XVI. DISSENTING OPINION OF JUDGE POWERS[1]

A. Index[2]

B. Dissenting Opinion

It is a matter of deep regret to me that I am unable to agree with my associates in all that is determined in the opinion and judgment filed herein. That was indicated when I signed it with reservations. One who disassociates himself from a substantial part of an opinion and judgment is under some obligation, it seems to me, to state the reasons. That is my present purpose.

The limited time available does not permit me to indulge in elaboration, or to mention all the points of difference with the opinion. I must be content, therefore, in indicating in broad outline those differences of view which seem to me to be of

[1] The dissenting opinion was not read in open Court but filed with the Secretary General as a part of the record in the case at the time when the judgment of the Tribunal was being pronounced.

[2] This index was filed with the dissenting opinion.

major importance. Some preliminary observations by way of background for such discussion may be helpful.

The evidence in this case is not in substantial conflict, so far as it relates to the vital evidentiary facts. For the most part, in spite of some difference in coloration, the evidence for the defense rounds out and supplements the picture given by the prosecution. The divergence of opinion of the Tribunal arises chiefly from a difference of view as to the interpretation of the evidence, and particularly as to what inferences may properly be drawn therefrom and as to what facts must necessarily be shown to constitute guilt of a particular crime, and the degree of proof with which it must be established.

These matters will not be treated separately, or in order, but my position, with reference to all of them, will be expressed or illustrated in the course of this separate opinion.

It seems to me important also that we should refresh our recollection as to some of the rights of an accused and some dangers which must be guarded against to insure a just verdict, and that will be discussed also.

Beginning with the judgment of the International Military Tribunal decided under the London Charter, and running through all the decisions of subsequent tribunals at Nuernberg, which were decided under Control Law No. 10, of which the London Charter is made a part, the following propositions are clearly discernible:

1. That guilt is personal and individual and must be based on the personal acts of the individual charged and is not constructive or collective so that criminal acts of some may be charged to others who had no part in their commission and no control over those who did commit them.

2. That to establish personal guilt it must appear that the individual defendant must have performed some act which has a causal connection with the crime charged, and must have performed it with the intention of committing a crime. Such act may be an act of omission where there is a duty to act and power to prevent. Crimes, generally speaking, are intentional wrongs, the intentional results of action or non-action. They are committed willfully and knowingly as the indictment charges. They are not the result of accident or of circumstances over which the actor had no control and no reason to anticipate.

3. All the elements necessary to establish the personal guilt of the individual charged must be proven beyond a reasonable doubt.

This last proposition means that the burden is on the prosecution to establish the guilt of the defendant, in accordance with the preceding propositions, by proof beyond a reasonable doubt.

It means that in the meantime he is presumed to be innocent, and that such presumption stands as a witness for him throughout the trial. It means that all the material evidence must be considered and if from the credible evidence two inferences may be drawn, one of guilt and one of innocence, the latter must prevail. It means that where circumstances are relied upon to establish guilt, the circumstances must be so complete as to exclude any other reasonable hypothesis.

These propositions are not a mere collection of words to be repeated, given lip service, and then ignored. They are basic. The ideas they represent must be constantly kept in mind if the rights of the accused are to be properly safeguarded and the conviction of those who may not have actually committed the crime charged avoided. To ignore them and what they require of the Tribunal in the way of mental attitude at any stage of the proceedings is to open the door to error and injustice. There is a vast difference between evidence which proves a crime and that which confirms a suspicion.

Unfortunately the prosecution's case was, for the most part, not presented either in the evidence or in argument in harmony with these propositions and the concept which they represent. For example, evidence as to all the crimes committed by the Third Reich, and they were many and horrible, has been introduced before us in all their gory details, including movies of conditions in some concentration camps taken after Allied troops occupied the territory, although it is not charged that any defendant in this dock had any direct connection with or responsibility for such conditions. It is argued that the defendants are guilty of all these crimes of which they received knowledge, actual or constructive. Much of the time of the trial was taken up with an effort to prove such knowledge, frequently by means of documents which are shown to have reached their office. The theory is that if a defendant knew of a crime anywhere in the government and remained at his post of duty, he thereby approved the crime and became guilty of it. Of course, the same result would follow if a defendant by some document or otherwise took cognizance of the fact that a crime had been committed unless he openly and vigorously protested against it.

Other statements of the prosecution are more frank and realistic. Witness the following from a prosecution brief:

> "Unless we subscribe to the preposterous proposition that a crime should not be atoned for if it was committed by a state, those must atone for a nation's crimes who held prominent positions in agencies involved in their planning or execution."

This may explain many things in this case, including the fact that the men who seem to have actually committed war crimes by their own testimony appear in this case, not in the dock, but as witnesses for the prosecution.

These attitudes reflect impatience with the idea that these defendants, as individuals, must be shown to have personally committed crimes according to the usual and customary standards or tests. They may also indicate a realization that the evidence in many instances is insufficient to establish guilt by such standards. They represent a concept of mass or collective guilt, under which men should be found guilty of a crime even though they knew nothing about it when it occurred, and it was committed by people over whom they had no responsibility or control. The theory seems to be that this concept applies with special emphasis when the defendants held prominent positions in the government of Germany when the crimes were committed.

There are other arguments advanced to sustain convictions on a mass scale, which, in my judgment, are even more unsound on legal grounds and more vicious in their consequences. But since the opinion does not mention them, or reveal the part they played in the decision, I shall not attempt to discuss them. It is sufficient to say that I reject them all. Since conspiracy is out of this case, no sort of legal legerdemain can substitute for proof that the defendant as an individual committed some act either of omission or commission with the intent thereby to bring about a result which is a crime charged in the indictment, and which accomplished its purpose. If the evidence is insufficient to establish guilt beyond a reasonable doubt on the basis of such individual responsibility, as distinguished from group responsibility, this Tribunal has no other alternative than to acquit.

All of these arguments and contentions in behalf of the prosecution lead by somewhat different routes to a very simple formula for determining guilt as follows: The government of the Third Reich committed many crimes; the defendants held prominent positions in that government, and knew of some of these crimes; therefore, they are guilty. It smacks more of something else than a proceeding to fix the legal responsibility for crime.

It is strange doctrine and reasoning to be advanced by lawyers representing American justice, and the American concept of crime. One excuse for it is that Control Law No. 10 contains a provision that those are guilty of a crime "who took a consenting part therein."

The phrase is interpreted to mean that by giving consent to the crime after it was committed was to take a consenting part, and that failure to either openly protest or go on a sit-down strike in

time of war, after receiving knowledge that somebody somewhere in the government committed a crime, was to consent to the crime and thereby become guilty of it. It makes proof easy and guilt almost universal.

Frankly, it is incredible to me that such a contention should be advanced, and more incredible that it should receive serious consideration. It is wholly unrealistic. It has neither reason nor a rudimentary conception of justice to support it. It does not even give proper effect to the language used in Control Law No. 10, and has no support so far as I have been able to ascertain in any of the decisions here at Nuernberg. Properly construed, this phrase simply means that one who "took a consenting part" must be one who *took* a *part* in the *crime* and the consent must play a *part* in the crime. This is the language of the statute. Consent after the crime, if such a thing is possible, could not play a *part* in the crime. A failure to openly object to a crime after it has been committed, where there is no right of objection, because of absence of jurisdiction in the matter, and where such objection would, therefore, accomplish nothing, cannot properly be called "consent" at all, and even if failure to resign under such circumstances after hearing about a crime can properly be called "consent" it could not play a *part* in the crime. The phrase "take a consenting part" properly construed is not inconsistent with the idea of individual responsibility for crimes. It is not inconsistent with the idea that to constitute a crime there must be on the part of the person charged some action or omission of duty having a causal connection with the crime charged and undertaken with the intention of committing a crime. Any person who can order a crime committed can consent to its commission with equal effect and with equal responsibility. To take a consenting part means no more than that.

This is the only interpretation which makes sense. It is the only interpretation which is consistent with the allegations of the indictment that defendants committed crimes "knowingly and willfully." It is the only interpretation which is consistent with a presumption of innocence, and that personal and individual guilt must be established beyond a reasonable doubt.

Moreover, Control Council Law No. 10 does not provide that remaining in office after receiving knowledge that someone in the government has committed a crime, is in itself a crime, and the indictment makes no such charge. It is not a crime and it does not in itself prove any other crime. Nor can it properly be allowed to sustain a conviction, or motivate a conviction on some other ground.

In order to comply with the letter and spirit of what has been heretofore stated, we must put out of mind entirely the fact that these defendants were recently members of a regime which we thoroughly disliked and with which we were recently at war, and that some of them have uttered offensive sentiments against our country, its leaders, and its troops. We must put out of mind entirely all the crimes of their compatriots in which they took no part. We must disregard all the evidence of such crimes and the horrible details and pictures presented here in connection therewith, all of which are inflammatory in character and likely to arouse passion and prejudice. The men in this dock must be tried and judged on what they did, and not on what somebody else did. They must be tried solely on the evidence relating to the particular crimes charged against them. They must be judged on fair and impartial consideration of all the evidence relating to their guilt, and not on the personal beliefs of members of the Tribunal, which are not established by the evidence beyond a reasonable doubt. There must be no assumption on the part of the Tribunal that it knows more about the facts than is thus established by the evidence. Such detachment from all of these irrelevant and inflammatory matters, and such devotion to the essentials of a fair and proper trial must be achieved, if justice is to be done.

If there be those who regard such an approach with disfavor, let them take comfort in the fact that it represents not only the law applicable to the Tribunals, but the ideals of justice of the people of the nation which sponsors these trials, and that a vast majority of those people would feel betrayed if convictions were based on any lesser standard.

Moreover, they should reflect on the fact that if these trials have a reason for existence, it is to encourage respect for the rules applicable to warfare. Such encouragement comes quite as much in freeing from punishment those who are not shown to have willfully, knowingly, and with criminal intent violated these rules as it does in punishing those who have so violated them. Any suggestion of constructive or collective guilt, no matter how disguised, would, of course, punish those who did not individually and personally violate the rules equally with those who did, and thus destroy not only respect for the rules but also the whole legitimate purpose of the trials.

Any other approach to these trials or purpose in pursuing them could not have respect for law and justice as its object.

It has seemed to me not only proper but necessary to refer in this separate opinion to the arguments and contentions in behalf of conviction hereinabove discussed because of the light they may

cast on many of the convictions contained in the Tribunal's judgment. Many of these convictions are incomprehensible to me except as viewed in the light of such arguments and similar lines of reasoning. Unfortunately the opinion, long as it is, reveals little of the process of legal reasoning which sustains the conclusion.

There are other preliminary matters which should be briefly considered as an aid to a better understanding of the discussion of the law and the facts with reference to some of the counts of the indictment which follow.

One thing which should be made unmistakably clear at the outset is that this Tribunal is not a law-making institution. I violently disagree with the opinion that we are engaged in enforcing international law which has not been codified, and that we have an obligation to lay down rules of conduct for the guidance of nations in the future. Such a conception entirely misconstrues our function and our power, and must inevitably lead to error of the grossest sort. It is not for us to say what things should be condemned as crimes and what things should not. That has all been done by the law-making authority. Control Law No. 10 gives us jurisdiction only of three crimes which are described therein, namely:

1. Crimes against peace.
2. War crimes.
3. Crimes against humanity.

Crimes against peace and crimes against humanity are defined by the act. War crimes are defined in part by the act and in part as violations of the laws and customs of war. There is no claim that there are any laws and customs of war applicable here except as contained in the Hague or Geneva Conventions, or described in Control Law No. 10. Thus, a definition or description of all the crimes for which we are authorized to convict has been reduced to writing for our guidance.

We have no power to reach out and condemn and punish anything and everything which we may believe to be wrong. Unless the acts of a defendant are a crime within the terms of a statute or rule, we have no authority to declare them a crime. In a case where the defendants are charged with violating these rules, we must be careful not to violate them ourselves by declaring an act to be a crime, which is not made a crime by these rules.

We are not enforcing uncodified international law, and no one has been indicted here for violating an uncodified rule of international law. Where a crime described in Control Law No. 10 purports to be a codification of a pre-existing rule of international law, and a question of interpretation arises, we may properly

953718—52——56

look to the rule as it existed before such codification as an aid to the interpretation. Other than that, we have no concern with uncodified international law.

Moreover, it must be realized that these rules do not contain a complete code of laws which cover every situation which may arise during warfare. Many acts which we may regard as cruel and wrong, do not come within their terms.

As Professor Wechsler has said*:

> "Once the evil of war has been precipitated, nothing remains but the fragile effort, embodied for the most part in the conventions, to limit the cruelty by which it is conducted."

The legal question, therefore, for us to determine is not whether a particular act ought to be a crime, but whether it is a crime under the rules applicable here, always keeping in mind that we have no right to extend these rules by construction.

It is the general rule that statutes and rules defining crime must be strictly construed in favor of the accused. This means that questions involving doubtful construction should be resolved in favor of the accused.

Other questions will be considered as they arise in connection with the discussion of the convictions under the several counts of the indictment, to which this separate opinion is directed.

My disagreement with the judgment in this case is limited to convictions which I believe to be either unwarranted or exaggerated and which, in my opinion, are not justified by the law or the facts. It will, therefore, be necessary to discuss both the applicable law and facts.

