of Fieldmarshal Leeb before the Commission of the IMT, pp. 1615-16.

the IMT and were unqualifying rejected. Keitel, Jodl, Doenitz, and Raeder were all found guilty of crimes against peace, in addition to war crimes and crimes against humanity. Before the Nurnberg Military Tribunals established under Control Council Law No. 10, military leaders were held answerable under the laws of war and convicted of war crimes by Tribunal V in the so-called "hostage" case (United States v. List, et al., (Case No. 7), as well as in the Medical case and the Milch case.[1] The responsibility of military leaders for crimes against peace has not been involved in any of the previous trials under Law No. 10, but both the Farben and Krupp judgments indicate quite clearly that the military leaders are answerable, just as is anyone else, if there [sic] guilt is established by the evidence. Thus, in the judgment of Tribunal VI acquitting the Farben defendants on the charge of crimes against peace, the Tribunal stated:[2]

The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders.

And Judge Anderson, in his concurring opinion dismissing the charges of aggressive warfare against the Krupp defendants, stressed that the defendants in that case "were private citizens and noncombatants", and that none of them had any "control over the conduct of the war or over any of the armed forces; nor were any of them parties to the plans pursuant to which the wars were waged".[3]

If these remarks are dicta, the judgment of the IMT is not. The decisions as to Keitel, Jodl, Doenitz and Raeder categorically and unequivocally establish that military leaders, just as other men, are bound by the obligations of international law and can be prosecuted for violations thereof, whether the charge be the commission of crimes against peace or of crimes against the laws and customs of war. Indeed, the IMT went much farther, and squarely expressed the view that many military leaders

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1. United States v. Karl Brandt, et al., (Case No. 1); United States v. Erhardt Milch (Case No. 2).

2. United States v. Carl Krauch, et al., (Case No. 6); p. 63.

3. Concurring opinion of Judge Anderson in United States v. Alfried Krupp, et al., (Case No. 10), p. 65.

other than the four whom it convicted as individuals, must also have been guilty of crimes against peace and war crimes. The IMT declined to render a declaration of criminality against the General Staff and Hi Command on the ground that it was not an "organization" or "group" within the meaning of that word as used in the London Charter, but in so doing the IMT declared:[1]

Although the Tribunal is of the opinion that the term "group" in Article 9 must mean something more than this collection of military officers, it has heard much evidence as to the participation of the officers in planning and waging aggressive war, and in committing War Crimes and Crimes against Humanity. This evidence is, as to many of them, clear and convincing.

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Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should escape punishment.

We may take it as established, then that the guilt or innocence of these defendants under Counts One and Four of the indictment is to be determined on the basis of the same principles as are applicable in the case of other defendants charged with the planning and waging of aggressive war. We come back once again to the two necessary elements of act and state of mind. In order to establish their guilt, it must be shown that they carried on substantial activity in a responsible capacity in connection with the planning or waging of war. It must be shown that they carried on such activity with the knowledge that the military power would be used, or was being used, to carry out a policy of conquest by means of aggressive wars or the threat of aggressive wars.

In order to determine whether the element of "participation" has been sufficiently established against any given defendant, it is necessary to establish the position or positions which be occupied at the time the aggressive wars were being planned and waged, and the nature and scope of the authority, responsibility, and duty which attached to his position or positions. In this connection, we suggest, the defendants rank is but one factor to be considered among numerous others. To be sure, it is

1. Vol. I, Trial of the Major War Criminal, pp. 278-79.

ordinarily true that a General discharges more important and responsible functions than a Major, that he is in a better position to influence the course of events, and that he is likely to have better access to information. But this is by no means universally true. A young staff officer of relatively junior rank at OKW or OKH, for instance, might well have much better information and far more actual influence in planning operations than a very much more senior officer in a routine training or administrative position. In the field, the Chief of Staff of an Army or Army Group would ordinarily have responsibilities and information of far broader scope than the commander of a division, though the latter might well be of a senior rank. In short, the matter of rank should not be altogether overlooked, but it should not be given more weight than the circumstances in any given case warrant.

Similarly, as a general and abstract proposition of international penal law, we can not gauge the question of participation solely by the size of the formation which an officer commands. In wars between the major military powers the commander of a battalion, regiment, brigade or even division may not loom very large. But in wars between the small countries, a battalion or even a company may be the strategic equivalent of a division. Analogously, the role of the German military leaders in the conquest of Denmark is not to be lightly pushed aside merely because the Danish army was small and therefore very few German troops had to be employed to effect the conquest of Denmark.

In short, in determining such questions as the degree of "participation", or whether the information available, to a man must have been sufficient to bring conviction to his mind, we must apply the standards of reasonable man to the circumstances in watch case as they appear from the evidence.

D. The Evidence Relied Upon by the IMT: Keitel, Jodl, Raeder and Doenitz.

Before turning to the evidence with respect to the defendants in this case, it will be profitable to look once more at the opinion of the IMT. By examining the judgments of the IMT against the military

defendants in that case -- Keitel, Jodl, Raeder and Doenitz -- we may ascertain what facts and circumstances were held to constitute the necessary evidence with respect to participation and knowledge in order to support the verdict of guilty which was rendered as to all four of those defendants.

There was, of course, a fifth military defendant tried by the IMT -- Hermann Goering, who was the Commander-in-chief of the Luftwaffe. Goering, however, was not a career soldier, and his offices and responsibilities under the Third Reich were of so varied a nature that his inclusion with Keitel, Jodl, TRaeder, and Doenitz would not be illuminating. We may note, however, that the IMT, in finding him guilty of crimes against peace, stressed the role which the Luftwaffe played in the subjugation of Czechoslovakia, Goering's meetings with Hitler and the other military leaders on 23 May 1939 and 22 August 1939 which preceded the attack on Poland, his participation in planning the invasion of Norway, and his status as Commander-in-Chief of the Luftwaffe in all the aggressive wars.

Keitel, as Chief of the OKW, had no command authority over the three branches of the Wehrmacht, but was in effect the Chief of Hitler's own military staff, which assisted and advised the Fuehrer in the preparation of his directives and coordinated the operations of the Army, Navy, and Air Force.[1] Keitel was held to have been connected with all the invasions and aggressive wars involved in the IMT case. With respect to Austria, Keitel -- together with Reichenau and the defendant Sperrle -- attended the conference with Schuschnigg in February 1938, in order to make a "military demonstration". When Schuschnigg called for a plebiscite on the question of Austrian independence, Keitel participated in the improvised military arrangements for the march into Austria. During the ensuing months, Keitel signed or initialed many of the OKW directives and memoranda in the so-called

1. Vol. I, Trial of the Major War Criminals, p. 288*89.

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"Fall Gruen", the plan for the military destruction of Czechoslovakia. After Munich, he initialed other directives for the conquest of the remainder of Czechoslovakia. Keitel was present at the conference with Hitler on 23 May 1939, when the Fuehrer announced his intention "of attacking Poland at the the first suitable opportunity", and signed or initialed various of the directives in connection with "Fall Weiss", the plan for the military destruction of Poland. The plane for the invasion of Norway and Denmark were originated by the German Navy, and were finally completed by the special inter-service staff under Keitel's supervision. Keitel signed various directives for the attack in the West, in violation of the neutrality of Belgium, HOlland, and Luxembourg. He initialed many directives in "Fall Barbarossa", the plan for the military destruction of the U.S.S.R., and attended Hitler's conference with the military leaders on 14 June 1941, just before the attack.

Jodl was Section Chief in the OKW in charge of operational planning.[1] The evidence relied upon by the IMT to support his conviction in general parallels the evidence against Keitel. Jodl, however, was assigned to a minor troop command from September 1938 to September 1939, and accordingly was not found to have been involved in the occupation of Bohemia and Moravia or the attack against Poland. He participated in improvising the plans for the invasion of Austria, and initialed many of the directives and memoranda in "Fall Gruen". He played a part in planning the invasion Norway and Denmark and the attack in the West, and continued his planning activities in connection with the invasions of Greece, Yugoslavia, and the Soviet Union. He was present at the conference between Hitler and the military leaders on 14 June 1941, just before the Russian campaign.

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Raeder was the Commander-in-Chief of the German Navy from 1928 to 1943.[1] In support of his conviction on the charge of crimes against peace, the IMT found him responsible for re-armament of the German Navy in violation of the Treaty of Versailles. He was present along with Goering, on Fritsch, and others, at the conference in November 1937 at which Hitler outline [sic] his plans for the eventual occupation of Austria and Czechoslovakia, and received various of the directives in connection with "Fall Gruen". He likewise received directives in connection with the attack against Poland, and directed the supporting activities of the navy i connection therewith; he was present at the meetings with Hitler in May and August 1939 at which Hitler announced his intentions. ON the suggestion of a subordinate, Raeder initiated the idea of invading Norway, and his staff participated through the OKW in developing the plans for the attack on Denmark and Norway. He received many directives in connection with the wars against Greece, Yugoslavia, and the Soviet Union, and the German Navy lent minor support to these operations.

Doenitz was acquitted on the charge of conspiracy, and his conviction under Count Two of the indictment before the IMT was based on much narrower grounds than in the case of the other three military defendants.[2] He was a Rear Admiral in command of the submarine arm of the German Navy when war broke out, but rose rapidly and succeeded as Commander-in-Chief of the Navy in 1943. He was not present at any of the conferences where Hitler's decision [sic] were announced. He was convicted of waging aggressive war apparently upon the basis that the U-boat arm was the most important part of the German fleet, and that he received sufficient advance information in order to coordinate submarine operations with the other activities of the Wehrmacht. With respect of the invasion of Norway and Denmark, the IMT

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1. Vol. 1, Trial of the Major War Criminals, pp. 315*16

2. Vol. 1, Trial of the Major War Criminals, pp. 206, and 310-311.

emphasized that Doenitz made out the operational orders for the supporting U-boats in March 1940, five weeks in advance of the actual attack.

E. The General Scope of the Evidence Against the Defendants in the Present Case.

If we apply the principles which have been set forth above to the present case, it will appear that the evidence is abundant and more than sufficient to establish and requisite degree of participation and knowledge on the part of these defendants. Furthermore, in the case of most of the defendants, the evidence is very parallel to and quite as strong as the evidence relied upon by the IMT in convicting Keitel, Jodl, and Raeder. As to one or two of the defendants -- such as the defendant von Roques -- where the evidence under Counts One and Four fall short of this standard, the proof is nonetheless as strong as or stronger than the proof on the basis of which Doenitz was convicted by the IMT of waging aggressive war.

In terms of the nature of "participation" it will be observed that the thirteen defendants should be divided into two more or less distinct groups. Four of the defendants -- Schneiwind, Reinecke, Warlimont and Lehmann -- were lending staff officers whose activities were carried on at the very highest levels, the OKW and the OKH. To borrow a phrase from American military vocabulary, we would say that these four defendants functioned "at War Department level". The importance of Schneiwind's position position as chief of the Marinekommandoamt and Chief of Staff of the SKL, where he was in charge of all matters pertaining to operations and intelligence, meeds no emphasis. During the years from 1938 to 1941, when the invasions and aggressive wars were planned and launched, Schniewind's role in planning and guiding the operations of the German Navy as a whole was second only to that of Raeder himself. With Raeder, he attended three of the four conferences stressed by the IMT at which Hitler outline [sic] his plans, so heavily relied

upon by the IMT in finding Keitel, Jodl, and Raeder guilty of conspiracy to wage aggressive war. He was active in the invasion of Norway and Denmark, in which the Navy played a major role. He received the same directives which Raeder received in connection with the wars in which the German Navy played a smaller part.