It would serve no useful purpose and is obviously impractical for me to discuss all the individual convictions in all the counts of the indictment. I shall, therefore, discuss in connection with the several counts, to which this separate opinion is directed, only such individual convictions as seem necessary to illustrate my separate view.

COUNT ONE

Count one charges the defendants therein named of crimes against peace—

> "In that they participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties including but not limited to planning, preparation, initiation and waging of wars of aggression,

* Wechsler, Herbert, "Issues of the Nuremberg Trial, "Political Science Quarterly (1947), volume 62 (Academy of Political Science, Columbia University, New York, 1947), page 17.

and wars in violation of international treaties, agreements and assurances."

The opinion and judgment of the Tribunal convicts the defendants von Weizsaecker, Keppler, Woermann, Lammers, and Koerner of this charge.

I am unable to agree with this judgment. Rather than attempting to point out the points of disagreement with the opinion on this count, it will be simpler to present my views independent of the opinion.

THE APPLICABLE LAW

At the outset, it seems important that we consider the law applicable to the situation. Not until we know what is necessary as a matter of law to constitute guilt, can we intelligently consider the evidence bearing on the question. Unfortunately, we are met here with a surprising lack of clarity in the decisions, and with some uncertainty, and an apparent divergence of view.

Some confusion appears to have resulted from the discussion in the cases, and some of it from holdings without adequate discussion of the legal basis therefor. I shall attempt to set out in some detail, my own analysis of the legal situation and my conclusions with reference thereto, and the reasons therefor.

The law which is the basis of our authority is Control Council Law No. 10, hereinafter referred to as "Law 10," enacted by the four occupying powers, on 20 December 1945. That law is binding upon us. It is the basis for the jurisdiction of this Tribunal. We have no power or jurisdiction with reference to any crime not described in that law, and the description or definition of the crime as contained in that law is binding on us.

Law 10 defines "crimes against peace" in Article II [paragraph 1] (*a*) as follows:

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

Some questions of interpretation arise at the outset. In the solution of these problems we must look to the language of the act primarily, and if there is still uncertainty, we must look to the historical background in an effort to arrive at the true meaning.

It must be conceded that, while the Control Council had power to enact any sort of law which it desired, the obvious purpose was

to provide machinery for the punishment of crimes which were thought to be crimes under international law existing at the time. This principle will be of some help in the matter of interpretation where it becomes necessary to resort to interpretation.

CAN THERE BE A CRIME AGAINST PEACE WITHOUT WAR?

The first question which arises is whether or not there can be a crime against peace within the meaning of Law 10 where there is no war. This is important for our consideration, because of the acts in Austria and Czechoslovakia, where troops moved in and occupied the country, but there was no war, and because of the further fact that there are some convictions here based on such actions. There are several matters which need to be considered in arriving at a proper solution of this question.

1. In the first place, the London Charter, which was adopted by the four occupying powers, and which was the basis for the prosecution of the major war criminals by the International Military Tribunal, (hereinafter referred to as the "IMT") makes no reference to "invasions" but referred only to "wars."

Law 10 states that its purpose is to give effect to the London Charter, and by its terms, the London Charter is made an integral part thereof. This being true, the description of crimes against peace contained in the London Charter [IMT charter] is also contained in Law 10, and we thus have two descriptions of the crimes gainst peace, and the problem of reconciling them.

This task must be approached with the assumption that by Law 10 there was no intention to substantially alter or change the definition of crimes against peace as contained in the London Charter, and incorporated in Law 10.

2. Moreover, the IMT held that the invasions of Austria and Czechoslovakia were "aggressive acts," but did not hold that they were "aggressive wars."

3. Law 10, by specifically referring to invasions and aggressive wars, recognizes that they are not the same thing, so that we cannot say that war includes invasions.

4. As previously pointed out, Law 10 obviously attempts to provide machinery for the punishment of crimes which were thought to be crimes prior to its enactment. Some of the authors of the London Charter have declared that it did not create any new crime against peace, but was merely a description or codification of a crime against peace, which existed prior to its adoption.

The IMT took the same view, basing its conclusion for the most

part upon the fact that some 63 nations of the world had agreed to abolish war as an instrument of national policy, in the Kellogg-Briand Pact, and some other treaties of the same general purport. But such reasoning would apply only to wars, because neither in the Kellogg-Briand Pact, nor any other treaty, so far as I am aware, is there any treaty or agreement affecting the countries here involved with reference to mere invasions—at least not invasions accomplished under the circumstances under which Austria and Czechoslovakia were invaded. The thing which is prohibited by all of these treaties is war. If we start with the premise that what was intended was to describe crimes which were already crimes under international law, we will have to exclude invasions, because there was no possible basis for claiming that a mere invasion was contrary to international law, prior to the enactment of Law 10.

5. An analysis of the language of Law 10 and its grammatical construction does not support the contention that a mere invasion is a violation of its terms. For example, it will be noticed that all of the alternative acts which the Statute provides shall each constitute the crime are separated by a comma, and the disjunctive word "or," whereas "invasions of other countries" and "wars of aggression, etc." are not so separated but, on the contrary, are united by the conjunctive word "and" which, from a purely grammatical standpoint, suggests that both are necessary to constitute the crime.

It has been suggested that such a construction is unrealistic, because it would mean that, in order for a war of aggression to be a crime against peace, it would have to be accompanied by an invasion. But it must be remembered that Law 10, in giving these Tribunals jurisdiction over certain described crimes, does not purport to describe comprehensively all of the crimes that may exist under international law. Indeed it restricts them and restricts our jurisdiction both in time and in territory.

There is nothing inconsistent, therefore, for Law 10 to limit our jurisdiction only to such crimes against peace as involved an invasion, first, because the invasion, coupled with the war, helps to emphasize its aggressive character, and ordinarily constitutes the best evidence that the war is one of aggression; and, second, because nearly all of the aggressive wars with which we have to deal, did include invasions.

Such a limitation contained in Law 10, has no effect in limiting international law generally, but only limiting the particular type of crime with which we are authorized to deal.

6. In addition, some rather absurd results follow an interpretation that invasions of other countries alone, and without war,

constitute a crime against peace. For instance, if we regard them as separate crimes, that is, if we regard invasions of other countries as a crime, and wars of aggression in violation of international law and treaties, as another crime, then any and all invasions, regardless of purpose, intention or effect, would be criminal, whereas, wars would be criminal only in the event they were aggressive, and in violation of international law and treaties, and if it is suggested that the phrase, "of aggression and in violation of international laws and treaties" applies to invasions as well as to wars, we are confronted with the obvious proposition that there are no such things as invasions in violation of international law and treaties, there are no treaties by which the nations have agreed to abandon invasions and no possible basis for the claim that an invasion without war was contrary to international law prior to the adoption of Law 10.

As to wars, there may—and indeed there seems to be—a difference of opinion as to whether initiating a war of aggression was a crime under international law, when the wars here involved were started, but at least there is substantial basis for such a claim in view of the fact that some 63 nations had joined in announcing the principle, and in a covenant to the effect that they would not resort to war as an instrument of national policy, and that Germany was a party to that covenant.

There is nothing of that sort so far as mere invasions are concerned.

7. Furthermore, it is very difficult to understand how any act can properly be described as a crime against peace, which does not constitute a breach of the peace. We are sometimes inclined to talk about the "crime of aggression," whereas the statute speaks of "crimes against peace." Confusion results. Neither the statute nor the treaties on which it is based condemn aggression. It condemns war for the purpose of aggression. Many acts may be aggressive that are short of war. They may merit the condemnation of all right-thinking people, but unless they involve a breach of the peace, it would be an abuse of language to call them "crimes against peace."

For all of the foregoing reasons, I have reached the conclusion that what happened in Austria and Czechoslovakia, where the troops of Germany marched in, but there was no disturbance of the peace, and no war, does not constitute a crime against peace.

WHEN IS THE CRIME AGAINST PEACE COMPLETE?

In view of the claim made in the opinion that all those who participated in a war of aggression knowingly, are guilty of crimes against peace, consideration must be given to the ques-

tion of what the crime is, and when it is complete. In other words, are those who participated in a war, after it has commenced, either on the economic, diplomatic, or military front, or in any other way, guilty of crimes against peace?

The prosecution, in its brief, contends that the word "waging" as used in the statute, means participation in the war in a substantial manner. The opinion gives no explanation as to the reason for its conclusion that such participation is a crime against peace.

I do not believe that a correct interpretation of the word "waging" as used in Law 10, leads to the conclusion that participation in the war, after it has commenced, is a crime against peace. According to Law 10, the crime against peace consists in "initiating" a war of aggression. The terms "planning," "preparation," "waging" are only means by which the war is gotten into motion.

The prosecution, in its brief, takes the position that the word "waging," as used in the statute, means something entirely different from "preparation," "planning," and "initiation." The principle of *ejusdem generis*, on the other hand, would suggest that it has a somewhat similar meaning, or is at least related to the previous words.

When the statute provides that "waging" is included in "initiation" it must, it seems to me, be given such meaning as relates it to initiations.

This is clearly stated in Law 10. It was not so clear under the terms of the Charter, and yet it was given such meaning by the IMT even under the Charter.

It has been claimed that there is some language in the IMT judgment decided under the provisions of the London Charter with reference to Doenitz, which appears to support a contrary view. If so, it is of minor importance in view of the numerous and definite expressions in that judgment, even as it relates to Doenitz, which show a contrary view.

For example, at the very outset of the discussion of "The Common Plan of Conspiracy and Aggressive War," the Tribunal, after saying that war was an essentially evil thing, states:*

> "To *initiate* a war of aggression, therefore, is not only an international crime; it is the supreme international crime * * *." [Emphasis supplied.]

A review of the facts stated by the IMT to support a conviction of waging an aggressive war, reveals that the emphasis is all placed upon what the defendant did before the war started, not afterward.

* Trial of the Major War Criminals, op. cit., volume I, page 186.

For example, in the case of Goering, the Luftwaffe which he commanded, and which raised havoc during the war, is hardly mentioned in connection with crimes against peace committed by him. The substance of his acts, which support his conviction, is contained in the last paragraph of the Tribunal's summing up for Goering as follows:[1]

> "After his own admissions to this Tribunal, from the positions which he held, the conferences he attended, and the public words he uttered, there can remain no doubt that Goering was the moving force for aggressive war, second only to Hitler. He was the planner and prime mover in the military and diplomatic preparation for war which Germany pursued."

In like manner, an examination of the facts stated by that Tribunal, to establish guilt of other defendants, shows that the emphasis and the facts which led to a conviction were activities of the defendants in bringing about the war, not in fighting it, or in participating in it in any way after it came into existence.

Even in the case of Doenitz, a careful examination of the case against him, as stated by the Tribunal, will show that it was what he did before hostilities actually broke out, and in reviving them after they were in fact over, that led to his conviction.

After stating the things that Doenitz did not do, the Tribunal makes this statement:[2]

> "Doenitz did, however, wage aggressive war within the meaning of that word as used by the Charter. *Submarine warfare which began immediately upon the outbreak of the 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.*" [Emphasis supplied.]

Then, after further statements concerning the influential positions of Doenitz, occurs this very significant statement:[3]

> "As late as April 1945, when he admits he knew the struggle was hopeless, Doenitz, as Commander in Chief, urged the Navy to continue its fight. On 1 May 1945 he became the Head of State and, as such, ordered the Wehrmacht to continue its war in the East, until capitulation on 9 May 1945."

This is the final fact stated by the Tribunal in the case against Doenitz, and it must have been regarded by the Tribunal as of the highest importance. Its obvious purpose is to show that, even after the war, which began in 1939, was in fact over,

[1] *Ibid.*, p. 280.
[2] *Ibid.*, p. 310.
[3] *Ibid.*, p. 311.

Doenitz ordered further and continued attacks. If this statement serves any purpose, it is to show that he, in effect, by what he did, initiated a new war, or revived one which was already over.

If "waging" in the sense of fighting a war, or merely participating in a war, was sufficient to establish his guilt, why was it necessary to refer to this fact in order to connect him with the initiation of a new war, or the extension of a war, already in existence, after it was, in fact, over?

This, it seems to me, clearly demonstrates that, in the opinion of that Tribunal, something more than participating in a war already initiated was necessary to establish waging within the meaning of Law 10.

This conclusion becomes even more imperative when it is considered that Doenitz commanded the submarines and that these submarines wrought terrific damage and destruction all during the course of the war. Yet this fact is not even mentioned in connection with crimes against peace. If waging war, in the ordinary sense of participating in the war, constituted guilt, these facts would establish it beyond peradventure or doubt. It would have been wholly unnecessary to refer to the fact that he had his submarines ready and in a position to strike in advance of the actual outbreak of the war and that he revived the war after it was otherwise over, and to base their judgment on these facts.

The prosecution cites some authorities which I think support the view that the word "waging" referred to in Law 10 does not mean participation in the war after it is started.

For example, Justice Jackson is quoted as saying the following:[1]

> "* * * our first task is to examine the means by which these defendants and their fellow conspirators prepared and incited Germany to go to war."

It is obvious that statement must have been made in the trial before the IMT. Professor Wechsler is also quoted as saying this:[2]

> "The greatest evil is, of course, the initiation of war itself. Once the evil of war has been precipitated, nothing remains but the fragile effort embodied for the most part in the conventions, to limit the cruelty by which it is conducted."