During the same period, Reinecke and Lehmann were the chiefs of important departments of the OKW. They were not directly concerned with operations, and did not attend the major meetings which Hitler held with the military leaders, but each within his own sphere -- law, prisoners of war affairs, and other important fields -- was called upon to plan for coming operations, and to issue appropriate directives during the course of the wars and for the occupation of enemy territory. Thus, in advance of the Russian campaign, Lehmann participated in preparing and distributing the "Commissar Order", and Reinecke made plans for the screening and handling of Russian prisoners of war.

The defendant Warlimont was fully informed of all operational intentions, and participated actively in the preparation of operational plans, but his activities transcended purely operational matters, and it is safe to say that no defendant in the dock was connected in such a multiplicity of ways with the planning and waging of aggressive war as was Warlimont. He is a prime example of the fact that the importance of a military leader's activities and the information at his disposal can not be determined merely by his rank.

The other nine defendants were all top level field commanders. The defendant Sperrle, from the outbreak of the war to August 1944, commanded an Air Fleet (luftflotte), the Air Force equivalent of an

Army Group. He transferred to the Luftwaffe at about the time of the denunciation of the arms limitation of the Treaty of Versailles in 1935, and, as Commander of the Condor Legion in Spain, commanded the revived air arm of the Wehrmacht in its first combat test. Sperrle, together with Keitel and Reichenau, participated in the "military demonstration" at the Schuschnigg conference, and Sperrle commanded the Air Force which would have been used for the conquest of Czechoslovakia pursuant to "Fall Gruen". As Commander of the German Air Forces in the West, Sperrle participated in numerous high-level planning conferences and in the preparation and execution of the invasion of the Low Countries and France.

Of the other eight defendants, all except Roques were top flight Army field commanders who, during the course of the war, commanded Army Groups or Armies. The overall plans of campaign for Germany's aggressive wars were laid down in directives from OKW and OKH, and their practical application in the field was developed by the Army Group and Army commanders pursuant to these directives, and in consultation with the Commander-in-Chief of the Army and his Chief of Staff. As is clearly shown by the Halder Diary and a mass of other evidence, the leading figures in the final development of these plans were the Commanders-in-Chief of the Army, von Brauchitssch, and his Chief of Staff, Halder. During the period from 1938 to June 1941, when the invasions and aggressive wars were being planned and launched, all of these defendants except Reinhardt and Roques were, at one time or another, Commanders-in-Chief or Chiefs of Staff of Armies or Army Groups. Until the end of 1941, the defendant Leeb, von Rundstedt, and von Bock were the only three Army Group commanders. The defendant Kuechler, from the very beginning, was the Commander-in-Chief of an Army, and he succeeded Leeb, upon the latter's retirement, as the Commander-in-Chief of an Army Group. The defendant

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Hoth was a Corps Commander during the Polish and Western campaigns, but commanded a Panzer Group, the tactical equivalent of an Army, when the Russian invasion was launched. The defendant Salmuth was the Chief of Staff of an Army Group until May 1941, when he became a Corps Commander. The defendant Hollidt was the Chief of Staff of an Army until the conclusion of the Polish campaign, at which time he became a Divisional Commander, and succeeded Hoth as the Commander of a Panzer Group a few months after the launching of the Russian invasion. The defendants Roques and Woehler are charged under Count One only with respect to the aggressive war against the Soviet Union; Woehler was at this time the Chief of Staff of an Army, and Roques was the Commander of an Army Group Rear Area, with the status of a Corps Commander. Of these defendants, Leeb, Kuschler, Hoth, and Salmuth attended several of

the meetings at which Hitler declared his intentions. Woehler, as Chief of Staff of the Eleventh Army, participated extensively in planning the campaign against the Soviet Union, and Reinhardt and Roques developed tactical plans at corps level.

F. The Contentions of the Defense, Analyzed by Way of Illustration

The foregoing is but the barest skeleton outline of the evidence against the defendants under Counts One and Four of the indictment. In our brief covering Counts One and Four, we are including a detailed summation of the evidence with respect to each defendant, and it would serve no useful purpose to duplicate here what we are setting forth in the brief.

Before concluding our statement under Counts One and Four, however, we will devote some attention to the contentions which have been put forth on the part of the defense to meet the prosecution's evidence. Most of these defenses and explanations are common to all or most of the defendants, and it would be possible to discuss these defenses in general terms. We think, however, that it will be more helpful to the Tribunal if we analyze these defenses in the specific form in which they have been put forth by several of the individual defendants, for in this manner the factual and legal issues will be more closely joined. We will discuss these defenses, therefore, by examining the evidence which has been adduced and the arguments which have been advanced on behalf of the defendants Leeb, Schniewind, and Lehmann. If the Court please, Mr. Rapp will continue with the reading.

THE PRESIDENT: Mr. Rapp.

BY MR. RAPP: If the Tribunal please—

1. Von Leeb

The defendant von Leeb was in retirement from February until July of 1939, and accordingly played no part in the invasion of Austria. He was not involved in the invasion and occupation of Denmark and Norway,

nor of Greece and Yugoslavia, and is not charged under the paragraphs dealing with the aggressive wars against those four countries. Leeb and Runstedt, as the two most senior German generals played a leading part in the expansion of the German army between 1933 and 1938, and Leeb is specifically charged in connection with the invasion of Czechoslovakia, and the aggressive wars launched in three major campaigns; against Poland, France and the United Kingdom in 1939, against Belgium, Holland, and Luxembourg in 1940, and against the Soviet Union in 1941.

Before dealing with Leeb's role in these aggressive wars, we would like first to dispose of certain arguments put forth in his behalf which seem to us patently wide of the mark. For example, Leeb testified that he wrote a book on defensive warfare,[1] and his counsel's opening statement laid great stress on the supposed contrast between the fact that Leeb is charged here with waging aggressive war and the fact that he is a specialist in defensive warfare.[2] The prosecution is quite unable to perceive the relevance of this evidence. It is quite apparent that a nation which is defending itself against an aggressive attack may well, if it is able, adopt offensive strategy and tactics in self defense; it is equally apparent that an aggressor nation may find it necessary at times to resort to defensive strategy and tactics. The defendant Schniewind during the course of his testimony pointed out very clearly the "distinction between military offensive measures and measures pertaining to aggressive war".[3] The armour plating on battleships is defensive armament, and soldiers wear helmets to protect their heads from injury, but if the battleship attacks the naval force of a peaceful and friendly nation, or if the soldier engages in an armed onslaught against a peaceful neighboring country, the armour plating and the helmet are surely being used for aggressive purposes. This argument is, to put it bluntly, simply childish. And in any event, when Leeb's forces broke

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1. Tr. p. 2280.

2. Opening statement by Dr. Laternser, pp. 1, 8.

3. Tr. p. 4841.

through the Maginot Line, and when they marched from East Prussia to the gates of Leningrad, Leeb was not conducting defensive warfare.

Certain other contentions are equally superficial. Thus Leeb stressed his opposition to National Socialism because of its "vociferous clamor" and its anti-religious aspects;[1] he repeatedly emphasized that he is devoutly religious,[2] and that he protested Himmler's decree encouraging mothers to bear children out of wedlock;[3] his counsel in so many words accused the prosecution of being "prejudiced" and "not solely guided by principles of justice" because we have accused Leeb and other "decent people of the best families";[4] witnesses on behalf of Leeb, such as General Halder, also testified that he was devout, and that he suffered certain minor annoyances from the Nazis because of anti-Nazi utterances by his wife.[5] Similar evidence has been given on behalf of other defendants. These contentions do not touch the prosecution's case, and accomplish only the destruction of straw men. We emphasized again and again in our opening statement that the defendants are not charged with being Nazis, and we described in detail the numerous points of friction between Hitler and his party cohorts on the one hand, and the Wehrmacht on the other. None of the defendants is charged with being anti-religious, and no attempt has been made to disparage the family background of any of them. These matters are, to be sure, of importance in evaluating and individual's entire character, but they do not seem to us of much significance in ascertaining the defendant Leeb's share in preparing and waging aggressive war in the light of the mass of direct evidence in the record.

Accordingly, let us look at the evidence with respect to Leeb's role in the occupation of the Sudetenland. The OKW directive for military action against Czechoslovakia was issued in May 1938, when Leeb was in

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1. Tr. p. 2281-82.

2. Tr. p. 2287.

3. Tr. p. 2283-84.

4. Opening statement of Dr. Laternser, p. 21.

5. Tr. p. 1926-27.

Temporary retirement; on the witness stand, Leeb could not recall when we first gained knowledge of "Fall Gruen".[1] According to Leeb, he learned at some unspecified date that he was to command an Army—the Twelfth Army—for the proposed operation against Czechoslovakia. He had been on vacation in the mountains, and sometime in August he came to Munich to discuss the plan. Thereafter, "during the month of August and September" he "continued to participate in the working out of the preparation of the Twelfth Army".[2] Leeb did not "expect the possibility of an armed conflict", because, according to him, Germany proposed only to occupy "a border area", "20 to 30 kilometers deep". In this area there were "either no Czech troops at all", or "if they were stationed there at all, would probably withdraw to the rear areas, in case of our advance". At the end of September "the two interested western powers gave their agreement and consent", and "this invasion was carried out in a peaceful manner". He expressed the astonishing opinion that "probably no shot would have been fired even if this agreement (the Munich Agreement) had not been reached prior to the invasion".[3]

The actual facts, clearly established by the documents in the record and the testimony of the defense witness Halder, tell a totally different story. Leeb's service record shows that, although he was in retirement, he was made available for service with the German Army Headquarters at Munich on 1 July 1938.[4] Leeb was a logical choice to lead an Army into Czechoslovakia; from 1930 to 1935 he had commanded the Military District at Munich, and he was an inhabitant of Bavaria and "knew all about the Bavarian forest area".[5] "Fall Gruen" was not a plan for the occupation of a border area twenty to thirty kilometers deep; as the documents clearly show, it was a plan to "smash Czechoslovakia by military action", to prevent the Czech army from escaping into Slovakia by forcing

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1. Tr. p. 2300.

2. Tr. pp. 2299-2301.

3. Tr. p. 2301.

4. Tr. pp. 2080-2081.

5. Halder, Tr. p. 2080.

it into battle, and to occupy Bohemia and Moravia as speedily as possible. Leeb's Twelfth Army and Rundstedt's Second Army were the two largest armies to be employed in the operation, and Leeb's army was to play a vital role in smashing Czech resistance. Its mission is described in a memorandum of a conference taken from the "Fall Gruen" documents:[1]

Twelfth and Fourteenth Armies will work together. Their columns must necessarily support one another during the thrust and cause the front to collapse. Bohemia only weakly occupied at frontier: 1 Division to 120 kilometers, Operation therefore promising. After the thrust in a northerly direction, Twelfth Army forces east and "races" for Brunn. The enemy will not be able to employ reserves according to plan.

In short, "Fall Gruen" was a highly aggressive plan and was expressly so described by Halder[2]. It was in fact so aggressive and so likely to involve Germany in conflict with the western powers, that most of the leading German generals were violently opposed to it and, according to Halder, even a military revolt against Hitler was planned. The Chief of the German General Staff, Beck, submitted a memo warning that the execution of "Fall Gruen" would precipitate a world war. The German generals did not think that Germany was prepared for such a war, and Halder testified that they went to dangerous extremes to forestall such a development.[3] Indeed, this very episode is one of the matters chiefly relied upon by the defense in order to show that the German generals did not have an aggressive mentality and were opposed to Hitler. In the face of this overwhelming evidence, Leeb's testimony that "Fall Gruen" was a mere border operation is an unmitigated misrepresentation, and his suggestion that there would have been no fighting even if the Munich agreement had not been reached is utterly fantastic.