[1] *Ibid.*, volume II, p. 104.
[2] Wechsler, *loc. cit.*

This clearly shows that the initiation is thought to be the crime, and that, so far as participation is concerned, nothing remains but the conventions to govern it.

Moreover, where a statute codifies preexisting law, it is customary to look to the preexisting law as an aid to interpretation. The situation is not unlike that existing where the common law is in effect. Frequently a legislature will abolish common law crimes, for example, and then enact a statute defining a crime briefly which existed at common law. It is the universal practice in such instances to look to the common law definition of the crime to aid in the construction of the statute.

Here we have a one-sentence definition of an international crime which was said to exist under international law before the definition was adopted.

For a more exact definition, especially on a point which may not be clear, we certainly have a right to look to what constituted that crime under international law, as it existed prior to the adoption of the statute, especially where, as here, it was the intention to adopt a description of a crime previously existing.

The reason why wars of aggression were held to be a crime against international law, prior to Law 10, was because to start such a war would be to violate the Kellogg-Briand Pact, under which the nations agreed to abandon war as an instrument of national policy, and other treaties of the same general purport. Under that pact, what would be the crime and when would it be complete?

If the treaty prohibited the use of war as an instrument of national policy, it seems obvious that the pact would be breached when the nation resorted to a war of aggression or to serve any other national policy. An agreement not to resort to war as an instrument of national policy is breached only by resorting to war, and the breach is complete when war has begun.

The offense, then, under this preexisting international law, would consist in creating a condition of war. There is nothing in that treaty, or in any of the other treaties of similar purport, which makes it a crime to participate in a war after it comes into existence.

When a nation finds itself at war, and its very existence is at stake, there is nothing in any of these treaties which even remotely suggests that it would be a crime for the citizens of either country, under these conditions, to participate in the war and to wage war to the limit, so long as they conform to the conventions in the conduct of war. So when we consider the background of the statute, and the reasons advanced to support the findings of the IMT, that is but a re-enactment of preexisting international

law, we are forced to the conclusion that those who participated in the war, after it has been started, even with knowledge of the true character of the war, are not guilty of waging a war of aggression.

Finally, there is a conclusive reason why it must be said that those who associate themselves with a war, after it is started, cannot, on that account, be guilty, and that is the very language of the Law 10. It defines the crime as:

> "*Initiation* of invasions of other countries and wars of aggression in violation of international laws and treaties * * *." [Emphasis supplied.]

When the statute says initiation is the crime, what right do we have to say that participation is also a crime?

The word "waging," as used in the statute, is referred to by the IMT as participation in a plan to wage war. It refers to the preliminary procedure up to and including the outbreak of war, not the participation in the war, after it has been initiated.

PERSONS CAPABLE OF COMMITTING CRIMES AGAINST PEACE

One further legal question must be considered here. We have already called attention to the statement of the IMT that it is the *initiation* of wars of aggression, which are the supreme crimes. We have called attention to the fact that under the law existing prior to the London Charter, or Law 10, the offense would consist in resorting to war as an instrument of national policy.

We have called attention to the working of Law 10, which described crimes against peace as the *initiation* of invasions of other countries, and wars of aggression, etc.

The question then arises, "What action, and by whom, may be said to constitute the crime of initiating a war of aggression?" The question of whether or not a nation will wage an aggressive war is a question of national policy. Obviously not everybody in the nation is in a position to participate in the formulation of such a policy. Whatever many of them do, as individuals, is so devoid of significance or effect that it would be wholly unrealistic to say that they were a factor in determining the policy to wage an aggressive war and therefore guilty of initiating a war of aggression.

The IMT, in its judgment concerning the defendants who were convicted, lays emphasis not only on their attitude and participation in a plan to wage a war of aggression, but also on the relation

of such defendant to Hitler and the opportunities they had and the capacity they had to influence national policy through Hitler.

The comments of that Tribunal are equally significant with reference to some of the defendants who were acquitted.

For example, take the case of Fritzsche. He not only delivered the daily paroles to the press, which directed the propaganda campaign in the press, and which were obviously very important in conditioning the minds of the German people for war, but he subsequently delivered radio addresses. These he apparently prepared himself, yet the Tribunal held him not guilty. It did not even go into the question as to whether he knew of a plan to wage a war of aggression. It speaks of Fritzsche's lack of position and influence in the Third Reich, and the further fact that he had never had a conversation with Hitler. It thus appears that position and influence, and standing with Hitler, were thought to be important, in order to play a part in initiating a war.

Of course, mere proximity to Hitler, such as a secretary or adjutant would have, would not be controlling. But in view of the power Hitler had, it is a factor in determining whether a person participated in the initiation of a war or not. To participate, requires, in addition, a position of power and influence, and the use of it, for the purpose of initiating a war, knowing the war will be one of aggression.

There is another thing about the holding as to Fritzsche that is significant. The Tribunal said he was but a conduit for the transmission of the daily paroles, and that he prepared and formulated daily radio paroles "according to the general political policies of the regime."

This suggests that people who are in a subordinate position, and who merely carry out tasks assigned them, according to the general political policies of the Nazi regime, are not in the class of people who can be said to have knowingly and willfully participated in a plan to wage a war of aggression. It suggests a substantial limitation on those who may properly be said to have committed crimes against peace.

The Tribunal in the Farben case in considering this question said in substance that the IMT had placed the dividing line just below the policy-making level. In other words, only those persons who were on a policy-making level could be liable for the commission of crimes against peace.

This statement was reaffirmed, at least in principle, in the Krupp case, and again in the High Command case. These holdings are persuasive and I think they are correct.

Who then are the people on the policy-making level?

A comprehensive definition will not be attempted. This much may, however, be said on the subject. Only those are included, regardless of title or official position, who, by reason of their position of power, are able to exercise, as a matter of free choice, influence on the governmental policy, so far as the question of going to war or refraining from going to war is concerned. The attitude or actions of others would be without significance or effect, and they could not, therefore, be said to have been a party to the initiation of a war. As to each defendant, therefore, we must seek the answer to the following three questions:

1. Did he knowingly engage in some activity in support of a plan or purpose to induce his government to initiate a war?

2. Did he know that the war to be initiated was to be a war of aggression?

3. Was his position and influence, or the consequences of his activity such that his action could properly be said to have had some influence or effect in bringing about the initiation of the war on the part of his government?

Only if all of these questions are answered in the affirmative will we be justified in finding a crime against peace has been committed.

It appears without question that the wars in connection with which some of the defendants in this case have been convicted were wars of aggression. It was so found by the IMT, and there is no occasion to discuss that question further. There is, as previously indicated, a question as to whether there was any aggressive war in Austria and Czechoslovakia, where German troops marched into the country. But this question has previously been discussed. There remains, therefore, for consideration, only the question as to whether the evidence establishes the guilt of the defendants according to the tests above outlined.

It seems to me unfortunate that the opinion quotes a statement of the IMT which was made with reference to the conspiracy count. The defense in that case had argued that there could not be a common plan or conspiracy in a dictatorship, because the dictator alone made the plans.

The Tribunal, in dealing with this question, in effect said, with reference to those who were fully advised of Hitler's plans and purpose, that those with knowledge of his plans, who gave him their aid, were liable. The statement, standing alone, and without reference to the context, and the fact that a common plan or conspiracy was under discussion when the statement was made, is misleading.

In the first place, it must be borne in mind that Hitler's plan therein referred to was the common plan or conspiracy to wage

aggressive war—a plan which the IMT held must be concrete and definite and not too far removed from the time of action. Also the "aid" referred to was to help bring the plan into realization by the initiation of the war involved in the plan. It does not include the performance of the normal functions of a civil servant.

Obviously, that statement cannot properly and literally be applied to anyone charged in this count. This is not a conspiracy count. The conspiracy count, which is count two, has been dismissed and it has thereby been adjudicated that the defendants were not parties to any common plan or conspiracy. What the defendants are charged with is what the IMT called, "waging." That is participation in a plan or a purpose to initiate a war, knowing that it was to be a war of aggression.

VON WEIZSAECKER

Von Weizsaecker is convicted because of his alleged participation in the initiation of the invasion of Czechoslovakia, or that part of Czechoslovakia which remained after the Sudetenland had been ceded, and Slovakia had declared its independence.

In my view, he is not guilty for two reasons. One, the invasion of Czechoslovakia was not a crime against peace, because there was no war, and no disturbance of the peace. Two, he took no part in bringing about or initiating such an invasion.

The first proposition has already been discussed. I turn to the second.

The opinion states in substance that von Weizsaecker did not originate the invasion and forcible incorporation of Bohemia and Moravia, and that we do not believe he looked upon the project with favor.

In spite of this concession, he is convicted. The opinion states, in substance, that although the defendant von Weizsaecker was not present at the conferences where Hitler announced plans of aggression, he became familiar with them from reliable sources, that is, von Ribbentrop, Canaris, leading generals of the Wehrmacht, and others, who furnished him with accurate information.

That is the first I have heard in this case of any such claim and, so far as I am aware, there is no evidence to support it. It is true, of course, that von Weizsaecker received some information as to what was actually going on, which may not have been generally available, but it has not been suggested heretofore, that he received information with reference to these conferences, where the common plan and conspiracy to wage an aggressive war were formed.

It is significant that on such an important matter no evidence is cited or referred to in support of the statement. Significantly, it appears elsewhere in the opinion that von Weizsaecker was not in von Ribbentrop's confidence and that they did not get along very well.

It is my judgment, based on the evidence in this case, that von Weizsaecker's knowledge of planned, future developments in the field of foreign policy, as it affected war, was limited to inferences which he was able to draw from what was going on about him. This was consistent with the secrecy regulations which were rigorously enforced in the Reich, and which provided that no one should be told of what was being done or planned with reference to matters of this sort, except that an official might be told what was necessary for him to know in order to perform his duties. But only so much was to be told as it was necessary for him to know, and not that until the time came when he must know.

For example, von Weizsaecker was not told of the planned invasion of Denmark and Norway until about 3 days before the invasion occurred, and after the German troops had departed, and was told then only because it was necessary for the Foreign Office to prepare and communicate a statement to be delivered to the Danish and Norwegian Governments.

Now what is the evidence on which the opinion relies to convict von Weizsaecker which indicates that he aided in the initiation of the invasion of Czechoslovakia? What he did before the marching in of the German troops, according to the opinion, is the following.

He received a memo from von Ribbentrop of an interview with Hitler which had to do with the relations with Hungary. It does not indicate that Hitler had any intentions of military action against Czechoslovakia. The balance of the evidence consists of memos of interviews with representatives of foreign governments, such as Britain, France, Italy, and Czechoslovakia, concerning a guaranty which Germany had agreed to give in the Munich Agreement.

In all of these interviews von Weizsaecker tried to avoid, excuse, and justify the failure and refusal of his government to enter into such a guaranty. But what did all of that have to do with the invasion which followed?

If the guaranty had been entered into, would the invasion have been less likely to follow? Hitler was not embarrassed by treaty obligations in his other campaigns. What reason is there to suppose that he would have been restrained by this one, especially since the so-called invasion or marching in of troops was carried out in accordance with, or as a result of, an agreement

on the part of the President and the Foreign Minister of Czechoslovakia?

But even more important than that, what could von Weizsaecker do about it? He was not in charge of the foreign policy of the Reich. It was not for him to decide whether such a guaranty should be entered into or not. He could not control that. If his government did not want to enter into such a guaranty, he could not compel it to do so.

It would be wholly unrealistic to suppose that von Weizsaecker had any control over such matters. He did not make the policy. He could only reflect the facts as to whether or not his government was willing to enter into such a guaranty. All he could do, and all he did do, was to make the best case in behalf of his government that he could, and that does not indicate any purpose or intention on his part to encourage a military assault on Czechoslovakia, nor did it, in fact, encourage such an assault.

These interviews do not appear to have had any connection whatever with Hacha's visiting Berlin, and with his submitting to Hitler's will, and his opening the door for the entry of the German Army, nor does it appear that they were intended to have such purpose. These interviews did not initiate, and had no connection with the initiation of that proceeding, and they are in no way connected with it.

The opinion then sets out a number of interviews with these same foreign representatives, which von Weizsaecker held following the absorption of Czechoslovakia, in which he defended the action which his government had taken, and claimed it was the result of an agreement between the two states, and that other governments had no grounds for complaint.

The opinion seems to lay stress upon what happened subsequently, and to draw from it the conclusion that von Weizsaecker played a consenting part. There is a suggestion also that what von Weizsaecker did following the absorption of Czechoslovakia was an implementation of the enterprise.

I am unable to support this line of reasoning. If what happened with reference to Czechoslovakia was in fact a crime against peace, von Weizsaecker could be found guilty in my judgment, only if he affirmatively did something to initiate the enterprise, and did it with the intention of initiating the enterprise. Evidence of that sort is entirely lacking.

The opinion reveals that von Weizsaecker had played a heroic part in an effort to preserve decency and peace. Because he was silent in this instance he is convicted, although evidence is lacking that he had advance notice of Hitler's purpose sufficient to enable

him to attempt anything effective to prevent it, if indeed, there was anything he could have done under any circumstance.

But, in my judgment, his failure to do anything to prevent the proceedings, even if he had had an opportunity, cannot be regarded as a crime. He does not commit a crime against peace in any event, by inaction. Something affirmative is required.