Leeb also minimized his own activities in connection with "Fall Gruen" in a manner which finds no support in the record. The picture he paints of himself is at this time as a retired officer, with his mind

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1. 388-PS, Pros. Exh. 1048, Bk. XII, p. 59.

2. Tr. p. 1868.

3. Halder, Tr. p. 1941-44

concentrated on research into family archives and vacations in the mountains, who merely, "took an interest in these preparations", will not withstand a moment's reflection in the light of the record. Leeb and Halder both testified that Leeb took no part in the military planning on the projected attack, [1] but the documents in "Fall Gruen" and the testimony of Leeb and Halder on cross-examination show that a special staff was formed in the summer of 1938 to work out the plan of operations for the Czech attack in the sector of the Twelfth Army. Leeb was, according to his service record, available for service in that very area at that very time, and the special staff was called "Working Staff Leeb". Halder testified that "Working Staff Leeb" was similar to "Working Staff Rundstedt" which was formed the following year to plan the attack on Poland.[2] A memorandum of 23 May 1939 concerning the formation of "Working Staff Rundstedt" states:[3] "The 'Working Staff Rundstedt' consists for the beginning--similar to the "Working Staff Leeb' in Munich in 1938--only of three persons." In 1939 the three persons were Rundstedt, Manstein, and Blumentritt. Working Staff Leeb was composed of Leeb, Manstein, and Blumenttritt; Manstein was Leeb's Chief of Staff in the Twelfth Army, and Blumentritt was the operations officer. Manstein, as Leeb's Chief of Staff, attended a meeting of all the Chiefs of Staff with HItler at the Obersalzberg on 10 August 1939 at which the likelihood of intervention by the western powers, and the weaknesses of the so-called "West Wall", flared up sensationally.[4] Leeb himself testified that, during the August and September, he "continued to participate in the working out of the preparations of the Twelfth Army."[5]

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1. Tr. pp. 2077 and 2436.

2. Halder, Tr. pp. 2082*83.

3. 388-PS, Pros. Exh. 1048, Bk, XII, p. 69.

4. 1780-PS, Pros. Exh. 1034, Bk. XI, p. 17

5. Tr. p. 2300.

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As a result of the Munich Agreement, it was unnecessary to carry out "Fall Gruen". Leeb led his Army into the Sudetenland and remained there until approximately the middle of October,[1] when he left active duty. On the 11th of that month, the OKW asked all Army headquarters, including Leeb's, to report "what reinforcements are necessary in the present situation in order to break all Czech resistance in Bohemia and Moravia?"[2]

Leeb's testimony concerning the outbreak of the war in September 1939 is equally evasive and meretricious. He stated that he was "in retirement" and "did not participate at all"; that, "as a complete surprise to me", he was called to the meeting with HItler on the Obersalzberg on 22 August 1939; and that from Hitler's remarks he gathered only "the impression that the situation was somewhat similar to the situation which prevailed before the invasion of the Sudetenland and…..that there would be no war". He says that he based his conclusion upon Hitler's announcement of the non-aggression pact about to concluded with Russia, upon Hitler's "100% assurance" that France and England would not intervene, and Hitler's statement that negotiations with Poland would continue. He further testified that he commanded Army Group C, with the mission of defending the western front of Germany.[3]

It is, of course, quite preposterous to imagine that Leeb would have been given such a critical assignment--command of the entire western front--without opportunity being afforded to him to acquaint himself with the forces at his disposal, their equipment and their resources for defense in

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1. Tr. p. 2444.

2. 388PS, Pros. Exh. 2048, Bk XII, p. 103

3. Tr. pp. 9301-04.

general. And, once again, the testimony of the defense witness Halder is quite sufficient to demonstrate this absurdity. Halder testified that an attack from the west had to be anticipated as a strong possibility in the event of a German attack on Poland, that the assignment of protecting Germany's western frontier was given to Leeb, and must have known by then "that the possibility of a military operation in the west existed and was being anticipated and that it was his duty in such a case to protect the West with a minimum of forces".[1] The vital nature of Leeb's role in the West is set forth in a directive for the conduct of the war issued on 31 August 1939, which stated: [2]

The Army will hold the Siegried Line (West Wall) and will make preparations to prevent its encirclement in the North by the Western Powers invading Belgium or Dutch territory. If French forces should enter Luxembourg, the frontier bridges may be blown up.

Leeb's "impression" of Hitler's remarks on the Obersalzberg is equally implausible. the non-aggression pact with Russia made it more likely, not less likely, that HItler would press home his advantage ruthlessly. Hitler did indicate a hope that England and France would not intervene, but he gave no "100% assurance", and in fact made it quite clear that he would carry through with his plan for the destruction of Poland regardless of what the western powers might do. So far from expressing any belief that negotiations with Poland would lead to a satisfactory solution, he told the generals: [3]

Poland is in a position in which I wanted her…I am only afraid that at the last moment some schweinehund will make a proposal for mediation.

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1. Tr. p. 2094.

2. C*1266, Pros. Exh. 1099, Bk. XIII, p. 207.

3. 798-PS, Pros. Exh. 1101, Bk XIII, p. 215.

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Hitler also made clear his aggressive intentions against the Western powers, and his cynical contempt for any rudiment of morality in international relations: [1]

It was clear to me that a conflict with Poland had to come sooner or later. I had already made this decision in the spring, by I thought that I would first turn against the West in a few years, and only afterwards against the East. But the sequence cannot be fixed. One cannot close one's eyes even before a threatening situation. I wanted to establish an acceptable relationship with Poland in order to fight first against the West. But this plan which was agreeable to me, could not be executed, since essential points have changed.

Everybody shall have to make a point of it that we were determined from the beginning to fight the Western Powers. Struggle for life of death…..A long period of peace would not do us any good….Destruction of Poland in the foreground….Even if war should break out in the West, the destruction of POland shall be the primary objective….I shall give a propagandistic cause for starting the war,--never mind whether it is plausible or not. The victor shall not be asked, later on, whether we told the truth or not. In starting and making a war, not the Right is what matters, but Victory…..Have no pity. Brutal attitude….Complete destruction of Poland is the military aim….

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1. Idem., p. 213; 1014-PS, Pros. Exh. 1102, Bk XIII, p. 217.

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Conviction that the German Wehrmacht is up the requirements. The start shall be ordered, probably by Saturday morning.

As the IMT found, these records of what Hitler said to Leeb and the other generals show that the final decision for Poland's destruction was reached shortly before 22 August 1939, that a conflict between Germany and the west was unavoidable in the long run, and that although hitler hoped to be able to avoid a simultaneous conflict with Great Britain and France, he fully realized that there was a risk of this happening but it was a risk which he was willing to take.[1]

In the last analysis, the best that can be made out of Leeb's story is that he believed that, if Poland yielded to German demands, there would have been no war: "If the Polish Corridor question would have been solved in a manner tolerable for us, then no war would have resulted".[2] Halder put it in much the same fashion; according to him the preparations for the invasion of Poland "represented a military means of pressure in order to support his political aims".[3] But even Halder admitted that the generals "had some reason to believe that Hitler's intentions were aggressive",[4] and, in any event, the hope that Poland might succumb to the threat of force without actual fighting is no excuse. This was held by the IMT very squarely with respect to the defendant Raeder:[5]

The defendant Raeder testified that neither he, nor von Fritsch, nor von Blomberg, believed that Hitler actually meant war, a conviction which the

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1. Vol. 1, Trial of the Major War Criminals, p. 202.

2. Tr. p. 2448.

3. Halder, Tr. p. 2090-91.

4. Tr. p. 2448.

5. Vol. I, Trial of the Major War Criminals, p. 191*192.

defendant Raeder claims that he held up to 22 August 1939. The basis of this conviction was his hope that Hitler would obtain a "political solution" of Germany's problems. But all that this means, when examined, is the belief that Germany's position would be so good, and Germany's armed might so overwhelming that the territory desired could be obtained without fighting for it. It must be remembered too that Hitler's declared intention with regard to Austria was actually carried out within little over four months from the date of the meeting, and within less than a year the first portion of Czechoslovakia was absorbed, and Bohemia and Moravia a few months later. If any doubts has existed in the minds of any of his hearers in November 1937, after March 1939 there could no longer be any question that Hitler was in deadly earnest in his decision to resort to war.

In this connection, it is interesting to note that Leeb in his direct testimony did not discuss eht [sic] occupation of Bohemia and Moravia in March 1939; when asked on cross-examination whether he did not regard the events of March 1939 as a breach of the Munich Pact, he replied that he "lived in retirement at that time and kept away from all politics, therefore I did not ponder this question". THis from a man who had himself led the march intuit he Sudetenland, who was subject to recall in the event of war saw one of Germany's greatest military leaders, and who professes to be deeply interested in questions of morality.

A final word should be said with respect to the fact that Leeb's forces were deployed along the western frontier, and were not engaged on Polish territory. His counsel has laid

great stress upon this circumstance,[1] but in fact it does not touch the issues. Leeb knew at this time that the attack upon Poland was aggressive,[2] and it is obvious that Rundstedt and B[e]ck could not have attacked in Poland without Leeb's holding action in the West. In this respect, Leeb's position was exactly analagous [sic] to that of a bank robber who stands guard at the door to fend of interference by the police while his confederates rob the bank. It is well settled that such a person is criminally liable as a principal; as has been stated in a leading text in a leading text on criminal law:[3]

No matter how wide may be the separation of confederates, if they are all engaged in a common plan for the execution of a felony, and all take their parts in the furtherance of a common design, all are liable as principals.

Furthermore, Leeb's position in the West was, fundamentally, no different form that of Doenitz. German submarine warfare was almost exclusively directed against England and France, and played no part or, at most a very insignificant part, in the fighting with Poland, but this did not prevent the IMT from convicting Doenitz of committing crimes against peace at the very outset of the war:[4]

"Submarine warfare which began immediately upon the outbreak of war, was fully coordinated with the other branches of the Wehrmacht. It is clear that his U-boats, few in number at the time, were fully prepared to wage war."

The evidence with respect to Leeb's responsibility for the aggressive wars in the West in the spring of 1940 is, if anything, even more conclusive than in the case of

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1. Opening statement of Dr. Laternser, pp. 33-34.

2. Tr. p. 2449.

3. Vol. I, Wharten's Criminal Law (12th Ed.), p. 341.

4. Vol. I, Trial of the Major War Criminals, p. 310.

[....]

be stinted at the weak spots on both sides of Saarbrueken. Fuehrer interjected here that his desire to have the main battle position on the commanding ridges on the southern bank of the Saar river was frustrated only by the out-break of the war.

c) Diversionary attack "Gelb". Here the assertion is made that diversionary attacks must not be initiated on the Rhine front because of the subsequent attack at the Upper Rhine. Closing of Swiss border is discussed.

Owing to coal shipments to Italy, the border cannot be closed before the actual start of the attack.....

2) Generaloberst on Witzleben talks on Operation "Gelb." Report is accepted without discussion. In the subsequent discussion on construction of fortifications, the Fuehrer lays great stress on Artillery emplacements…..

3) Gen. Dollmann speaks briefly on situation at Seventh Army, stressing its deficiencies. Outlines three crossing operations within Operation "Gelb"….

4) After that, the Fuehrer speaks about the general situation…..

In short, Leeb participated at the highest level in the planning of aggressive war in the west, and was one of the three chief executors of the aggressive plans. There is no issue as to knowledge; Leeb admits that he knew of Hitler's aggressive intentions, [1] and he attended the meeting between Hitler and the military leaders on 23 November 1939 at which Hitler declared:[2]

I shall attack France and England at the most

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1. Tr. p. 2311-12

2. Vol. I, Trial of the Major War Criminals, p. 210.

favorable and quickest moment. Breach of the neutrality of Belgium and Holland is meaningless. No one will question that when we have won.

Leeb has put forth two defenses. The first is that he joined with the other German generals in opposing Hitler's plan to attack in the west immediately after the Polish campaign in the fall of 1939. That is quite true, and the record contains a memorandum which Leeb submitted to Brauchitsch in October 1939 urging that it would be wiser for Germany to pursue a waiting policy, and pointing out he undesirable political repercussions which a violation of the neutrality of Holland, Belgium, and Luxembourg would entail. But all of this is no defense whatsoever. The aggressive wars in the West were in fact planned, prepared, and waged, and Leeb did in fact knowingly participate. Before the IMT, the defendants Keitel and Raeder both raised a similar "defense of opposition" but the IMT rightly disallowed it. Indeed, in a deeper sense Leeb's memorandum to Brauchitsch aggravates his guilt, for it shows that he clearly realized that a violation of the neutrality of Holland, Belgium, and Luxembourg would be looked upon with horror by all neutral states.

In the case of Holland, Belgium, and Luxembourg, Leeb makes the further defense that his troops did not invade those countries, since his entire campaign was fought in France. This contention, analgous [sic] to the contention that Leeb's troops were never actually on Polish soil, is also stressed by his counsel. The answer, of course, is the same in the case of the contention about Poland. Leeb well knew that the entire design and plan of campaign in the West was to overrun the Low Countries and smash the French and British armies. He confederated with B[e]ck, Rundstadt and others, and is just as

liable for the criminal attacks on Belgium and Holland as are B[e]ck and Rundstedt themselves:

In such cases of confederacy, all are responsible for the acts of each, if done in pursuance of, or as incidental to, the common design.

THE PRESIDENT: At this time the Tribunal will be in recess for fifteen minutes.

10 August 1948-M-ED-8-1-Arminger (Schaeffer)
COURT V, CASE XII

THE MARSHAL: The Tribunal is again in session.

THE PRESIDENT: You may proceed, Mr. Rapp.

MR RAPP: If the Court please, Leeb's criminal responsibility for the invasion of the Soviet Union need not detain us long; the evidence is overwhelming and his attempts at explanation are quite unconvincing. Once again, he commanded one of the three Army Groups involved in the attack, and led his forces north from East Prussia to Leningrad. The record is replete with evidence of his leading role in planning and executing the invasion, and will be set forth in detail in our briefs. Leeb defended his participation on the ground that he was mentally opposed to the attacks, but there is no evidence that his "opposition" ever took any overt form and, in any event, for reasons already stated, his mental reservations do not constitute a defense. Leeb's only other defense is related to the question of knowledge. He attended the conference between the military leaders and Hitler in March 1941 when Hitler announced his definite intention to attack Russia, and, according to Leeb, the burden of Hitler's argument was that Russia was about to attack Germany, and that in self-defense Germany would have to launch a so-called "preventative war".[1]

The argument that the German attack on the Soviet Union was launched in "self-defense" was also raised before the IMT, and was rightly rejected. Since the time of the IMT judgment, additional evidence presented in this case has abundantly reinforced the IMT's conclusion. It clearly appears, from the Halder Diary and other documents, that Hitler decided to attack Russia for two primary reasons: firstly, in accordance with his long-cherished objective, expounded in Mein Kampf and in his speeches, to win "lebensraum" in the East and exploit the natural resources of the Soviet Union, such as grains and oil. Secondly, Hitler was reluctant to undertake military

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1. Tr. p. 2328.

operations across the channel against England, and concluded that England was holding out and refusing to make peace largely in the hope that Russia would come to her assistance. The attack against Russia, was, in Hitler's mind, in large part a means to bring England to her knees. As early as July 1940, Halder quoted Hitler to the effect that "With Russia smashed, Britain's last hope would be gone. Germany then would be master of Europe and the Balkans."[1] Leeb's testimony that Hitler represented the war against the Soviet Union as a "preventative war" finds absolutely no basis in the record. Leeb and the other Army Group and Army Commander-in-Chief were present at the meeting with Hitler on 14 June 1941, shortly before the Russian campaign was launched, and Halder summarized Hitler's discourse as follows:[2]

"After lunch, comprehensive political speech by Fuehrer, in which he gives the reasons for his intention to attack Russia and develops his calculations that Russia's disintegration will induce Britain to give up the struggle."

The other goal of destroying the Russian state and exploiting the resources of the Soviet Union was also clearly revealed to Leeb and the other military leaders. At the meeting of 30 March 1941, relied on by Leeb, HItler did not say anything about a preventative war, but on the contrary made clear the far-reaching objectives of the Russian campaign. Leeb and the other generals were expressly told at this meeting that the destruction of the State and the extermination of the intelligensia was part of their task. As Halder put it in his Diary:[3] "Our goal's in Russia: crush armed forces, break up state…..The individual troop commanders must know the issues at state. Thye must be leaders in the fight." The organization and objectives of the elaborate German machinery for the economic exploitation of Soviet territory, set up under Rosenberg's leadership, were also well known to the military leaders.

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1. NOKW 3140, Pros. Exh. 1359, Bk XIX, p. 22.

2. Idem., p. 37.

3. NOKW 3140, Pros. Exh. 1359, Bk XIX, pp. 31, 33.

There is not a shred of evidence in the contemporary documents to support Leeb's defense that the Soviet campaign was represented to the German generals as a "preventative war". As the IMT found:[1]

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

"The plans for the economic exploitation of the U.S.S.R., for the removal of masses of the population, for the murder of Commissars and political leaders, were all part of the carefully prepared scheme launched on 22 June without warning of any kind, and without the shadow of legal excuse. It was plan aggression."

Mr. Dobss will continue:

MR. DOBBS:

In turning from Leeb to Schniewind, we not only turn from the Army to the Navy, but also from the highest level of planning and execution in the field to planning and execution at "Navy Department level". Schniewind became Chief of a bureau in the OKM in October 1937, and was fully informed concerning the navel rearmament. He became Chief of Staff of the Naval War Staff about the time of Munich, was generally informed concerning "Fall Gruen", and received the directs issued in anticipation of the occupation of Bohemia and Moravia.[2] But the principal charges against Schniewind under the indictment relate to the aggressive wars against Poland, the Western powers and the Low Countries, Yugoslavia and Greece, the Soviet Union and, in particular, Denmark and Norway. The evidence Schiewind parallels very closely the evidence which led to the conviction of Raeder by the IMT.

In convicting Raeder of the commission of crimes against peace in connection with the outbreak of war with Poland, France, and the United Kingdom, the IMT stated:[3] "Raeder received…..the directives of 'Fall Weiss' beginning with that of 3 April 1939; the letter directed the Navy

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1. Vo. I, Trial of the Major War Criminals, p. 215.

2. Tr. pp. 4940-41.

3. Vol. I, Trial of the Major War Criminals, p. 315.

to support the Army by intervention from the sea. He was also one of the few chief leaders present at the meeting of 23 May 1939. He attended the Obersalzberg briefing of 22 August 1939." Schniewind likewise received the directives on "Fall Weiss" and was present at the well-known meetings with Hitler on 23 May and 22 August 1939.[1] Furthermore, the record in this case contains many documents showing Schniewind's direct and constant participation in naval preparations for war with Poland and the western powers. Schniewind's only defense is the same contention that was made on behalf of Raeder and Leeb, namely, that he thought Poland might yield to German demands without fighting; this defense was rejected by the IMT, and has already been discussed in our analysis of the evidence against Leeb.

With respect to Raeder's responsibility for the invasion of Denmark and Norway, the IMT judgment states:[2]

"Admiral Karls originally suggested to Raeder the desirable aspects of bases in Norway. A questionnaire, dated 3 October 1939, which sought comments on the desirability of such bases, was circulated within SKL. On 10 October Raeder discussed the matter with HItler; his War Diary entry for that day says Hitler intended to give the matter consideration. A few months later HItler talked to Raeder, Quisling, Keitel, and Jodl; OKW began its planning and the Naval War Staff worked with OKW staff officers. Raeder received Keitel's directive for Norway on 27 January 1940 and the subsequent directive of 1 March, signed by Hitler."

The evidence against Schniewind is substantially the same. Admiral Karls' original suggestion was embodied in a letter to Raeder, and Raeder turned this letter over to Schniewind "to investigate the military angles of the problem" and make appropriate recommendations.[3] Schniewind was not present at Raeder's discussions with Hitler, Quisling, Keitl and Jodl,but was kept fully informed of the tenor of these discussions by Raeder.[4] Schniewind made a second "exhaustive study about the whole Norwegian problem" at the end of 1939 or the beginning of 1940, which "was transmitted to the OKW."[5] When the Special Working Staff to develop the

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1. Tr. pp. 4820-47.

2. Vol. I, Trial of the Major War Criminals, pp. 315-16.

3. Tr. pp. 4852-53.

4. Tr. pp. 4857-58.

5. Tr. pp. 4860-61.

operational plans was set up, the Navy was represented by Captain Krancke, and Schniewind saw to it that the SKL furnished Krancke with all necessary information on the naval aspects of the proposed operation.[1] Schniewind, like Raeder, received the first operational directive, covering the invasion and occupation of both Denmark and Norway, early in March, 1940,[2] and thereafter "the SKL gave the corresponding directive to the subordinate agencies of the Navy".[3]

Schniewind, like Raeder and the other defendants before the IMT, defends the occupation of Norway on the ground that it was a "preventive measure" to forestall a British occupation,[4] despite the fact that the entries in the Navy War Diary in October 1939 contain no indication whatsoever that fear of a British move was a factor at that time.[5] This contention was fully considered and rejected by the IMT.[6] Furthermore, whatever might be said in this regard with respect to the occupation of Norway, Schniewind admitted here, in reply to a question by Judge Hale, concerning the occupation of Denmark, that "even today, I do not know any international law justification for this matter".[7] As the IMT stated:[8]

"No suggestion is made by the defendants that there was any plan by any belligerent, other than Germany, to occupy Denmark, No excuse for that aggression has ever been offered."

In the course of its opinion convicting Raeder on the charge of crimes against peace, the IMT further stated:[9]

"Raeder received the directives, including the innumerable postponements, for the attack in the West. In a meeting of 18 March 1941 with Hitler, he urged the occupation of all Greece. He claims this was only after the British had landed and HItler had ordered the attack, and points out the Navy had no interest in Greece. He received Hitler's directive on Yugoslavia."

Schniewind likewise received the directive in connection with the attack

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1. Tr. p. 4862.
2. Tr. pp. 4865-67.
3. Tr. p. 4868.
4. Tr. p. 4872.
5. Tr. pl. 4853.
6. Vol. I, Trial of the Major War Criminals, pp. 206-209, 316.
7. Tr. p. 4918.
8. Vol. I, Trial of the Major War Criminals, p. 316.