It is not possible to examine and discuss the other convictions under this count in detail, and no useful purpose would be served thereby. It is sufficient to say that not in any of them is there any evidence to show that the defendants did anything affirmatively to initiate a war, knowing it was to be a war of aggression.

Woermann was the head of the political division in the Foreign Office, and as such, subordinate to von Weizsaecker and to von Ribbentrop. He is convicted because of certain diplomatic messages he sent which are described in the opinion. The only ones which relate to a possible future war are those sent to Slovakia. They are obviously messages which originated with the army and have to do with coordinating military action in case of attack.

The Foreign Office is, of course, the only appropriate channel of communication between nations. In transmitting these messages the Foreign Office acted merely as a transmission line. It is hardly to be supposed that these messages represent Woermann's plan. He was not running the army, nor planning military cooperation with Slovakia in case of attack. It was a proper precautionary measure in any event. But it was in fact, as we know now, a preparation for attack on Poland. But it was disguised as a defense arrangement. It was so represented to Slovakia, and there is no reason why Woermann should have recognized at the time that it was an act of preparation for a war of aggression against Poland. But if he had recognized it, I do not see what he could have done about it. He was a subordinate in the Foreign Office. The Foreign Office was available for such communications regardless of what Woermann may have thought about the matter.

None of the other matters cited in the opinion have anything to do with initiating the war against Poland. Indeed, many of them are concerned with events happening after the war was over. For instance, there is a message sent by him stating that a certain Polish Bishop would not be permitted to return to Poland after the war. This could have no connection with initiating that war, in any event. Moreover, the message merely conveyed the decision of his government. It would be wholly unrealistic to suppose that it was up to Woermann to decide whether the return of the Bishop should be permitted or not.

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This and many other like items of evidence cited in the opinion seem to indicate that the controlling consideration, so far as the opinion is concerned, is whether or not, in what the defendant did, he acted in sympathy with the Reich program or in opposition to it. And if it can be found that the things he did are in harmony with the Reich program, no matter how innocent the acts in themselves may be, the opinion seems to hold that he then cooperated with or implemented such program. Of course, under such a formula, one may be held to participate who merely writes a letter or receives one, or forwards a report, no matter how harmless these documents may be in themselves.

In my judgment, the field is not that open. To be guilty—I repeat—the defendant must have participated in the initiation of a war of aggression. In order to do that, he must have committed some act intended to have some effect in bringing about a war, knowing it would be a war of aggression. That kind of evidence is conspicuous by its absence here.

KEPPLER

As to Keppler, his activities were in Austria, where there was no war, and this, in itself, in my judgment, is a complete defense to the charge.

Moreover, there is no indication that he worked there with a view of initiating a war. His job was to seek a union with Austria by peaceful means. Since all the political parties in Austria favored a union, it was not unreasonable to suppose it could be accomplished.

The conditions requisite for such a union had already been accomplished before the German troops entered Austria. A government favorable to such a program had been established before the troops moved in.

That Keppler did not favor the entry of the troops is shown by his statement quoted by the IMT. When Goering telephoned Keppler to have Seyss-Inquart send a telegram requesting German troops to enter Austria to prevent bloodshed, Keppler replied:*

> "'Well, SA and SS are marching through the streets, but everything is quiet.'"

This indicates pretty clearly that Keppler did not favor the entry of German troops and that he believed it unnecessary.

The opinion does not cite any facts or evidence to support the proposition that Keppler initiated, or helped to initiate, an invasion of Austria. His guilt seems to consist in an interference with Austrian affairs. But this is not a crime against peace.

* Trial of the Major War Criminals, op. cit., volume I, page 193.

As to the defendants who were convicted because of their activity in the Four Year Plan, it does not appear that they knew that preparation was being made for an aggressive war. There is no doubt that the Four Year Plan, at least in its later stages, was engaged in preparation for war on a rather large scale, but every nation engages in military preparations. Such preparations are as useful for defense as for aggression.

Hitler, up to the outbreak of the war in 1939, repeatedly declared that such preparations were for defense, and there was great emphasis placed on the danger which confronted Germany from without. Those who engaged in production of armament and military preparation are not liable unless they do so for the purpose of preparing for a war of aggression. Proof of this essential fact is lacking.

The same consideration, of course, applies to other kinds of defense preparations, such as defense councils and defense committees, and other types of civil and government organization.

Lammers is held largely because of his preparation of decrees and other documents for Hitler. The nature of his work and the liabilities of one who merely formulates decrees and other official documents, is discussed under count six of this separate opinion. It is sufficient here to say that he was, in the words of the prosecution, "Hitler's faithful servant," exercising clerical and secretarial functions and drafting decrees as a technician in that field.

He was the office chief of Hitler's office, as Chancellor, and served Hitler in the civilian sector of government. Hitler had other offices through which he exercised other functions, including military functions. Lammers was not concerned with policy. He exercised no policy-making functions. While he held the title of Minister, it was purely honorary. He exercised the functions of a State Secretary. He cannot properly be said to have been on a policy-making level, or to have exercised any influence or power in the direction of initiating a war.

In my view, none of the defendants convicted under this count can properly be held to have participated in a plan to wage a war of aggression, or of exercising any activity with the intention or purpose in view of starting or initiating such a war, and if such a construction could possibly be placed on their activities, it does not appear that they had any influence or effect in bringing about a state of war. Neither they nor their activities appear to have had any influence on Hitler. They were not the people on whom Hitler relied for guidance and support in such mat-

ters, and their actions were without significance, so far as the initiation of the war with which they are charged, is concerned.

COUNT THREE

Count three charges the defendants therein named with participation in the murder of prisoners of war and belligerents engaged in the war against Germany.

RITTER

Ritter is alleged to have participated in such murders because of two incidents, to wit:

1. The murder of Allied fliers;
2. The Sagan murders.

The murder of Allied fliers refers to the lynching of Allied fliers who bailed out of their planes after allegedly making machine gun attacks on civilians on the highways or in the fields, while flying at low altitude. In the interest of brevity they will be referred to here merely as, "Allied fliers."

That such incidents occurred, and that Allied fliers were lynched and murdered, and that such acts were indefensible murders, is well established. If it be conceded that these Allied fliers had made attacks on civilians as claimed by the defense, the remedy was not lynch murders. They were entitled to be taken as prisoners of war and if they committed war crimes they were subject to trial and punishment in accordance with the rules of the Hague and Geneva Conventions. There was no excuse or justification for murdering them.

Our task here is to determine whether the defendant Ritter had any criminal responsibility for such murders. It would seem almost superfluous to suggest in a legal opinion that a person to be guilty under this charge must have himself murdered prisoners of war or ordered others to do so, or at least performed some act or non-act which had a causal connection with such murders and was performed with the intention of causing or assisting in causing such murders.

Ritter became attached to the German Government as a civil servant before the First World War. He served first in the Colonial Office. He was a soldier during the First World War. He joined the Foreign Office in 1922. His work there was mostly in the field of economics and in connection with commercial matters. He worked on reparations after the First World War, and negotiated many trade treaties subsequently for Germany. He became Ambassador to Brazil in 1937. He was withdrawn from

that position due to Party opposition. He had reached retirement age, and asked to be retired, but was not permitted to do so. He was made Ambassador for Special Assignments in the Foreign Office.

After the war broke out he was made liaison officer between von Ribbentrop, the Minister of Foreign Affairs, and Keitel, the head of the armed forces. The functions of that position are indicated by the title. His job was to maintain contact or liaison between these two top officers, and to facilitate communication between them. For that purpose he maintained field headquarters not too far removed from either. He had no authority to determine policy, or to make any decisions concerning policy either for the Foreign Office or for the army. The purpose of liaison was to keep each informed in matters which concerned both and to facilitate negotiations between them, and to enable the two officers to better coordinate their efforts.

It is no doubt true that where differences arose he was free to make suggestions, and did make suggestions with a view to enabling the parties to reach a common agreement or understanding.

On 15 June 1944 Ritter received from Keitel, as stated in the opinion, a proposed program of procedure concerning the mistreatment of Allied fliers, and Keitel requested the opinion of the Foreign Office with reference thereto. The Foreign Office was naturally consulted because it would be required to answer protests received from the protective powers of enemy countries.

This communication requested the opinion of the Foreign Office by the 19th. On the 18th Ritter telephoned that the opinion of the Foreign Office could not be delivered by the 19th because it would be necessary to contact Berlin. On the 25th of the month Ritter wrote to Keitel's office, transmitting (*PS–735, Pros. Ex. 1232*):

> "For your preliminary information, the draft of a reply to the Chief of the Supreme Command of the Armed Forces in answer to his letter of 15 June. The draft has been submitted to the Reich Foreign Minister.
>
> "Since the Reich Foreign Minister is away on travel for several days, he was not able, as yet, to give his approval to the draft."

This draft had Ritter's name typed at the end of it, and was obviously prepared in the form of a letter to be sent by Ritter, but Ritter drew a line with a pen through his name and marked it "draft," and wrote a separate letter enclosing it, as above stated.

Ritter's conviction is based on his alleged authorship of this draft, or his transmittal of it to Keitel's office. The draft is an expert legal opinion and deals particularly with the Geneva Convention, and the rules developed thereunder. It bears every evidence of having been prepared by an expert in that field. Ritter was not such an expert. His specialty was economics. No witness testified that Ritter prepared it. He testified that he did not. The circumstances all confirm his statement.

There is the circumstance that he telephoned that the attitude of the Foreign Office could not be transmitted until he contacted Berlin. There is the long delay in formulating the Foreign Office opinion. There is the fact that Keitel asked for the Foreign Office's opinion, and the further fact that the draft did contain the Foreign Office's opinion, as von Ribbentrop's subsequent approval shows. There is nothing whatever in the evidence to suggest that Ritter prepared it.

The opinion relies wholly upon the fact that it bears a stamp of having been in his office, but that circumstance proves nothing as to where it was prepared. There was no claim in the trial or in the argument that the markings, or absence of markings on the draft had significance. It appears for the first time in the opinion. Under such circumstances it is a pretty slender reed on which to hang a conviction.

It is true that the draft, although making several objections based on international law, does recite that the Foreign Office agrees in principle, but as will hereafter appear, von Ribbentrop had already agreed in principle. This fact was unknown to Ritter and this is another circumstance which indicates that von Ribbentrop's office prepared the draft, or that it was done under pretty close supervision by von Ribbentrop, and that Ritter did not prepare it. It seems to me that the finding that Ritter prepared the draft is contrary to the evidence.

The important thing, however, is that nothing came of the draft. It had no consequence whatever. Ritter's communication to Keitel's office gave notice that von Ribbentrop's approval was subject to Hitler's approval, and that he would not give his final approval until Hitler had approved.

It further appears, without dispute, that Sonnleithner, of von Ribbentrop's office, was to present the matter to Hitler. This circumstance suggests that he may have had something to do with the preparation of the draft. In any event when it was presented to Hitler, Hitler said it was "nonsense," according to von Ribbentrop's testimony before the IMT, and nothing was ever done about it. It never went into effect. No orders were ever

issued because of it. It could not possibly, under any circumstances, be the cause of the murder of Allied fliers.

There is another circumstance which shows that Ritter took no part in the formulation of any policy with reference to Allied fliers. On 28 May Jodl asked Ritter about the radio campaign then being put on by Goebbels, with reference to these Allied fliers, and what was proper to be done to resist them. Ritter replied that he "should apply to a legal expert."

The manner in which this policy of lynching of Allied fliers was initiated and developed is clearly shown in the evidence, and it clearly appears that Ritter had nothing whatever to do with it. The IMT, in its judgment concerning Bormann stated:[1]

> "Bormann is responsible for the lynching of Allied airmen. On 30 May 1944 he prohibited any police action or criminal proceedings against persons who had taken part in the lynching of Allied fliers. This was accompanied by a Goebbels' propaganda campaign inciting the German people to take action of this nature, and the conference of 6 June 1944, where regulations for the application of lynching were discussed."

The same Tribunal, in its judgment against von Ribbentrop stated:[2]

> "Von Ribbentrop participated in a meeting of 6 June 1944, at which it was agreed to start a program under which Allied aviators, carrying out machine gun attacks on civilian population, should be lynched."

This conference was held with Hitler at Hitler's headquarters, and Keitel and Jodl of the armed forces, as well as von Ribbentrop, were in attendance. This clearly demonstrates that the Foreign Office, or rather von Ribbentrop, the Foreign Minister, had agreed to this general policy on 6 June, at a conference which Keitel also attended, so that when Keitel addressed the communication to von Ribbentrop on 15 June it was not to seek his opinion about the general policy, but rather the details of a program to put the policy into effect, and this involves technical procedures upon which Ritter obviously was not qualified to act, and did not attempt to act.

On 4 July, Hitler issued the following directive (*741–PS, Pros. Ex. 1238*):

> "According to press reports the Anglo-Americans intend to subject to air attacks, small localities without any war, economic or military value, as a reprisal against V–1. In the event this report proves true, the Fuehrer orders that notices

[1] Trial of the Major War Criminals, op. cit., volume I, page 340.
[2] Ibid., p. 287.

be served by way of radio and the press that every enemy aviator who is shot down while participating in such an attack, is not entitled to treatment as a prisoner of war, but that he will be killed as soon as he falls into German hands. This rule shall apply to all attacks on small localities which constitute neither military targets nor communication targets, etc., and are, therefore, of no military significance."

As stated in the opinion, this order was actually put into effect and became the official policy.

It will be noted that this statement of Hitler's provides no machinery of any kind for determining whether Allied fliers who bailed out had attacked civilians or nonmilitary objects, and it contains no definition of "nonmilitary" objects. The inevitable result was to make all bailed-out fliers subject to attack according to the judgment or opinion of the attacker.

The opinion of the Foreign Office which Ritter transmitted would have been an improvement on this, but it had no effect. It was declared to be nonsense and discarded. This order of Hitler's had its origin in the Bormann action, and the conference of 6 June. It was uninfluenced in any way by any document which Ritter even touched.

My conclusion is that Ritter played no part in this transaction, except the normal function of liaison; that he porformed no act, not even of liaison, which has a causal connection with the death of any Allied fliers, and that what he did indicates no criminal intention whatever, and I am unable to follow the reasoning which leads to the conclusion that he is guilty of participating in multiple murders.

SAGAN MURDERS
STEENGRACHT VON MOYLAND AND RITTER

In connection with this incident not only Ritter but also Steengracht von Moyland, who was then State Secretary in the Foreign Office, are convicted—Ritter because it is claimed he helped prepare a diplomatic note, and Steengracht von Moyland because it is claimed he dispatched it.

It is doubtful if the indictment charges any such crime against Steengracht von Moyland, and it is certain that it does not against Ritter.

Unfortunately, the opinion attempts to abstract rather than to quote what the indictment charges in count three, and by the process of reversing the order of statement, greatly enlarges the scope of the charge. What the count charges has already been stated in substance, but in view of the confusion at this point, and

in aid of a better understanding, it may be well to quote it verbatim:

"27. The defendants von Weizsaecker, Steengracht von Moyland, Ritter, Woermann, von Erdmannsdorff, Lammers, Dietrich, and Berger, with divers other persons, during the period from September 1939 to May 1945, committed war crimes, as defined in Article II of Control Council Law No. 10, in that they participated in atrocities and offenses against prisoners of war and members of the armed forces of nations then at war with the Third Reich or were under the belligerent control of, or military occupation by Germany, including murder, ill-treatment, enslavement, brutalities, cruelties, and other inhumane acts. Prisoners of war and belligerents were starved, lynched, branded, shackled, tortured, and murdered in flagrant violation of the laws and customs of war, and through diplomatic distortion, denial, and fabricated justification, the perpetration of these offenses and atrocities was concealed from the protecting powers. The defendants committed war crimes in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups connected with, the commission of war crimes."

It will be noticed that what is charged here is participation in the murder of prisoners of war and belligerents of countries at war with Germany. All other allegations are but means by which it is claimed the crimes were committed.

The indictment is so framed that the first paragraph of each count charges the crime. In succeeding paragraphs is stated, by way of a bill of particulars, what each defendant did to constitute his guilt of such charge. The legal sufficiency of such statements in the paragraphs to sustain the charge is, of course, a legal question for the Tribunal.

Paragraph 28*c* is the one which describes the acts of Steengracht von Moyland and Ritter which it is claimed constitute their guilt, and the opinion specifically finds them guilty of the crimes set forth in said paragraph. It is as follows:

"28*c*: In March 1944, approximately fifty officers of the British Royal Air Force, who escaped from the camp at Stalag Luft III where they were confined as prisoners of war, were shot on recapture. The German Foreign Office was fully advised and prepared "cover up" diplomatic notes to the Protecting Power, Switzerland. Von Thadden of the German Foreign Office wrote to Wagner, a subordinate of the defendant Steengracht von Moyland, stating that a communication was being sent to Great Britain via Switzerland to the effect that,

in the course of a search 'a number of British and other escaped officers had to be shot, as they had not obeyed instructions when caught.' In furtherance of this policy to shoot escaped prisoners of war upon recapture, the defendant Ritter, issued a warning notice, disclosing the creation of so-called 'death zones' for the alleged protection of 'vital installations' wherein 'all unauthorized persons will be shot on sight.' A letter from the German Foreign Minister to the defendant Ritter in July 1944, stated that the Fuehrer was in agreement with the German Foreign Office communication to the Swiss Embassy concerning the escape of the prisoners of war from Stalag III, and that he further agreed to the issuance of the warning notice and the forwarding of such a communication to the Swiss Embassy."

It will be noted that this paragraph does not charge Steengracht von Moyland with having done anything. It simply charges that someone wrote a letter to his subordinate. It charges Ritter only with having written warning notices of danger zones, a charge on which, by the opinion, he is acquitted.

It has been the settled view of these Tribunals that no defendant should be convicted on a charge not mentioned in the bill of particulars contained in the paragraphs of the indictment. Indeed such would have to be the rule if indictments are to mean anything. Otherwise, Ritter would appear to defend under count three for having posted warning notices of danger zones in prisoner-of-war camps, and find himself convicted of an entirely different charge. That is what has actually happened.

Tribunal No. I in Case 1 (Doctor's [Medical] Case) stated the rule as follows:*

"However, no adjudication either of guilt or innocence will be entered against Rose for criminal participation in these experiments for the following reason: In preparing counts two and three of its indictment, the prosecution elected to frame its pleading in such a manner as to charge all defendants with the commission of war crimes and crimes against humanity generally, and at the same time to name in each paragraph dealing with medical experiments only those defendants particularly charged with responsibility for each particular item.

"In our view this constituted, in effect, a bill of particulars and was, in essence, a declaration to the defendants upon which they were entitled to rely in preparing their defenses, that only such persons as were actually named in the designated experiments would be called upon to defend against the specific items. Included in the list of names of those defendants specifically charged with responsibility for the malaria experi-

* United States *vs.* Karl Brandt, et al., Judgment, volume II, this series, pages 266–267.

ments, the name of Rose does not appear. We think it would be manifestly unfair to the defendant to find him guilty of an offense with which the indictment affirmatively indicated he was not charged."

If we are to follow this rule—and there is no reason why we should not—there should, on that account, be no conviction here as to either Steengracht von Moyland or Ritter, and especially not Ritter.

But, passing that, the evidence does not warrant a conviction in any case.

It is probably unnecessary to say more about the facts than appears in the opinion, in order to demonstrate that neither Steengracht von Moyland nor Ritter is shown to be guilty of participation in the murder of these unfortunate British prisoners of war who had escaped from prison. But before approaching that question, some correction and supplementation of the facts seems appropriate. It will then appear, I think, that they are not guilty of anything.

Complaint is made in the opinion as to the [two] notes sent to Switzerland as Protective Power for Great Britain. Both were introduced as rebuttal documents (Exhibit C–372) [*NG–5844*] which, when considered in connection with the absence of a specific charge against Steengracht von Moyland and the complete absence of a charge against Ritter with reference thereto, raises a further question as to the propriety of considering them in connection with a substantive, affirmative charge against these defendants.

On 26 May, the German Foreign Office received an inquiry (*NG–5844, Pros. Ex. C–372*) from the Swiss Government, as Protective Power for Great Britain, about the reported death of British prisoners of war who had escaped from a prison camp in March, preceding. It was Ritter's task, as liaison man with the armed forces, to investigate this matter. There is no indication that he had ever heard of it before receiving this assignment.

Keitel denied any knowledge of the matter, but gave some indication that these prisoners had escaped from the prison camp and were captured by the police. Ritter then contacted the police and was furnished perfect records, showing these men were shot while resisting arrest.

Albrecht, the head of the legal division of the Foreign Office, had been summoned by von Ribbentrop from Berlin to Salzburg, where von Ribbentrop maintained his headquarters, to prepare a reply to this inquiry from the Swiss Government. Ritter thought these records of the police were a "swindle" and so advised von

Ribbentrop and Albrecht. He told the police the same thing, and they did not resist the idea very strongly.

Albrecht prepared the reply note. The opinion convicts Ritter largely because Albrecht says he prepared the note after talking to Ritter. Of course he talked to Ritter. He would hardly prepare the note at von Ribbentrop's invitation without talking to the man who investigated the facts. There is no claim that Ritter deceived him. He could not report anything more than what had been reported to him. He told Albrecht what the police reported, and also that he thought it was a swindle. What more could he do? And after the note was prepared, both Albrecht and Ritter advised von Ribbentrop not to send it. Von Ribbentrop, of course, as Foreign Minister, completely controlled what note, if any, should be sent. Ritter had no control over that.

What von Ribbentrop did with it, and whether or not he sent it, and whether or not the note in evidence which apparently came from the British Foreign Office files was the one Albrecht prepared, does not appear. But, assuming that it was sent, and that the copy in evidence is a true copy of what Albrecht prepared, Ritter has committed no crime.

Whether or not Steengracht von Moyland dispatched the note at von Ribbentrop's orders, or had anything to do with it, does not satisfactorily appear. No names are attached to the notes in evidence. But if he did sent it, as the opinion states, it was by order of von Ribbentrop and without any knowledge as to its incorrect statements. At least the evidence fails to show he had any knowledge that it contained incorrect statements.

As to the second note it does not appear that Ritter had anything to do with that. Steengracht von Moyland has some recollection of it. But it was obviously a high policy matter for which Hitler and von Ribbentrop were responsible. At least it does not appear that Steengracht von Moyland prepared it or dispatched it. The opinion seems to take the view that because he stated he had no clear recollection of it, that such statement is evidence that he did send it.

It thus appears that neither Ritter nor Steengracht von Moyland had any part in a deliberate fabrication of a falsehood to be sent in a diplomatic note to Great Britain. Steengracht von Moyland had nothing to do with the preparation of the note and was not informed as to its incorrectness when at the direction of the Foreign Minister, he dispatched it, if he did dispatch it.

Ritter reported truthfully and fully as to the facts revealed in his investigation. Albrecht prepared the note. Von Ribbentrop, the Foreign Minister, controlled the matter of sending it after being fully advised as to the facts as was possible at the time.

But even if it be conceded *arguendo,* that Ritter and Steengracht von Moyland deliberately and intentionally played a part in sending a false note, the crime would not be participating in the murder of the British prisoners of war, which took place some 2 months before they ever heard of it.

It later came to light, and is now known, that Hitler issued a direct order to the police to run down these escaped prisoners of war and kill them. There is no suggestion in the evidence that Ritter or Steengracht von Moyland knew this at the time these notes were prepared and dispatched, or that they had any other information than that contained in the note prepared by Albrecht at Salzburg.

I am unable to follow the reasoning which leads to the conclusion that Steengracht von Moyland and Ritter are guilty of participating in murders which occurred 2 months before they heard of them, or took any action with reference to them.

LAMMERS

What has heretofore been said in the discussion of the case against Ritter and his alleged participation in the murder of Allied fliers is equally applicable to other defendants so charged in count three, including the defendant Lammers. He is charged, because of a letter (*635–PS, Pros. Ex. 1229*) he wrote to the Minister of Justice on 4 June transmitting the circular decree of Bormann dated 30 May.

In transmitting this decree Lammers was performing the normal functions of the Chancellery. It was a sort of secretariat which served the Chancellor much as any secretarial organization would serve the head of a government. It was the proper avenue through which approaches were made to the Chancellor, and was the mechanism designed to distribute communications of all kinds from the Chancellor to the ministries or other agencies of government.

Lammers, as head of the secretarial organization known as the Chancellery, had no right to decide what he would or would not distribute. He had no choice in the matter. In performing that purely clerical or ministerial task, he could hardly be charged with criminal intent in any situation. He gave no orders, and of course, had no authority to do so. He did call attention to the respect in which the decree might be applicable to the operations of the Ministry of Justice.

If the Ministry of Justice did anything as a result, it was done because of the decree of Bormann, not because of Lammers' letter transmitting it.

But the conclusive circumstance that Lammers' letter, even if it

led to the dismissal of prosecutions of people who had engaged in lynching (and there is no evidence that it did), could not have thereby encouraged future lynchings is the fact that the police had already been prohibited from interfering with lynchings, and this was accompanied by a radio campaign. (See quotation from IMT, *supra.*) The dismissals, therefore, if there were any, were the *result* of a public policy of authorized lynchings, not the *cause* of it. It can hardly be claimed that the letter had any causal connection with the lynchings which had already taken place.

BERGER

Berger is convicted of participation in the murder of the French General, Mesny, a prisoner of war. That General Mesny was brutally murdered in reprisal or revenge for the alleged shooting, by the French Maquis, of a German general, and that this was done on direct order of Hitler, given to Keitel, there can be no doubt. Our task is to determine whether or not defendant Berger had any criminal responsibility for the crime.

Berger held many positions in the SS. He was Lieutenant General in the SS and the Waffen SS; liaison officer between the Reichsfuehrer SS and the Reich Minister for the Occupied Eastern Territories; Chief of the political directing staff of the Reich Minister for the Occupied Eastern Territories; Supreme Military Commander in Slovakia in 1944, and Chief of the Postal Censorship. He obviously could not devote all of his time to any one of them. In addition to these tasks, he was made Chief of Prisoner-of-War Affairs under Himmler, and subordinate in that function not only to Himmler but to Keitel, and of course, Hitler as well.

The office had previously existed under that same name, Chief of Prisoner-of-War Affairs, in the organization of the army. Berger, upon his appointment, assumed that title so that the term Chief of Prisoner-of-War Affairs, may refer to the agency or to the person of Berger, and it is important to know in every case in which sense it is used. In the documents which the opinion cites, the agency is referred to because the evidence shows, without dispute, that Berger did not sign any of these documents. Some of them were signed by Meurer, who was his Chief of Staff in Prisoner-of-War Affairs, and in charge of the office, and who was in the habit of signing Berger's name to documents involving the agency.