9. Idem., p. 316.

in the West, and the SKL issued appropriate orders to the subordinate naval agencies to support the Army by occupying certain Dutch islands and by laying mines to block off the Dutch coast.[1] He attended the meeting of the military leaders with Hitler on 23 November 1939[2] at which HItler declared that he would attack France through Belgium and Holland and that a "breach of the neutrality of Belgium and Holland is meaningless. No one will question that when we have won". Schniewind received the directives of December 1940 for the invasion of Greece, and of 27 March 1940 for the occupation of Yugoslavia; German naval units accompanied the Army into Greece to deal with shipping matters in the Greek ports.[3]

As the IMT found, Raeder opposed HItler's plan to invade the Soviet Union, and endeavored to persuade Hitler to change his mind.[4] There is no reason to doubt Schniewind's testimony that he shared Raeder's views.[5] But Schniewind, like Raeder, received the "Barbarossa" directives, and the Navy took the "necessary preparatory measures".[6]

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1. Tr. pp. 4885-4886.

2. Tr. p. 4884.

3. Tr. pp. 4892-94.

4. Vol. I, Trial of the Major War Criminals, p. 316.

5. Tr. pp. 4897-4900.

6. Tr. p. 4898.

3. Lehmann

The defendant Lehmann was the director of the Legal Department of the OKW from the summer of 1938 until the end of the war; in 1944 he was given the military rank of Generaloberstabsrichter. Although he had no strategic or tactical responsibilities, the record clearly shows that he was well informed in advance concerning the Wehrmacht's war plans in order that he might take whatever preparatory measures were necessary in the legal field. Thus, when preparations for the attach of Poland were being made, Lehmann received a copy of a decree dated 3 April 1939, issued by Warlimont's office, on the subject of "Command Authority in the Operational Zone of the Army".[1] The Purpose of this decree was to define the authority of the various governmental agencies, both military and civilian, which would be carrying on activities in the operational zone. Similarly, only two days after Hitler decided to invade Yugoslavia and a week before the invasion actually began, Lehmann received a decree signed by Keitel entitled "Special Instructions Concerning Directive Np. [sic] 25".[2] Directive No. 25 was the document in which HItler had first announced that Yugoslavia had to be "smashed as rapidly as possible".[3] The Keitel decrre [sic] received by Lehmann stated that "The Yugoslavian territory to be occupied by German troops in the course of the operation will be treated as an operational area of the Army". The German rules for court martial procedure subjected all foreigners and Germans in the operational zone to court martial jurisdiction for offenses committed there.[4] It is clear that the Keitel decree was sent to Lehmann so that he would be advised in advance that he could expect a good deal of new business in his Legal Department as a re-

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1. C-120, Pros. Exh. 1079, Bk XIII, p. 85.

2. 1740-PS, Pros. Exh. 1180, Bk XVI, p. 43.

3. C-127, Pros Exh. 1187, Bk XVI, p. 72.

4. Lehmann Doc. Bk II, p. 11.

sult of the Yugoslavian campaign, and so that he could prepare himself to take care of it. He was being asked to do in his own sphere exactly what the Field commanders were being asked to do in theirs -- to take whatever steps were necessary in order to carry out the aggressive war against Yugoslavia.

Lehmann was up to his ears in preparing for the invasion of Russia. He said that Keitel told him in March that "there was a possibility of war with Russia."[1] On March 30th, Hitler announced at a conference with the military leaders that commissars would be liquidated after capture in the forthcoming Russian campaign, and also that neither soldiers who committed offenses against indigenous civilians now civilians who had committed crimes against Wehrmacht personnel would be tried by court martial. Shortly after this, according to Lehmann, he received a telephone call from Keitel's office and was told to write a draft of an order putting the latter intention into effect. This was the beginning of the infamous Barbarossa jurisdiction order. Lehmann worked on this during most of the month of April. He conferred with Keitel, Jodl, Warlimont and Mueller and finally produced a version which was acceptable to Hitler. During this same period, he received the OKW draft of the Commissar Order and mase [sic] some changes in that. Lehmann turned out his third draft of the Barbarossa jurisdiction order on April 28th and he had talked to Keitel and Jodl about the Commissar Order earlier than that.[2] Lehmann knew that Russia was shortly to be invaded, he knew that the German occupation of Russia was to be characterized by practices prescribed by the OKW which flagrantly violated international law, and he worked with might and main for three months before the campaign

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1. Tr. pp. 7952-96.

2. Tr. p. 8064.

began to concoct the prescriptions.

The foregoing are merely samples of the type of activity in which Lehmann was engaged in preparing for aggressive wars. The prosecution suggests that the case against Lehmann under Counts One and Four is almost exactly analagous [sic] to the case which was established against Funk before the IMT. Funk, for example, was convicted of making economic preparations for the aggressive war against the Soviet Union by making plans for the economic exploitation of the Occupied Soviet territory and by planning for the printing of ruble notes in Germany in order to serve as occupational currency. Lehmann's activities in the legal field exactly paralleled Funk's in the economic field. Neither Funk nor Lehmann was a leading figure in the origination of aggressive war plans, but each took a substantial part in his own field.

G. Summary

We believe that, by dealing with the proof under Counts One and Four concerning Leeb, Schniewind, and Lehmann, we have met and disposed of all the defenses which have been raised under these counts. For the most part, the patter of defense has changed very little from defendant to defendant. Thus, the defendant Kuechler more or less parrotted [sic] Leeb's highly implausible description of the meeting with Hitler of 22 August 1939 at the Obersalz. Kuechler, indeed, quite outdid his former Commander-in-Chief by advancing the preposterous suggestion that the nonaggression pact between Germany and Russia made a war between Germany and Poland very improbably "because it did not seem to me that it was possible for us to conclude a treaty with Russia and a few days thereafter attack a state which was on more or less friendly terms with Russia".[1] Just as Leeb claims that he "did not ponder" the moral or legal significance of the German occupation of Bohemia and Moravia, so

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1. Tr. p. 2801.

Kuechler brushes it aside as "a political measure and it was outside of my scope to judge it."[1] During the western offensive, Kuechler's Eighteenth Army smashed through Belgium and Holland and ultimately captured Paris. When asked on cross-examination whether he could justify the violation of the neutrality of the Low Countries, he could only reply:[2]

"It was a political measure which I really didn't think about at all. I really don't know what I thought about it then. ……I think in a political connection, I really didn't think about it at all."

Such testimony reveals a brazen indifference to the life, liberty, and well-being of entire nations that is almost as repellent as the very acts with which these men are charged. It is exasperating even to spend time commenting on statements such as these. Certainly Leeb did not consider this wanton, outrageous and murderous attack on peaceful and harmless neighboring countries a "political matter beyond his scope" when he sent his memorandum to Brauchitsch in October 1939, and wrote therein:[3]

"One cannot help thinking that England and France are actually waiting for us to do them a favor by attacking, or even violating, Belgian's and Holland's neutrality. The fact that the French took no action whatsoever in the fact of the initial massing of Army Group B formations -- although they must have known it for a long time -- proves how much they would welcome such an attack.

"Such an attack would provide England and France immediately with the one thing they haven't got up to now, i/e/, a forceful propaganda slogan, and this would even be the best one imaginable: to defend the Fatherland -- even if it is only the Belgian one! No Frenchman will fail to yield to such a slogan; everyone will fight for the homeland as soon as it appears to be threatened by the penetration of German troops into Belgium.

"The British warmongers would like nothing better than our attach which would give them an excellent excuse to brand us as the instigators of unrest in Europe. More than ever before will be demand that this instigator be destroyed -- and they will be heeded, to be sure!

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1. Tr. p. 2795

2. Tr. p. 2944

3. Leeb Doc., Book. III, pp. 70-71

"Any violation of Gelgium's [sic] neutrality is bound to drive that country into the arms of France. France and Belgium will then have once common foe: Germany, which for the second tim within 25 years, assaults neutral Belgium: Germany, whose governmental solemnly vouched for and promised the preservation of and respect for this neutrality a few weeks ago!

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"If Germany, by forcing the issue, should violate the neutrality of Holland, Belgium, and Luxemburg, 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."

This document is a tribute to Leeb's intelligence but, in light of subsequent events, it can hardly serve as a testimonial to his character. Rather it is an indictment, not only of Leeb, but of nearly every defendant in the dock. It conclusively establishes that these men knew that what they did was wrong. There is, we suggest, no document in the entire record which is more damning.

MR. FULKERSON:

WAR CRIMES AND CRIMES AGAINST HUMANITY

Counts Two and Three.

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 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 -- Leeb, Kuechler, Hoth, Reinhardt, Salmuth, Hollidt, 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 the few individual defendants and for this purpose we will deal with Leeb, Kuechler and Hoth.

1. Leeb.

None of the defendants, including the defendant Leeb, denied the unlawful character of the Commissar Order.[1] Nor does 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:

a. that he protested against the issuance of the Commissar Order to Brauchitsch and Keitel; (2)

b. that 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; (3)

c. that the Commissar Order was transmitted by OKH 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 three Armies; (4)

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1. Tr. p. 2346.

2. Tr. pp. 2346-49.

3. Tr. p. 2350.

4. Tr. p. 2349.

d. that 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"; (1)

e. that he was never informed of the reports submitted by his subordinate units showing that the Order was being carried out; (2)

f. that 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; (3)

g. that many, if not all, of the reports of commissar shootings were deliberately falsified; (4) and

h. that many of the commissars reported as shot were in fact killed in battle. (5)

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 with Leeb's Army Group, with 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 Leeb protested against the Order to 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.

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1. Tr. pp. 2350-52.

2. Tr. p. 2361.

3. Tr. p. 2354-56.

4. Tr. p. 2359.

5. Tr. p. 2357.

b. Whether or not 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.[1] The headquarters of Leeb's Army Group North was the only headquarters which could have re-issued the Commissar Order to the Rear Area. The Fiftieth Corps also reported shootings of commissars.[2] 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.[3] Whether 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, Hoeppner, and the defendant Kuechler, who commanded the three Armies under Leeb's Army Group were directly subordinate to Leeb in the chain of command. Leeb testified that all three of them shared his own view that the Commissar Order was unlawful.[4] 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 Leeb's testimony that he himseld [sic] did not pass the Order to the Fiftieth Corps and the Rear Area, we must also conclude that Busch, Hoeppner and Kuechler could have behaved in the same fashion. But there is no evidence that Leeb made any attempt to prevent the army commanders from disseminating the Order.

In fact, the record clearly establishes that Leeb's Army Group headquarters issued directives to the subordinate Armies in connection with the execution of the Commissar Order. 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 the detection and

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1. NOKW 2154, Pros. Exh. 275, Bk CD, p. 9

2. NOKW 2179, Pros. Exh. 64, Bk III, p. 77; NOKW 2207, Pros. Exh. 89, Bk III, p. 143.

3. Tr. pp. 2360-61.

4. Tr. p. 2351.

were working in labor detachments with other prisoners.[1] Another document shows that Leeb's Ic Officer, Jessel, who testified in this proceeding, directed the Ic Officer of Kuechler's Eighteenth Army to screen prisoner collection points for commissars who had escaped detection by removing their insignia.[2]

d. While there is no reason to doubt 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. 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. Buy [sic] 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 Leeb gave no such oral instructions or that they were totally ineffective.

e. 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 Leeb's statement that he repeatedly protested against the Order to von Brauchtisch 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,[3] then it stands to reason that the staff of the Army Group must have known that 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:[4]

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 war time.

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1. NOKW 3136, Pros. Exh. 1547, Bk XXII, p. 34.

2. NOKW 3145, Pros. Exh. 1553, Bk XXII, p. 57.

3. Tr. pp. 2351-52.

4. United States v. List, et al., (Case No. 7), Tr. p. 10461.

f. Leeb's argument concerning the percentage of captured commissars covered by the reports of shootings in 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.[1] 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, 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.[2] He also testified that the Commissar Order became known on the Russian side,[3] and that thereafter most of the commissars removed their insignia in an effort to avoid detection,[4] 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:[5] "Treatment of captured political commissars (most of them are not detected before arrival at PW camps)". Considering that commissars were being killed in battle, committing suicide, and disguising their identity, and that no doubt the prosecutions collection of reports of commissar shooting is far from complete, Leeb's calculations are seen to be worthless.

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1. Tr. pp. 2354-56.

2. Tr. p. 2179.

3. Tr. p. 2160.

4. Tr. p. 2164.

5. NOKW 3140, Pros. Exh. 1359, Bk. XIX, p. 40.

g. When desperately pressed, men are often driven to inconsistencies, and 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 non-execution of the Commissar Order, by lulling the higher authorities into the belief that it was being carried out.[1] Yet, only a few minutes before he had argued vehemently that the reports of his Sixteenth Army, which covered the shooting of only seventeen commissars out of an estimated 1,200 to 1,500 captured, "reveal of necessity that the order on a whole was not carried out."[2] If these reports show 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 execution are not "faked", but are entirely trustworthy reports of commissars executed. What are "faked" are not these reports but both of Leeb's defenses with respect to percentages (f.) and fabricated reports (g.); these defenses are not only spurious but mutually inconsistent.

h. 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" [unclear] and "killed in action" (gefallen).[3] On 27 September 1941, the XXVIII Corps of Kuechler's Army reported:[4]

"On 25 September, the Battalion Commissar Kanajew (110th Railway Protection Regiment of the 2nd NKWD 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."

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1. Tr. p. 2359.

2. Tr. p. 2354.

3. E.G., NOKW-2117, Pros. Exh. 61, Bk III, p. 36.

4. NOKW-[2096], Pros. Exh. 88, Bk III, p. 140.

Other reports by the same Corps stated: [1]

"On 18 and 19 September, troop operations were carried out in the woods of Nove Lissine by the Corps Signal Battalion and that 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 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, bon Kuechler swore:[2]

"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."

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"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 a prodigious sharpening of von Kuechler's recollection. On the witness stand here he clearly remembered that he received the Order direct from OKH 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

1. NOKW-1580, Pros. Exh. 670, Bk IXD, p. 321.

2. Tr. pp. 2923-24.

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".[1]

Kuechler's defenses are, in general, the same as those of 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;[2] that he never learned that any commissars were being shot pursuant to the Order;[3] that his lc Officer (Jessel) never showed him any of the reports concerning the shooting of commissars;[4] and that probably the commissars reported shot were in fact killed in action.[5] 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.

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…."[6] On cross-examination, he said that he had to pass it down because "I did not wanr [sic] to be endangered of being regarded as a disobedient commander"[7] But was Kuechler in fact under any pressure to pass it down? Leeb, according to his testimony, did not pass the Order down to the Fiftieth Corps or the Rear Area. Kuechler knew that Leeb was opposed to the Order, and can hardly have feared that 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-inChief "did not pass this Order

1. Tr. pp. 2929-31.

2. Tr. pp. 2831-32.

3. Tr. p 2833.

4. Tr. pp 2833, 35.

5. Tr. p. 2834.

6. Tr. p. 2831.

7. Tr. p. 2922.

on to their troops at all", and that Fieldmarshal 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.[1] But 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 Kuechler's command. Kuechler's responsibility for these murders is as clear as Leeb's.

3. Hoth

In the cases of Leeb and 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 beyong [sic] any doubt".[2] Hoth seems to say that he disapproved of the Order, but, unlike Leeb and Luechler [sic] he does not claim that he gave any oral expression to his disaproval [sic] when passing the Order down.[3] 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.[4]

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1. Closing argument before the International Military Tribunal, pp. 65, 67

2. Tr. p. 3081

3. Tr. p. 3087

4. 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 Germany 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 those 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.[1] On June 30, the 12th Panzer Division reported that "A political commissar holding the rank of Colonel was taken prisoner. He was shot as ordered".[2] 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 that "Approximately twenty commissars were shot by the division within a two-weeks period".

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1. NOKW 2246, Pros. Exh. 62, Bk III, p. 40

2. NOKW 2245, Pros. Exh. 69, Bk III, p. 91

3. NOKW 2239, Pros. Exh. 70, Bk III, p. 93

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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: [1]

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 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 neen [sic] 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

1. NOKW 2239, Pros. Exh. 70, Bk III, p. 93.

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: [1]

"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. More 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 Leeb tried to suggest that this very natural fear which overtool [sic] Russian commissars was due to "Russian propaganda". [2] 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 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 those 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" [3] Is that why the

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1. NOKW 1904, Pros. Exh. 67, Bk III, p.84

2. Gersdorff, Tr. p. 2171

3. Gersdorff, Tr. p. 2162.

commissars often committed suicide, or removed their insignia?[1] 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 German 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 murder 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".[2] Military Tribunal V, in the Hostage case, convicted Rendulic of passing down the Commissar Order, although there was no proof in the record in the case that any commissars were shot by the troops of Rendulic's division.[3]

Tribunal V also convicted von Lyeser in connection with the Commissar Order.[4] Leyser commanded a Division in the defendant Reihardt's Corps, and three reports by 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 Leyser and, needless to say, their responsibility as

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1.Tr. pp. 2164, 79

2.Vol. I, Trial of the Major War Criminals, p. 317

3.United States v. List, et al., (Case No. 7), pp. 10509-10

4.Idem, pp. 10524-25.

Army Group, Army, and Corps commanders was far greater than that of Divisional commanders such as Rendulic and von Leyser.

These commanders were under and affirmative dity [sic] 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 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 Yamshita case,[1] and, as was held by Military Tribunal V in the Hostage Case:[2]

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 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, maybe. 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 directive in connection therewith. Their guilt for those crimes has been established beyong [sic] any shadow of a doubt, and the crime for which they bear this guilt is the crime of murder.

MR. FULKERSON: Could I ask the Court if you would like to take a recess at this time? Mr. Higgins is going to continue on another subject.

THE PRESIDENT: Well, there's just about two minutes and, I think, we will not start this second subject but will be in recess until 1:30.

(Recess until 1330 hours, 10 August 1948)

AFTERNOON SESSION

(The Tribunal reconvened at 1400 hours, 10 August 1948)

THE MARSHAL: The Tribunal is again in session.

THE PRESIDENT: You may proceed:

MR. HIGGINS: If Your Honers 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.[3]

On 7 October a German radio broadcast announced that "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 German troops, and they must be slaughtered ruthlessly in combat wherever they turn up".[4] 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.[5]Warlimont then sent it to the office of Foreign Counter-Intelligence underAdmiral 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 whom they should shoot after capture. Canaris said that a definite criterion should be laid down; that the German troops should be restricted in the exercise of this order to commandos

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1.In re Yamashita 66 Sip. Ct. 340 (1946)

2.United States v. List, et al., (Case No. 7), p. 10456.

3.516-PS, Pros. Exh. 144, Bk IV, p. 89.

4.1266-PS, Pros. Exh. 118, Bk IV, p. 8.

5.Ibid, p. 9.

who were either in civilian clothing or in German uniform.[1] 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 SD. Canaris wanted such people to be placed in special confinement after capture, to be reported to the Foreign Counter-Intelligence Office, and to be tried by courts-martial.[2] Canaris also pointed out that reprisals against prisoners of war were absolutely forbidden.[3]

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 behing [sic] 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".[4] 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,

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1. 1264-PS, Pros. Exh. 119, Bk IV, p. 13.

2. Ibid.

3. 1265-PS, Pros. Exh. 121, Bk IV, p. 19.

4. Ibid, p. 20.

to a certain extent, by Hitler himself. There were six paragraphs in the final version. The first paragraphs in the final version. The first paragraph was worded by Hitler, but the argument used there that commando warfare wasoutside 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.

Theillegality of the Commando Order is clear, and has been established by the decision of the IMT and by the opinion in United States v. 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 re-edited for the last time and signed by Hitler, Warlimont distributed it to the three branches of the Wehrmacht 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 Commander 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 Quartermaster Staff and initiated 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. 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.[1]

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 issued the German troops had been shooting captured paratroopers and members of sabotage units. These classes of troops are included regularly on the SD lists of liquidated persons.[2] This was done by virtue of other orders which had been issued from the outset of the Russian campaign.[3]

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 Third Panzer Army for 18 November 1942 -- exactly one month after the Commando Order was issued -- reads:[4]

Various difficulties have arisen concerning the execution of the Fuerhrer 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 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 Third Panzer Army the next day provided:[5]

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1. Tr. p. 5350.

2. NOKW 2747, Pros. Exh. 752, Bk IX, p. 45.

3. NOKW 2626, Pros. Exh. 249, Bk VI-AB, p. 39.

4. NOKW 3482, Pros. Exh. 46, Rebuttal Bk II, p. 43.

5. NOKW 2746, Pros. Exh. 748, Bk IX-I, p. 29.

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

Similarly, on 29 October, 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 wasnot 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 Kuechler, Reinhardt, 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 responsible".[1] Warlimont and Lehmann, of course, as the draftsmen of the Commado 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 wrespect 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 circumstance 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

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1. Vol. I, Trial of the Major War Criminals, p. 314.

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.[1] 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".[2] 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.[3]

Another regular occupation of these prisoners of war was to engage in the loading and unloading and transportation of munitions.[4] From time to time, as could be expected, these prisoners of war were killed while so employed.[5] But the object of the order which committed them to this work was carried out: German blood was spared.

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, anti-tank ditches and field positions of various kinds. Salmuth did it in France just as Hoth did it in Russia.

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1. Vol. I, Trial of the Major War Criminals, p. 232.

2. NOKW 1527, Pros. Exh. 180, Bk V, p 20; NOKW 2251, Pros Exh 187, Bk V, p. 41

3. NOKW 2337, Pros Exh 188, Bk V, p 44; NOKW 3337, Pros Exh 3, Rebuttal Bk I, p 4.

4. NOKW 2966, Pros Exh 1346, Bk V, Sipp 5, p 5.

5. NOKW 1941, Pros Exh 208, Bk V, p 112.

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.[1] 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, Ukranians, 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

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1. The general principles governing escaped prisoners of war are set out in Sections 50 to 54 of the Geneva Convention.

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.

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 and Stalags within the jurisdiction of these defendants. The Oberquartiermeister of 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 six 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% 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 Erhardt Milch 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.[1] 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 the 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 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 surfounded [sic] 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 perservered 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

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1. United States v. Alfred Krupp, et al., (Case No. 10) pp. 61-88.

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. 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 overall 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:[1]

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 three 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.

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1. United States v. Alfried Krupp, et al., (Case No. 10) Tr. p. 90.

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 this contrary to the evidence of that actually happened. 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 3rd 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:[1]

The Fuehrer had 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 labor allocation administration must make it possible to mobilize the work-capacity of the entire able-bodied population. If success cannot 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 3rd Panzer Army three weeks later stated the following:[2]

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 October 22. 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: [3]

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

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1.NOKW 3539, Rebuttal Exh. 39, Rebutall Bk II, p.17.