Meurer was a witness for the prosecution and conceded these facts.

Berger began taking over the agency on 1 October and had completed a considerable portion of the task by 23 October, but the complete take-over did not take place until about the middle of November. When Berger took over the agency, he took over the personnel of the agency with him. These were all Wehrmacht men who belonged to the armed forces under Keitel.

Berger's first knowledge of the proposal to execute a French general came to him from Meurer early in November. Meurer, as a prosecution witness, testified to Berger's reactions as follows (*Tr. p. 2351*):

> "He was horrified at the teletype letter and the whole contents of the telegram and he immediately said in no case would he agree to this, and under no circumstances would he have the matter carried out."

Further, in cross-examination, he testified (*Tr. p. 2376*):

> "When the written order came in he at once and spontaneously declared that he would not have carried out an order of that sort; he also stated that he would immediately contact Himmler on this matter, and, if necessary, would contact the Fuehrer himself."

The evidence shows that he did attempt to contact Hitler, but that Hitler would not receive him. Before he was able to contact Himmler, Berger was injured, early in the month of November, as a result of being buried alive in debris in a bombing raid, and was confined to the hospital for at least 2 weeks.

Upon his return from the hospital he inquired of Meurer what, if anything, had been done about the matter, and learned that there had been no further developments. He went to southwest Germany to see Himmler at Freiburg, and finally contacted him at Ulm, and after much difficulty had an interview with Himmler, in which he protested against this procedure, and apparently Himmler gave him some encouragement to believe that it would be abandoned, and wrote him a Christmas letter which seemed to contain such assurance.

Early in January, Berger had to leave on a business trip and before leaving told Meurer to keep a sharp lookout and to let him know. Apparently, he had some apprehension at the time that the matter was being revived. While Berger was away, and on 19 January, this murder took place. It was accomplished by SS men in Wehrmacht uniforms, while transferring some French generals from one camp to another.

The opinion puts great stress upon the fact that some of the men in the group were subordinates of Berger in the agency, Chief

of Prisoner-of-War Affairs, but there isn't a suggestion in the evidence that they acted upon any order of Berger's. It must be remembered that while these men were subordinate to Berger, they were also subordinate to Keitel and to Himmler, as was Berger himself, and that they would naturally act in accordance with orders originating from that source regardless of whether they had Berger's permission or not.

An unfortunate error seems to have crept into the opinion. It quotes Berger as saying to Meurer, when Meurer reported to him on sending in the three names, that Berger approved of Meurer's action saying:

> "* * * because, after all, there are no possibilities left."

This statement, given as a direct quote from Berger, would indicate that Berger had given up the struggle and was determined to make no further resistance, but this also is not the record. The witness Meurer testified as follows:

> "I informed him of the changes that meanwhile occurred, and he approved my measures, because after all, there were no other possibilities left to me." (*Tr. 2375.*)

This conveys quite a different meaning, and does not suggest that Berger had given up the struggle. The facts appear to be, even as related by the prosecution witness Meurer, that Berger did nothing in the way of participating in this scheme to murder a French general; that, on the contrary, he did everything he could do to prevent the carrying out of such a scheme, even to the point of advising his office chief that he would have nothing to do with it.

The attitude of Berger to the execution of this order to have a French general shot is fully shown by the testimony to be one of opposition, and as effective opposition as it was possible for him to exert.

His attitude is further shown by the fact that almost immediately thereafter he heard that Hitler planned to hold as hostages certain prominent English prisoners of war who were connected with the Royal family, and Berger promptly had these prisoners of war moved to a point in Germany near the Swiss border, and from there, on his order, they were taken into Switzerland, and Berger declared at the time that it was being done to "prevent a second Mesny affair." He went to the extent of violating Hitler's order, to put prisoners of war beyond the reach of anyone who sought to carry out another murder like the Mesny affair.

Berger's conviction seems to rest upon the proposition that he was unable and unsuccessful in preventing Hitler, Keitel, and

Himmler from carrying out this enterprise. They were his superiors. Many lives have been lost by efforts to prevent these men from carrying out their will. The law imposes upon Berger no such obligation. He did expose himself to danger in his opposition, and he did nothing affirmative to aid the action. I am unable to see any legal basis for the conviction of Berger in connection with this unfortunate murder.

COUNT FIVE

Count five charges the defendants therein named with war crimes and crimes against humanity—

> "* * * in that they participated in atrocities and offenses, including murder, extermination, enslavement, deportation, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by Germany, plunder of public and private property, wanton destruction of cities, towns, and villages, and devastation not justified by military necessity."

The opinion contains a lengthy discussion preliminary to the question of guilt of individual defendants. It seems necessary to refer to it only briefly.

In my judgment, it is incorrect to say that all of the German people, except a few, participated in the persecution of the Jews, and it is incorrect to say that the Foreign Office knew of exterminations of the Jewish people, especially if by the term, "Foreign Office," it is intended to imply that the Foreign Office defendants here had such knowledge. The evidence, in my opinion, falls far short of supporting any such a conclusion.

It is incorrect also, it seems to me, to assume that every reference to the "Final Solution" of the Jewish Question means extermination. The fact is that when the first campaigns against the Jews were inaugurated, the term, "Final Solution" came into use. Generally in the early stages, the final solution meant forced emigration. During one period it meant deporting the Jews to Madagascar. As a result of the Wannsee Conference, it meant deporting them to labor camps in the East. It never meant extermination, except to a few of the initiated.

The evidence shows that the program of extermination was handled with the greatest of secrecy. Hitler orally instructed and directed Himmler to start this action; Himmler carefully

953718—52——58

selected and pledged to secrecy the men who were to work with him and to carry out these exterminations; places were selected which were isolated, and were camouflaged by being identified with labor camps nearby, and the program was carried on with the deliberate purpose and design of preventing the German people, and all others not connected with the enterprise, from knowing what was going on. The evidence by those who were on the inside of this terrible extermination program strongly tends to show that not over 100 people in all were informed about the matter.

This is rather eloquently illustrated by the case of Fritzsche. Fritzsche was a responsible official in the Propaganda Ministry. He gathered news for the press and made news broadcasts over the radio; his whole activity was to discover the news and know what was going on, and yet the IMT found that he did not know about these exterminations.

He testified in that case that he had heard rumors; that he had asked Goebbels about the matter and that Goebbels informed him that it was just foreign propaganda. Under such circumstances, I do not believe it can be assumed, even though rumors may have been heard, that the defendants in the Foreign Office, or any other of the defendants, had knowledge of these exterminations at the time they were occurring, or at any time material here. The evidence certainly fails to show it beyond a reasonable doubt. Of course, they all know of them now and the world knows of them.

VON WEIZSAECKER and WOERMANN

The discussion in the opinion concerning von Weizsaecker and Woermann, in count five, which deals with the persecution of the Jews, is a long one. It reveals all of the details of those horrors. I fear it gives the impression that the Foreign Office was the principal agency for the execution of such policies. The method of presentation should not prevent a calm and logical analysis of the entire matter. The situation demands, for a just solution, reason and judgment, not emotion.

I have discussed some of the evidence with reference to the knowledge of the Foreign Office defendants of the extermination of Jews, to some extent in connection with another defendant. I will not repeat it here, but will expect what is said on that subject in connection with the Foreign Office defendants to apply to all.

Something additional, however, must be said here. The handling of the so-called Jewish question was vested by Hitler exclu-

sively in Himmler and his SS. The limited field in which von Weizsaecker and Woermann might exercise a veto on proposed Jewish measures will be discussed later. With reference to the question of knowledge on the part of von Weizsaecker and Woermann, the opinion cites the entire record of the Jewish persecutions. These persecutions increased in intensity as the years went by. Exterminations did not become a significant part of the program until about the middle of 1942 and most of the exterminations took place during the last 2 years of the war.

The opinion cites the Einsatzgruppen reports as charging von Weizsaecker and Woermann with knowledge of them. These reports are those of the SS units engaged in behind-the-line activities in Russia, and as a part of the war against Russia. But that war did not start until June 1941. Strange as it may seem, the incidents on which von Weizsaecker and Woermann are convicted are events which happened in June or July 1942, before they are shown to have had notice of those horrible things having happened, so that obviously, von Weizsaecker and Woermann could not be charged with having acted with knowledge of such events.

Moreover, it must be remembered that both von Weizsaecker and Woermann left Germany in 1943. Both were demoted by von Ribbentrop. Von Weizsaecker was sent to the Vatican, and Woermann to China, so at the time the worst persecutions took place, they were not even in the country.

The opinion cites the testimony of von Weizsaecker's son. It fails to show that von Weizsaecker had knowledge of any systematic exterminations at any time. It shows only that he knew of individual deaths, and that he could not understand them. But even more important than that, there is no time fixed in the son's testimony as to when his father heard of these deaths, whether at the beginning, in the middle, or at the end of the war. The testimony of the son quoted is worthless on that account.

There is nothing to impeach von Weizsaecker's testimony about what he knew. Certainly it is not impeached by the kind of facts referred to in the opinion. Moreover, it is indicated in the opinion that von Weizsaecker has some responsibility for what was done by Luther and Rademacher of the Foreign Office, whose activities are extensively quoted in the opinion.

Von Ribbentrop testified before the IMT that he set up a department in the Foreign Office to carry out Party programs. That was the Department "Germany" or "Deutschland." It was directly subordinate to von Ribbentrop, reported to him and received its instructions from him. Neither von Weizsaecker nor Woermann had anything to do with it.

With some of these irrelevancies out of the way, what was the picture? When the first action against Jews in Germany began, and Jews were required to register their property, the Foreign Office received many protests from foreign governments based on the grounds that Jewish nationals of those governments residing in Germany were required to register their property. Von Weizsaecker immediately conferred with the governmental department that was handling Jewish matters, and succeeded in having all Jews of foreign nationality relieved of this requirement, and an exception made in their favor. Later the general exception seems to have been lost, as pressure against the Jews increased, but the Foreign Office as represented by von Weizsaecker and Woermann continued to insist that it be consulted whenever any action against Jews of foreign nationality was contemplated. The object, of course, was to enable the Foreign Office to satisfy the reasonable demands of foreign governments, and to cultivate good relations with such foreign governments, and to prevent anything from happening which would produce bad international relations. This was a matter of foreign relations or foreign politics which was their particular responsibility and gave them a right to be heard, and that right was accorded them. Thus, when it was proposed to deport Jews from Holland, the Foreign Office was consulted. Von Weizsaecker objected that since Sweden was the Protective Power for Holland, it would not only have the right to object but the right to inspect the places where these people were housed, and that if it were discovered that they had been removed from Holland, the results would not be good so far as the relations with Sweden were concerned.

When it came to the proposal to deport Jews from France, von Weizsaecker objected vigorously to the deportation of Jews of American nationality on the ground that such treatment of American nationals would lead to bad international relations with America. He could not object on that ground to the deportation of other Jews of foreign nationality, because the governments of nations of which they were nationals, had agreed to their deportation. But this action of von Weizsaecker's was overruled by von Ribbentrop, and American Jews were deported.

When it came to deporting French and stateless Jews, a deportation for which von Weizsaecker and Woermann are convicted, the Foreign Office had no legitimate grounds to object. France agreed to the deportations; the Jews were stateless. No grounds, therefore, based on foreign politics existed for objection. Their consent meant no more than that. If von Weizsaecker's objection made on good grounds concerning American Jews was to be overruled, what possible grounds could be urged against the deporta-

tion of these French and stateless Jews, so far as foreign politics were concerned? So the so-called consent of von Weizsaecker and of Woermann was merely the recognition of a fact that conditions were absent which gave them a right to object on the grounds of foreign politics. But the opinion seems to hold, especially as to von Weizsaecker, that even in such a situation, he should have taken advantage of the opportunity to deliver a lecture to von Ribbentrop on international law and on morality.

Such a sentiment fails, it seems to me, to appreciate the realities of the situation prevailing in the Reich and the personality of von Ribbentrop. He was in the habit of doing the lecturing. For an underling who, he had recently overruled to attempt to lecture him certainly would have done no good, and it might have done a lot of harm. If von Weizsaecker could not prevent von Ribbentrop from deporting Jews of American nationality on the ground that it might disturb international relations, how could he expect to interest him in nondeportation of Jews on grounds of general morality? But I do not see how either of these men can be convicted for such an oversight in any event, and failure to preach morality is not a crime—at least not one charged in the indictment or provided for in Control Council Law No. 10.

I am unable to grasp the significance of the other incident cited against von Weizsaecker concerning employees of diplomatic corps. I understand that the term "Diplomatic Corps" includes all people employed by the government, which maintains the mission and for the purpose of carrying out the functions of the mission. The dispute has reference to people personally employed by such members, as for instance, household help in their homes.

If my interpretation is correct, it seems to me that von Weizsaecker's opinion was correct. But whether it was or not, there is nothing to indicate that it was not given in good faith, and honestly. A mistake in the interpretation or application of the law, fortunately, is not a crime.