2.NOKW 686, Pros. Exh. 719, Bk IX-G, p. 26.

3.NOKW 2100, Pros. Exh. 471, Bk VII-A, p. 152.

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 this troops, which provided:[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 helpers, with indigenous units, or with the indigenous police service.

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Whoever tries to evade his service obligation will be severely punished. The same also applies to persons harboring anyone liable to service or in any way attempts to 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 July 23rd, the minutes of a meeting held at the headquarters of the 3rd Panzer Army noted that one reason for the difficulty in apprehending inhabitants for labor commitment was the large quota which had been imposed by 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 who had escaped were to be apprehended "regardless of personal

1.NOKW 2340, Pros. Exh. 484, Bk VII-A, p. 191.

situation" and substituted for the escapees.[1]

On 26 July the 3rd 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". Once of the measures suggested to overcome this resistance was the following:[2]

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.[3] The value of Reinhardt'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 3rd Panzer Army, was being met by the middle of August.[4]

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

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1.NOKW 2473, Pros. Exh. 487, Bk VII-A, p. 222

2.NOKW 2454, Pros. Exh. 489, Bk VII-A, p. 226.

3.Tr. P. 3834.

4.NOKW 2570, Pros. Exh. 492, Bk VII-A, p. 235.

November 1944.[1] 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.

MR. HIGGINS: Dr. Hochwald will continue the reading.

THE PRESIDENT: Dr. Hochwald --

DR. HOCHWALD: May it please the Tribunal --

E. Murder and Ill-treatment of Civilian Populations: the Einsatzgruppen

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 w ere even more savage. Thousands upon thousands of civilians were illegally spirited away and imprisoned or murdered, pursuant to the notorious "Nacht und Nebel" decree formulated by Warlimont and Lehmann. A stupid and brutal policy for the suppression of resistance by the indiscriminate slaughter of hostages characterized the Germany 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 – a program of murder which was described

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1. NOKW 2931, Pros.Exh.1279, Bk VII-Supp. p. 26.

by Military Tribunal II as "beyond the experience of normal man and the range of manmade phenomena".[1] All the defendants have emphatically donied any knowledge of the extermination mission of these units and of criminal acts perpetrated by the SD. If they learned at allttthat communists, Jews and other so-called "undesirables" were being killed, then the rumors which c ame 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 a nyway concerned with such "excesses". In each and every case, it wasthe 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 anti-partisan 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.[2]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.[3] The

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1. United States v. Ohlendorf, et al.,(Case No. 9),Tr.p.6648.

2. Section 3, Annex to Hague Convention of 18 Oct.1907,Art.42-56.

3. Ibid, Art.42.

military authority is obligated to ensure public order and safety[1] and to respect family honor and rights and the lives of persons.[2] Tribunal V in the "Hostage" case has given full recognition to this principle:[3]

"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."

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 whenthey were in command of these areas. The testimony of the witness Ohlendorf is noteworthy. Ohlendorf was condemned to death

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1. Section 3, Annex to Hague Convention of 18 Oct.1907,Art.43.

2. Ibid, Art.48.

3. United States v. Wilhelm List, et al.,(Case No. 7) Tr. pp. 10455-56.

in this very building, but the Tribunal which found him guilty of massmurder paid high praise to his truthfulness.[1] 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 Wehrmacht itself issued requests and directives for these executions and gave their support for the carrying out of these executions are 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 Wehrmacht. However, with respect to the demands of liquidating Jews in Sinferopel 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 four weeks and the Army commanded the Einsatzkommandos directly while I was left in Romania. According to Army instructions, these Einsatzkommandos reported directly to the Army about the liquidation of Jews such as took place, for instance, in Czernowitz. 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" case[2], "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 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

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1. United States v. Otto Ohlendorf et al., (Case No. 9) Tr. P. 6787.

2. United States v. List, et al., (Case No. 7), Tr. P. 10461.

knowledge, is a palpable and grotesque fabrication. As the defendant Leeb himself testified:[1] "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".[2] 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.[3] That is why security divisions were stationed in the rear area to patrol the roads and railways, and why the Feldkommandanturas and Ortskommandanturas 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 and 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 counter-intelligence activities in the occupied area, and why intelligence reports were regularly submitted to the headquarters of these defendants telling them what was

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1. Tr. P. 2364.

2. Halder, Tr. P. 2107.

3. Tr. Pp. 1542-44.

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 can not 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 unbeknownst to the Army, is utterly preposterous - the desperate sparring 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 do plainly see and hear going on about them. Let us briefly examine some of the documentary evidence with respect to three of the defendants - Leeb, 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.[1] 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

1. NOKW-17-6, Pros. Exh. 57, Bk III, p. 27.

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 Leeb's headquarters.[1] It also provided that "suspicious civilians" in the Army Group Rear Area would be turned over to the Einsatzgrouppen and Einsatzkommandos of the Security Police and SD. The order of 7 October 1941, received by 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:[2]

"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 unobstrusively 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. Leeb's headquarters received all of them. Leeb does not deny this. He merely says that he does not recall reading them or doing anything about them. Far from being Leeb's salvation, it is his condemnation.

A tabulation of the number of executions by Einsatzgruppe A, attached to Leeb's Army Group, shows that, from the beginning of the Russian campaign to 15 October 1941, 135,567 persons were murdered, all but a few thousand of whom were Jews.[3] The vast majority of these murders took

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1. NOKW-2423, Pros. Exh. 244, Bk VI-AB, p. 14.

2. NO-3422, Pros. Exh. 367, Bk VI-GH, p. 214.

3. L-180, Pros. Exh. 956, Bk IX-P, p. 48.

place in Lithuania, Latvia, and Estonia, which were within the operational area of Army Group North during part or all of the aforementioned 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 Reichs Commissariat was established in Estonia on 5 December 1941, but Leeb conceded that the Commander of the Rear Area of the Army Group North still had military functions and powers after that date.[1]

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 Wehrmacht; that its crimes were never reported to the Wehrmacht 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 Leeb's immediate subordinates. Stahlecker said:[2]

"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 of the rear area (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. Hoeppner, 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

1. Tr. pp. 2514-15.

2. Pros. Exh. 956, L-180, Doc. Bk 9-p, page 20.

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 Kowno which was captured by the 16th Army a few days after the campaign opened:[1]

"During the first pogrom in the night from 25 to 26. 6. the Lithuanian partisans did away with more than 1500 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 the Lithuania similar actions followed the example of Kowno, 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 Leeb were informed of the planned massacre before it even took place. Leeb's own headquarters were located in Kowno from 1 to 10 July. He admits he heard of killings in Kowno while his headquarters were still in East Prussia, but denies any killings while his headquarters were in Kowno.[2] It appears, however, that the murder and persecution of the Jews continued during the time Leeb was in Kowno and thereafter. The report above speaks of pogroms during the nights following 26 June. Another Einsatz report dated 11 July 1941 stated:[3]

"In Kowno 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 Lithanians and the Jews....

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1. Pros. Exh. 956, L-180, Doc. Bk. 9-P, p. 30.

2. Tr. p. 2513.

3. Pros. Ex. 922, NO-2934, Doc. Bk. 9-N, pp. 101-102.

Prisons now are being combed through once more, Jews -- if special reasons prevail -- are being arrested and shot. This will involve executions of minor nature of 50 to 100 persons only. To prevent Jews from returning to Kowno, an agreement was made with the Higher SS and Police Leader to the effect that the ORPO draw a cordon around Kowno not allowing any Jews to enter the town. If necessary, Jews will be fired upon. All Wehrmacht agencies were informed about the directives".

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.[1]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 and atrocities. They continued while Leeb was in Kowno. 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 h ad entered the city and instigated a pogrom. "All synagogues have been destroyed; 400 Jews have already been liquidated."[2] It also pointed out that, as a result of the alleged shooting of a German soldier by a Jews, "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:[3]

"At Riga, the Einsatzkommando 2 assroted [sic] the entire material, searched all offices, arrested the leading Communists as far as they could be found and, headed by SS-Sturmbahnfuehrer Barth, conducted in an examplary [sic] manner all actions started against the Jews. 600 Communists and 2,000 Jews were killed during pogroms in Riga and, since the arrival of EK 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 additional 1,600 Jews were liquidated by the EK 2 within Latvia."

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1. Tr. p. 2384

2. Pros. Exh. 958, NO-2935, Doc. Bk 9-P, p. 56.

3. Pros. Exh. 924, NO-2938, Doc. Bk. 9-O, p. 3.

10 August 1948-A-CG-20-1 Arminger-Weber
Court V Case XII

THE MARSHAL: The Tribunal is again in session.

MR. HORLICK_HOCHWALD: A report of 6 July 1941 establishes the murder of 526 persons by units of Einsatzgruppe A in Garsden, Prottingen, and Polangen. "During the three large-scale actions mainly Jews were liquidated. Among the number executed, however, there were also Bolshevist officials and snipers, some of which had, for this purpose, been handed over by the Wehrmacht to the Security Police.

Up to 16 July 1941, a unit of Einsatzgruppe A had killed 1,150 Jews in Duenaburg. "The arrested Jewish men are shot without ceremony and interred in already prepared graves....[1] Between 22 and 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 Pagiviai, Kedainie, and Marianpole.[2]

The mass murders thus far discussed occurred in Lithuania, Latvia, and Esthonia 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 Leeb's jurisdiction in the operational area of Army Group North -- which extended from the border of the Reich to his front line. The Reichs Commissariat Ostland was first established on 25 July 1941 and extended to the Duena River.[3] Most of the cities where the massacres took place were at the time located in the Rear Area of Army Group North, while Kowno was, for part of the time Leeb's own headquarters.

When Dorpat and Reval in Esthonia were captured by troops of Army Group North, "a Kommando of the Security Police was always with the first army units".[4] The same report showed that up

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1. Pros. Exh. 924, NO-2938, Doc. Bk 9 O, p. 3.

2. Pros. Exh. 959, NO-2849, Doc. Bk 9 P, p. 59.

3. Leeb, Tr. p. 2516; also operational maps of 7 and 20 1941. Exh. 1480, NOKW-3150, and Exh. 1481, NOKW-3151.

4. Pros. Exh. 956, L-180, Doc. Bk. 9 P, p. 20.

to 25 October 1941, 474 Jews and 684 Communists had been executed in Esthonia.[1] A report of Einsatzgruppe A covering its activities up to the end of 1941 states "Today there are no longer any Jews in Esthonia."[2]

During the time when these atrocities occurred, Esthonia was part of the operational area of Army Group North.[3] The cities of Reval, Dorpat, Marvan, and Pirnau in Esthonia were in the Rear of Army Group North during the month of October 1941[4] 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 Leeb's jurisdiction. Of particular interest is the following finding by Tribunal II in that case:[5]

"On September 10, 1941, Sandberger promulgated a general order for the interment of Jews which resulted in the interment of 450 Jews in a concentration camp in Pleskau...The Jews were later executed."

Pleskau was Leeb's headquarters prior to September 1941 until he resigned in January 1942. How much greater was the power and responsibility of Field Marshall 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 fire-fly".

The murderous collaboration between 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

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1. Ibid, p. 48.