I see no justification for holding von Weizsaecker or Woermann guilty of persecution of the Jews in connection with the matters recited in the opinion. The deportation of these Jews was in the hands of the SS or the occupying forces in France. The Foreign Office, as represented by von Weizsaecker and Woermann, had a limited right of objection as to Jews of foreign nationality. They seem to have exercised that right wherever it was available. Where it was not available, they had no grounds for objection. That is the extent of their consent. To convict them, is to punish them for the acts of another department of government, which they did not order, and which they were powerless to prevent.

Steengracht von Moyland is charged in paragraph 42 of the indictment:

"42. * * * innocent members of the civilian population of the occupied countries not connected with any acts against the occupying power were taken as hostages and, without benefit of investigation or trial, were summarily deported, hanged, or shot. These innocent victims were executed or deported at arbitrarily established ratios for attacks by person or persons unknown on German installations and German personnel in the occupied territories. In many cases the recommendation and approval of the German Foreign Office, with the participation of * * * Steengracht von Moyland * * * [and others] were required prior to the execution of these measures and the necessary diplomatic 'cover-up' was effected to conceal the nature of these crimes.

* * * * * * *

"48. * * * Since by far the greater part of the victims of this genocidal program were nationals of puppet and satellite countries dominated by the Third Reich, the German Foreign Office, through the defendants * * * Steengracht von Moyland * * * [and others] forced these governments to deport persons of Jewish extraction within their countries to German extermination camps in the East, and directed and controlled the execution of these measures. * * *"

It will be observed that in the first paragraph [above] Steengracht von Moyland is charged with *approving* deportations, and in the second with *forcing* deportations.

A reading of the opinion reveals that Steengracht von Moyland is not convicted on either of these grounds, and that the reason for his conviction is remote from any statement contained in the bill of particulars against him.

As previously pointed out, it is my view that indictments should mean something and that no defendant should be convicted except upon a charge contained in the bill of particulars.

But that aside, the things on which Steengracht von Moyland is convicted do not, in my opinion, constitute a crime against humanity at all. For that reason it seems to me unnecessary to go into the question of whether all of the findings of fact contained in the opinion are justified.

Assuming that they are justified by the evidence, no crime against humanity appears.

What appears in the facts, as found by the Tribunal, is the following:

1. That on von Ribbentrop's order, Steengracht von Moyland organized an office for anti-Jewish action abroad;

2. That a card index of Jews abroad was prepared and presented to him;

3. That a memorandum was presented to him recommending violent action against the Jews in Budapest; that he referred this to the Minister at Budapest, who disapproved it, and nothing came of the matter. The subsequent action against Jews in Budapest had no connection with Steengracht von Moyland, and is not claimed to have had;

4. He advised the Swedish envoy that he was not competent to deal with Danish questions. He was legally correct. The opinion suggests he should have shown sympathy.

5. Several reports and memorandums were prepared in the Foreign Office, one with reference to the deportation of Jews in Greece, particularly in the Salonika area, but this appears to have exempted Jews of foreign nationality, whose governments had not consented to the deportation, and this was the only competency that Steengracht von Moyland, or the Foreign Office, had in the Jewish question.

6. There was extensive correspondence had, and memorandums and reports made, in an effort to permit some Jewish children to emigrate. The original request was to permit them to emigrate to Palestine. This could not be done under the German policy prevailing at the time. The German Government was courting the Arabs; the Mufti of Jerusalem was in Germany. Germany hoped to make contact with the Arab world and to conclude an alliance with it, and did not want to risk displeasing the Arabs by sending Jews to Palestine. This was a high-level decision which Steengracht von Moyland did not make and could not violate. There were some negotiations with a view of having them taken to England and various reports and memorandums were prepared on the subject until von Ribbentrop stopped the whole business.

7. Steengracht von Moyland wired the Legation at Bucharest to make an effort to have the Rumanian Government cancel its permit for the Jews to emigrate to Palestine, in order to bring its policy in accordance with the German policy.

It is transactions of this type that are the basis of the conviction of Steengracht von Moyland, and particularly negotiations concerning permissions to emigrate. The opinion, after describing these documents, states in the two final paragraphs, the conclusions with reference to them as follows:

"It would be difficult to conceive of a more flagrant bad faith than that which was carried out in these negotiations. Here at least is one occasion where Ribbentrop, as Foreign Minister, asked for advice of his Foreign Office. Here was the opportunity for the Foreign Office and its State Secretary to give good advice instead of bad; to point out how the improvement in German foreign relations and its rehabilitation in the eyes of the world would be possible by at least permitting children to be saved from extermination; but every step which the Foreign Office took, every recommendation that it made, was directed to block efforts made by leading countries of the world, neutral as well as enemy states, to permit little children to come unto them and to defeat the efforts of the good Samaritans, and turn their offers into Nazi propaganda."

"Steengracht was a party to this; he must bear the responsibility. He should be and is held guilty under count five."

This shows pretty clearly that Steengracht von Moyland's guilt consists in his failure to read a moral lecture to von Ribbentrop. It is unnecessary to speculate as to whether or not he should have done so, and what the effect would have been if he had. It is only necessary to point out that his failure to do so is not a crime against humanity charged in the indictment and defined in Control Council Law No. 10.

The opinion in this [case], and in the case of other defendants in this count, seems to me to ignore the definition of crimes against humanity as contained in the law, and to proceed upon the theory that anything which a defendant may have done, which fails to meet the personal approval of the writer of the opinion, as to what constitutes proper conduct, is a crime against humanity.

This impression is fortified by statements in the opinion as follows:

"The defendants here are charged with violation of international law.

"International law is not statutory."

In my view, we are not enforcing any vague uncodified law, which we are free to mold to suit our own tastes. There is no such thing as a crime against humanity within our jurisdiction, except a violation of the provisions of Control Council Law No. 10 [Article II, paragraph 1(*c*)] which defines the crime as follows:

"*Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane

acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

It has been held by these Tribunals, and uniformly followed, that under the principle of *ejusdem generis* the word "persecutions," as used in this statute, refers to the same kind of acts and offenses enumerated in the same sentence, that is, murder, extermination, enslavement, etc. A persecution, therefore, must involve some act of violence against the person of the persecutee. The expression of anti-Semitic ideas, or sentiments, no matter how unreasonable and unjustifiable it may be, is not in that class.

The opinion fails to show any act on the part of Steengracht von Moyland which was intended to produce, and which did in fact produce, any mistreatment of Jewish people which can properly be described as a "crime against humanity."

KEPPLER

The defendant Keppler is convicted because he helped organize, and was a member of, the Aufsichtsrat of the corporation known as DUT.

When the government was transferring ethnic Germans into the Reich to become citizens of Germany, the defendant Keppler recognized the hardships to which these people were exposed and took the lead in organizing a corporation under the private incorporation laws to serve their interests. It is DUT. It was generously supplied with government capital and, in addition, borrowed large sums of money which it used in helping these people transfer to their new location and to become rehabilitated there. Frequently they were not permitted to take along with them their household furniture and farm machinery and livestock and things of that kind. The corporation helped with the liquidation of such property in cases of that kind, under a power of attorney given by the person. In the case of removals from the South Tyrol, they were not permitted to move out any of their property. The DUT helped to list and appraise the property, and present and collect a claim for it from the Italian Government.

When the settler arrived in Germany, it made advances to him in the way of loans until he could become self-supporting and made loans to him to enable him to become established in whatever trade or business he was accustomed to. If he was a farmer they helped him get a farm and to buy the necessary machinery and equipment to reestablish himself. The same policy was pursued if he followed some trade or business.

The nature of its business functions is well described in one of its reports (*NID–7721, Pros. Ex. 2829*) which the prosecution put in evidence as follows:

> "The tasks and duties of our company on the one hand comprise the care of all matters connected with the settling of property questions and the transfer of property belonging to resettlers and left behind in their country of origin. On the other hand, it takes care of all economic aspects in connection with the reemployment of the resettlers in the new settlement areas of the Reich. It was essential that a suitable organization be created with the utmost dispatch, which would make it possible to provide for the resettlers not only advice and care with regard to economic problems, but also—in the interim period until their reemployment—to obtain loans against cash property left behind, assistance payments, transfer money when a home is assigned and, finally, the financial means for making a new start."

Considering the nature of this corporation and the service it rendered, what, may we ask, was Keppler's crime in helping to organize it and serving on its governing board? The opinion does not say much about DUT. It speaks rather of what others did, and of other programs. Keppler is responsible only for what he himself did and, conceding that others may have been guilty of a crime against humanity in forcing a person to enter the Reich, there is no reason why such person must be allowed to starve to death. Those who offer him food and help, and minister to his wants, are not made criminals simply because he may be a victim of somebody else's wrongs.

DUT was a separate corporation, set up to render a service, including a financial service, to these people. Its service was an aid to humanity, not a crime against humanity.

These comments apply equally to the defendant Kehrl in this count.

VEESENMAYER

The opinion with reference to Veesenmayer seems to me to present a greatly exaggerated, and in some instances an incorrect, description of his activities and the results thereof. He had been an instructor in political science and economics at Munich University. He became attached to Keppler when Keppler was Economics Adviser to the Party. With Keppler he went to Berlin, where he continued to serve on a part-time basis, dividing his time between the University of Berlin and his work with Keppler.

When Keppler went to the Foreign Office, Veesenmayer went with him. He continued to work with Keppler on economic questions, and he was used by von Ribbentrop for special assignments in the political field.

The opinion discusses his activities in reverse order. He was sent to Serbia in 1941 while it was belligerently occupied by Germany and at a time when partisan warfare and the shooting of hostages, which was taking place there, marked it as one of the bloodiest chapters of the war. Jews were being shot as hostages at a terrific rate. Veesenmayer's task was to try to work out some political arrangement which would result in the pacification of the country.

When he discovered the situation—and he was then carrying the title of "Reich Plenipotentiary"—he joined with the Minister Benzler in a message to the political division of the Foreign Office recommending that an arrangement be worked out for the removal of the Jews from Serbia by sending them down the Danube River to Rumania.

Later the same day, both these parties joined in a second message, emphasizing that a quick and laconic solution was necessary as a matter of practical necessity. This message, of course, referred to the recommendation for the removal of the Jews by sending them down the river in barges. The attempts in the opinion to make it appear that the reference is to extermination of Jews is wholly unwarranted. This is all Veesenmayer did in Serbia.

Benzler, the Minister, had labored to the same end before Veesenmayer arrived and continued the same effort after Veesenmayer's departure, but to no avail. The partisan warfare and the shooting of hostages continued until in the process the Jews were so reduced in number as to cease to be a factor. While the opinion heaps scorn on Veesenmayer on account of this matter, it had to recognize that these unfortunate Jews in Serbia lost their lives not because the recommendations of Veesenmayer and Benzler were followed, but because their recommendations were not followed. If their recommendations had been carried out, at least thousands of these unfortunate people could have been saved. The part which he and Benzler played in Serbia merits no condemnation under the circumstances which existed there. The cause of humanity would have been served if their recommendations could have been carried out.

HUNGARY

Veesenmayer is convicted because of his activities in Hungary. In 1943, Hungary, which was an ally of Germany in the war, was

showing a lack of enthusiasm for the struggle. Its troops were displaying a lack of fighting spirit. There were elements in the population of Hungary which wanted to abandon the alliance with Germany and to make peace with Russia. This feeling grew as the Russian armies advanced toward the Hungarian border.

Von Ribbentrop sent Veesenmayer to investigate the political situation and report. He made a detailed study of the situation in Hungary. In his report he discussed many of the political leaders and their attitude. He listed the elements in the population which were hostile to Germany, and inclined to adhere to her enemies, and whose influence was operating to pull Hungary away from her alliance with Germany. He listed first among those elements the Jews, and third, the clerical circles. No one in this case has questioned the fact that his report is objective, unprejudiced, and factually correct. He explains why the Jewish population was opposed to Germany. He states that it is because of the manner in which Jews have been treated in Germany. This might even be considered a criticism of the German policy, but nobody questions that it is a correct judgment.

It should be remembered that Veesenmayer's work had not been in connection with Jewish questions; that was the exclusive prerogative of Himmler and the SS. He had shown no particular anti-Semitic sentiments. His work had been exclusively in the field of economics and politics. He recognized, as a fact, that the Jewish elements in Hungary, with their friends and the influence they were able to exert, represented a balance of power in Hungary which was pulling Hungary away from her alliance with Germany.

The correctness of his judgment on that proposition is not challenged.

He also reported that there were elements in the government, including the Prime Minister, which were opposed to Germany. His only recommendation was that there should be a shake-up in the government. This report he sent to von Ribbentrop. Whether anyone else ever saw it or not is not discussed by the evidence. The opinion condemns Veesenmayer for this report, which, in my judgment is without reason.

Later he made what has been called a second report, which only suggests means which might be effective for accomplishing a change in the government, but the matter seems to have taken a different course than the one he recommended. The situation in Hungary continued to worsen from the German standpoint. Other reports were received from Hungary, especially from the SS

which had some of its units there. The army also had a small detachment there.

In March 1944, Hitler and Horthy, who was the Regent of Hungary, had a meeting as a result of which Horthy agreed to form a new government which would cooperate more closely with Germany. Such a government was formed and Veesenmayer was sent to Hungary as German Plenipotentiary and Minister. He carried the title of Plenipotentiary in other countries previously, and carried that title in Serbia, as previously noted.