2. Pros. Exh. 957, 2273-PS, Doc. Bk. 9 P, p. 51.

3. Leeb T r. p. 2515.

4. Leeb Tr. p. 2521; see also the operation map. Pros. Exh. 1493, NOKW-316

5. United States v. Ohlendorf et al (Case No. 9) p. 6819.

and proving the murder of approximately 1,200 persons with the active participation of Leeb's subordinates, were in the very front area of Army Group North as shown by the operational maps in evidence.[1] It should also be pointed out that Sonderkommando 1a under Sandberger or Einsatzgruppe A established an office in Pleskau as early as 10 July 1941.[2] It was still there on 16 January and during substantially all of that period Leeb had his headquarters in Pleskau.[3]

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 Rositten were shot in the morning hours by the Latvian Self-Defense."[4] The slaughter of Jews at Rossitten was reported four days later; the same document reports:

"In the early morning of 5 August several hundred Jews were shot by the Latvian Self-Defense. In order to forestall any misinterpretation the Division has established by inquiry of the C.G. that this special operation was ordered and carried out by order of the SD.

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 those matters."

The Commander of 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 Rossitten, Latvia was in the Rear Area of Army Group North before and after this mass murder, and units of the 281st Security Division were stationed there during that time.[6]

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1. Pros. Exh. 1490, NOKW-3160, Ex. 1495, NOKW 3165, Exh.1496, NOKW-3166.

2. Pros. Exh. 906, NO-3401, Doc. Bk. 9 N, p. 41

3. Pros. Exh. 901, NO-3405, Doc. Bk. 9 N, p. 17

4. Pros. Exh. 962, NOKW-2150, Doc Bk. 9 P, p. 65

5. Idem.

6. Leeb Tr. p. 2517-18

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Another example of blissful ignorance is the defendant Roques. From his headquarters was issued an order which reads:[1]

"execution 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."

On the 29th and 30th September 1941 about 34,000 Jews were slaughtered by units of Einsatzgruppe C in Kiew[2] which was occupied by troops which were subordinate to Roques. His chief of staff visited the unit which registered these killings on the day after the unprecedented massacre occurred. Nevertheless, Roques denies that he ever heard of the killing of the Jews in Kiew from his chief of staff or anyone else.[3]

During the month of August 1941, 44,000 Jews were killed by units of the Higher SS and Police Leader.[4] This dignitary was the representative of the Security Police and the SD in Roques' area.[5] He usually had his headquarters in the same locality as the defendant and frequently dined with him and his officers.[6] But, strangely enough, Roques did not learn what the tasks of this man were. Twenty-three thousand of those 44,000 victims of Roques' dinner-partner, were killed in Kamieniec Podolsk during three days.[7] On 2 September Roques' chief of staff had a conference at the headquarters of Army Group South in which the figures "concerning the settlement of the Jewish quest on in Kamieniec Podolsk" were discussed.

The Higher SS and Police Leader, however, was in no way as reluctant and secretive as Roques wants us to believe. A report

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1. Pros. Exh. 1575, NOKW-2594, Tr. p. 5479.

2. Pros. Exh. 951, NOKW-2129, Doc, Bk. 9 P, p. 1

3. Pros. Exh. 951A, NOKW-2129, Tr. p. 5491.

4. Pros. Exh. 943, NO-3146, Doc. Bk. 9 O, p. 66

5. Tr. p. 5294

6. Tr. p. 5471

7. Pros. Exh. 940, NO-3154, Doc. Bk. 9 O-, page 52.

8. Pros. Exh. 938, NOKW-1554, Doc. Bk. 9 O, p. 50.

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.[1] Does it need to be said that by a happy coincidence 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 twelve years old were executed by units subordinated to him. The place of the massacre, Berditschew, was at that time the headquarters of Roques.[2]

On the 19 September 1941 the Jewish district Shitomir was evacuated and all Jews of the placem [sic] 3145, in number, were transported by 12 trucks, which has been placed at the disposal of the Einsatzgruppen by the Feldkommandantur and the City Administration of Shitomir, 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 Shitomir completely and radically".[3] Shitomir 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 Roques.[4]

Roques' own witness admitted having watched an incident at the very outbreak of the war, when the Jews of Dobromil were

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1. Pros. Ex. 81, NOKW-1165, Doc. Bk. 3A, p. 116-7.

2. Pros. Ex. 1485, NOKW-3155.

3. Pros. Ex. 945, NO-3140, Doc. Bk. 9O, pages 79-90.

4. Roques Tr. p. 5487, Pros. Ex. 1482, NOKW 3152, Pros. Ex. 1489, NOKW-3159

herded together in the market square by the SD, and the Ukrainian militia. This happened in the immediate vicinity of the defendant's headquarters. Office of Roques' staff were present and observed this incident.[1] The witness was under the impression that the defendant suffered a mental shock as a result of this experience.[2] One of the incidental effects must have been amnesia, as Roques maintains that he never learned about the task of the SD.

When approximately 90,000 Jews were murdered by units of Einsatzgruppe D,[3] 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. Those officers collaborated closely with Einsatzgruppe D.

Ohlendorf testified, as a witness for Woehler, that the orders for the commitment of Einsatzgruppe D and its subordinates, the intelligence and counter-intelligence 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[4]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".[5]

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1. Tr. p. 8944.

2. Tr. p. 8927.

3. Pros. Ex. 914, NO_3359, Doc. Bk. 9 N, p. 70

4. Pros. Ex. 568, NOKW-631, Doc. Bk. 8, p. 96.

5. Pros. Ex. 1606, NOKW-3238, Tr. p. 6046-47.

Woehler's defense is that he was of the opinion that those 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 those reports bears clear proof what the original word was. It reads:[1]

"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."

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1. Pros. Ex. 891, NOKW-1628, Doc. Bk. 9 [unclear], p. 68.

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Woehler received reports which stated that the indigenous population was liberated "from the Communits and Jews who had remained behind";[1] that Sonderkommando 11a, a sub-unit of Einsatzgruppe D, was "straightening out the Jewish question" in Nikolajew,[2] and that the "Crimea was free of Jews".[3]

On the 3rd of July 1941 the defendant issued an order that the Einsatzkommando of the Security Police should proceed to Belzy.[4] This Einsatzkommando promptly killed the Jewish Council of Elders and 45 other Jews there. It further directed the Romanian Police to shoot an unidentified number of Jews.[5]

On 9 July Einsatzkommando of Einsatzgruppe D reported through the 11th Army:[6]

"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 Romanian 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 Hodin to screen that place."

Woehler's counter-intelligence officer received and copied the report.

Woehler himself ordered the Einsatzkommando to remain in Czernowitz. 3,105 Jews and 34 Communists were liquidated in this place by the Einsatzkommando.[7]

On the 4th of August, 1941, Einsatzgruppe D reported to

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1. Pros. Ex. 1607, NOKW-3236, Tr. P. 6048.

2. Pros. Exh. 1609, NOKW-3234, Tr. P. 6058.

3. Pros. Exh. 916, NOKW-628, Doc. Bk. 9-N, page 74.

4. Pros. Exh. 1605, NOKW-3453, Tr. p. 6027.

5. Pros. Exh. 928, NO-2952, Doc. Bk, 9-), p. 19.

6. Pros. Exh. 1605, NOKW-3453, Tr. p. 6027.

7. Pros. Exh. 858, NO-2837, Doc. Nk. 9-L, p. 43.

the 11th Army that 68 Jews and a number of Jewish hostages had been shot by Sonderkommando 11a Kishinjew. Woehler read this report.[1] He obviously had sent the Sonderkommando to Kishinjew with the order to seize Jews and politically undesirable elements.[2] On the same day Woehler received a report that in Kodyma 97 Jews had been executed by a unit of Einsatzgruppe D.[3] These Jews had been shot with the approval of the defendant Salmuth by the execution squad consisting of 12 members of Einsatzkommando 10a and of 24 soldiers who belonged to units subordinated to Salmuth.[4] Salmuth in turn was subordinated to the 11th Army.

On 14 November 1941, the Ortskommandatur of Sinferopol reported to the Rear Area of the 11th Army that "the 10,000 Jews remaining are being executed by the SD".[5] At the time Woehler's headquarters was 15 to 20 miles away from Sinferopol.[6] The Oberquartiermeister of the 11th Army, Woehler's direcg 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 Sinferopol:[7]

"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:[8]

"For every officer and for every enlisted man it was, at that time, a matter of course that every Jew was shot.

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1. Pros. Exh. 1594, NOKW-3233, Tr. p. 9571.

2. Rebuttal Exh. 113, NOKW-3557, Tr. p. 5982.

3. Pros. Exh. 1595, NOKW-3237, Tr. p. 5982.

4. Pros. Exh. 741, NOKW-586, Doc. Bk. 9-I, p. 10.

5. Pros. Exh. 883, NOKW-1573, Doc. Bk. 9-M, p. 52.

6. Tr. p. 6054.

7. Pros. Exh. 893, NO-2828, Doc. Bk. 9-M, p. 70.

8. Tr. p. 9115, 9117.

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: Mr. President:

THE PRESIDENT: General Taylor.

GENERAL TAYLOR:
This concludes our discussion of the evidence under the charge 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,[1] the plunder of property and the wanton destruction and devastation of towns and villages, the force labor of women and children on trenches and fortifications under the most rigorous conditions of work; and the conduct of Leeb and 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 Charter, provides that such a circumstance "may be considered in mitigation".[2] In the cases of Keitel and Jodl, the International Military Tribunal was unable to find any circumstances which could be considered

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1. United States v. Wilhelm List et al., (Case No. 7)

2. Para. 4 (b) of Article II

in mitigation. Are the principal defendants in this case in any better situation?

In his Opening Statement on behalf of the defendant 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".[1] 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."[2] And the defendant Leeb himself, after testifying concerning his conduct with respect to the Commissar Order, declared:[3]

"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 Fieldmarshals and Generals - really so enmeshed that it was impossible for them to avoid crime?

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1. Opening Statement of Dr. Laternser, p. 5

2. Opening Statement of Dr. Laternser, p. 21.

3. Tr. p. 2353.

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Court V, Case 12

We should observe, at the outset, that it is not the duty of a prosecutor in drawing and 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 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 c omes 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 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, 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".[1]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

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1. Tr. p. 2351.

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 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 report 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 f ront, reports of liaison officers from the OKH and 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:[1]"The Commanders-in-Chief of the Army Group or Army either did not pass this order on to their troops at all, or they ordered, on their own authority, to evade it. 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."

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1. Closing Statement of Dr. Laternser before the IMT, page 65.

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 to secretly 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 that Fieldmarshal Rommel did with the Commando Order. That is what the defendant Leeb told us he did with respect to the Fiftieth Corps and the Army Group Rear Area, and that is what the defendant 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 d esperate 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 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 necessesity 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 Commanders-in-Chief had openly declared their unwillingness to ob ey 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.[1] Why was the defendant 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.[2]

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. Leeb and Hitler came to a parting of the ways because of a disagreement on tactical matters and three years later the same thing occurred between Hitler and 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

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1. During the last years of the war, Himmler, Sepp Dietrich and one or two other SS leaders were given high military commands.

2. Halder, Tr. p. 2026.

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 Kuechler put it, to "make demands in such a way that a break must occur".[1] 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 openly declare 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 overall 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 defendants' will was affected and coerced by the order. If the defendants' 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

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1. Tr. p. 2982.

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 circumstnaces in mitigation? There are many new roofs in Nurnberg: 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 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 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 of 1941 outline the 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 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 reflections, 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 Fieldmarshal. 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 Leeb, 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 or 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 Leeb and the senior Fieldmarshals, 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.