He was to be the highest political officer of the Reich in Hungary, and take his instructions from von Ribbentrop. His powers are outlined insofar as Germany is concerned by the instrument of his appointment. The description of his powers, as contained in the opinion, are greatly exaggerated. For instance the opinion states:

> "The army was under obligation to support Veesenmayer in his political and administrative duties."

This suggests that he was exercising power in Hungary by virtue of the force of the German Army. There is nothing of that sort in the instrument of appointment, and in order to make it clear what functions Germany expected him to perform, I set out the instrument of appointment in full as follows (*NG–2947, Pros. Ex. 1806*):

> "(1) The interests of the Reich in Hungary will henceforward be protected by a Plenipotentiary of the Greater German Reich in Hungary, who will simultaneously bear the designation Minister.
>
> "(2) The Reich Plenipotentiary is responsible for all political developments in Hungary and receives his directives through the Reich Minister for Foreign Affairs. He has the special task of paving the way for the formation of a new national government which will be resolved to fulfill loyally and until final victory is achieved the obligations imposed upon it by the Tripartite Pact. The Reich Plenipotentiary will advise this government on all important matters and represent always the interests of the Reich.
>
> "(3) The Reich Plenipotentiary is to ensure that the entire administration of the country, as long as German troops are there, is carried out by the new national government under his guidance in all fields, and with the object of utilizing to the fullest all the resources the country has to offer, in particular the economic possibilities, for the joint conduct of the war.
>
> "(4) German civilian offices, no matter of what nature which are to operate in Hungary, may be established only with the

consent of the Reich Plenipotentiary; they will be subordinate to him and will act in accordance with his directives.

"To perform tasks of the *SS* and Police concerning in Hungary, and *especially police duties in connection with the Jewish problem,* a Higher SS and Police Leader will be appointed to the staff of the Reich Plenipotentiary and will act in accordance with his political directives. [Emphasis supplied.]

"(5) As long as German troops remain in Hungary, military sovereignty will be exercised by the Commanding Officer of these troops. The Commanding Officer is subordinated to the High Command of the Wehrmacht and receives his directives from him.

"The Commanding Officer of troops is responsible for the internal military security of the country and for its defense against threats from abroad.

"He supports the Reich Plenipotentiary in his political and administrative duties and acquaints him with all Wehrmacht requirements, especially with regard to the utilization of the country for the provisioning of the German troops.

"The requirements of the Wehrmacht, insofar as they concern the realm of civilian affairs, are met by the Reich Plenipotentiary.

"In cases of imminent danger the Commanding officer of German troops has the right to order also in the realm of civilian affairs, measures necessary for the fulfillment of military tasks. He will arrive at an agreement with the Reich Plenipotentiary concerning this as soon as ever possible.

"The Reich Plenipotentiary and the Commanding officer of German troops must cooperate as closely as possible wherever their spheres of activity overlap and agree on all measures.

"(6) I name Party Member Dr. Edmund Veesenmayer Plenipotentiary of the Greater German Reich and Minister in Hungary.

Fuehrer HQ. 19 March 1944
Signed: ADOLF HITLER"

Moreover, such army detachments as were in Hungary when he was appointed, left very soon thereafter.

The opinion lays stress upon the fact that this instrument provides that no German civil offices were to be opened in Hungary without Veesenmayer's consent. I see nothing remarkable in such a position. His job in Hungary was primarily to keep Hungary in the war on Germany's side. He represented the German political line or policy in Hungary under directives furnished him by von Ribbentrop. This operation might be

greatly hampered if other German civil offices were established which pursued a different and an inconsistent policy.

It should be remembered that Himmler and his SS organization maintained a foreign intelligence service, and were frequently in disagreement with the Foreign Office in the field of foreign policy. It was established in this case that the SS representatives in Hungary were not in sympathy with the policy pursued by the Foreign Office in Hungary. They were impatient at the restraint imposed by the method of working with the Hungarian Government. They wanted to take over Jewish matters themselves. They favored a more aggressive policy. They were suspicious of Veesenmayer. In view of this background, it is easy to see why von Ribbentrop would insist on his representative being the ranking German *political* leader in Hungary. It gave him control over the policy to be pursued there by Germany.

After the new government set up following the Hitler-Horthy Conference, and Veesenmayer became established in Hungary, he reported to his government what the Hungarian Government was doing, and promising to do, in the way of deporting Jews to work camps in Germany. These reports are numerous and cover a period from the latter part of March until a little after the middle of June 1944. These reports seem to be the basis of his conviction. But Veesenmayer did not deport anybody. The deportations were carried out by the Hungarian Government.

Not a single witness or document introduced in the case indicates that Veesenmayer was doing the deporting. The opinion quotes testimony of the head of the Jewish organization in Hungary, a prosecution witness who certainly could not be charged with being prejudiced in favor of the defendant. Such question we may assume to be the strongest evidence in the case supporting the Tribunal's conclusion, and yet, if it is analyzed, it will be found that in place of supporting the Tribunal's conclusion, it is in opposition to it. For continuity I reproduce that quotation here (*Tr. p. 3647*):

"Q. Do you mean by that, Witness, that the defendant Veesenmayer was not concerned with the execution of the Jewish deportations which (I will leave open for the moment) was carried out by Jarosz, von Baky, Endre, Eichmann, or Winkelmann?

"A. My dear colleague, I do not suppose that you will imagine that a man as intelligent as Veesenmayer would formally carry out his mandate as Plenipotentiary and Minister of the German Reich in such a way as to transgress his limits by interfering with the executive. He could not and should not

have done it under any circumstances and he did not need to. As I said this morning, by appointing a suitable government in Hungary, and laying down the general political directives for it, further activity and closer activity concerned with greater details of the executive was no longer necessary. He was, if I may say so, the spiritual author, but he was certainly not the executor."

It will be noticed that the witness states first that Veesenmayer did not and should not transgress his limits as Plenipotentiary and Minister of the German Reich by interfering with the executive, and that he was not the executor of the Jewish policy. This is inconsistent with the claim made in the opinion to the effect that Veesenmayer ordered these deportations and was the *de facto* government of Hungary. The witness states second, that the deportations were accomplished by appointing a suitable government in Hungary and laying down the political directives for it. The witness is of the opinion that this was the manner in which Germany influenced deportations, and that it was the work of Veesenmayer, and therefore, that he was the spiritual author.

But it appears without any dispute in this record that Veesenmayer did not appoint the new government, and that Veesenmayer did not lay down the political directives for it.

The new government was appointed by Horthy. True, it was influenced by Germany. That influence was by Hitler and is manifest by the agreement between Hitler and Horthy. To the extent that Germany agreed to the appointment of certain individuals to be in the new government, that agreement was expressed by von Ribbentrop. It is undisputed, and the instrument of appointment clearly provides that the political directives are to be issued by von Ribbentrop.

Veesenmayer merely passed on these political directives from von Ribbentrop to the Hungarian Government, so according to the witness' own tests, Veesenmayer cannot be the spiritual author of these deportations because he neither appointed the new government, nor issued political directives to it.

After these deportations had continued for a few months they were suddenly stopped. They were stopped by Horthy, and so completely and effectively were they stopped that trains which had already started for Germany carrying Jewish deportees, were stopped en route, and returned to the point from which they started, and the people unloaded. This should end all argument as to where the power of government in Hungary lay during this period. Horthy himself testified that after he stopped them, Veesenmayer requested, on behalf of his government, that they be resumed, and that he refused.

Horthy claims that he took this action after having heard a report that these Jews were being mistreated in Germany, and that he heard this report from people who obtained it by monitoring a message of a foreign government sent from Switzerland.

It is wholly unrealistic to charge Veesenmayer with responsibility for these deportations, or to assume that he had any power in Hungary to effect deportations. Whatever was done in Hungary during this period was done by the Hungarian Government and in accordance with its agreement with Hitler. It may be true that the Hungarian Government was influenced by Germany, but if so, it was Germany as represented by Hitler, at his meeting with Horthy, and by von Ribbentrop—men who controlled the Government of Germany—and not by Veesenmayer, a young man who for the first time in his life was serving in a ministerial capacity.

It is a little surprising to find such praise for Horthy in the opinion. It apparently overlooks that he was an enthusiastic ally of Hitler, and pursued the same program until the Russian troops came so close to the Hungarian border that he decided that it was the better part of discretion to take another line.

The opinion also seems to overlook that Horthy, together with Mussolini, enjoyed the distinction of having each been kidnapped by German forces, as a means of rescue from the wrath of their own people, and brought to safety in Germany. These rewards were compensation for cooperation, and that fact should not be overlooked.

These deportations were the result of the Hitler-Horthy conference, and were to be carried out by a new government to be set up by Horthy, yet Veesenmayer was appointed as the diplomatic representative of Germany, and charged with the responsibility of reporting what the Hungarian Government was doing to carry out that agreement, and of delivering to it the political directives which von Ribbentrop transmitted to him, and that this course involved urging the Hungarian Government to remain faithful to its agreement with Germany, and, therefore, it might, as a matter of first impression, appear that Veesenmayer aided and abetted these deportations.

The difficulty with this line of reasoning is that Veesenmayer, as an individual, had of course, no influence with the Hungarian Government. No act of his could have any effect on the policy pursued by the Hungarian Government. If the messages he delivered to the Hungarian Government had effect, it was because they were messages from the German Government, demands, requests, and suggestions of various sorts. As to them, Veesenmayer was little more than a postman delivering messages.

953718—52——59

For example, the opinion lays great stress upon the fact that Veesenmayer was instructed to deliver to the Hungarian Government an ultimatum, and that he did deliver the ultimatum as instructed. Can anybody claim that such delivery constituted a crime? It was not his ultimatum; it did not purport to be. It was not understood to be. In delivering it he acted merely as a messenger, and so it is with the various communications which the German Government sent through Veesenmayer to the Hungarian Government.

As to the diplomatic representative of Germany, he was the proper person to deliver all such messages. I am unable to see that in so doing he had any criminal intention or that the delivery of them constituted any crime.

Elsewhere in this separate opinion I have discussed the responsibility of the man who formulates decrees or even signs orders at the direction of somebody else, as in the case of the Chief of Staff, and have reached the conclusion that no crime is involved. Much less is it a crime to act as a messenger.

The person who is responsible for the issuance of an order that requires the commission of a crime, and the person who executes such an order, is liable, but the messenger who carries it, or the postman who delivers it, or the diplomatic representative who delivers it, commits no crime so far as I am able to see.

The opinion closes with the remarkable statement that, "We believe Veesenmayer knew that these Jews were being exterminated and so find."

It is significant that the opinion does not say that the evidence shows such facts beyond a reasonable doubt. There is no evidence that any of these Jews which Veesenmayer reported did not go to work camps in Germany as he reported, and as had obviously been reported to him, nor is there any evidence that they were thereafter exterminated. There is no evidence that I can find that Veesenmayer even heard a rumor of exterminations until Horthy claimed to have had it reported to him from some message of a foreign government which had been monitored. But the deportations stopped then. There is no evidence that Veesenmayer was in any way connected with any further deportations. He did urge them on Horthy, in accordance with a directive of his government, but Horthy refused.

Veesenmayer was a diplomatic representative whose duties were to report from Hungary and to make representations to the Hungarian Government in accordance with directives issued to him by the Reich. The attempt to make him responsible for the crimes of Hitler and Horthy, and their governments, and the SS over

whom he exercised no command authority, cannot be sustained by the facts or the law.

The charge of the indictment that Veesenmayer *forced* the Hungarian Government to deport its Jews, is not established by the evidence beyond a reasonable doubt. If the Hungarian Government was forced at all, it was by Hitler, and in his conference with Horthy and by threats emanating from him, and which had effect because they came from him and not because they may have been delivered by Veesenmayer.

Incidentally, Veesenmayer is convicted under count seven, the slave labor count, of a war crime in that he participated in the deportation of these same people, involved in this count, to Germany for slave labor. Obviously, this could not legally stand even if he had a part in such deportations, for the reason that the deportations were not from belligerently occupied territory but from the territory of an ally.

In addition to that, he is also convicted under count eight, on account of this same matter, although in the opinion it is recognized that what he did in Hungary was not as a member of an SS unit, but as a Foreign Office representative.

DIETRICH

The defendant Dietrich is charged in the paragraph of the bill of particulars in the indictment with the following:

> "46. A program for the extermination of all surviving European Jews was set up by the defendants in the winter of 1941–42 and organized and systematically carried out during the following period. Through the efforts of the defendants, * * * Dietrich [and others] the rationale and justification for, and the impetus to, mass slaughter were presented to the German people. * * *
>
> * * * * * * *
>
> "48. * * * The defendants Lammers and Stuckart were principally connected with the formulation of the genocidal policy, and the defendant Dietrich conditioned public opinion to accept this program, by concealing the real nature of the mass deportations. * * *"

A reading of the opinion does not lead to the conclusion that the Tribunal regards either of these specifications as having been established by the evidence. As to the first, no evidence is cited to establish that the defendant organized and systematically carried out a program for the "extermination of all surviving European Jews during the winter of 1941–42." There is nothing in the evidence to indicate that the defendant Dietrich had anything

to do with the formulating of such a program or had anything to do with carrying out of such a program, or had any knowledge of the existence of such a program.

As to the charge in the second paragraph that he concealed information for the purpose of deception of the people as to the real nature of the deportations, the opinion expressly exonerates him from that.

Why then was he convicted?

In brief, the opinion holds that he is responsible for anti-Jewish propaganda material issued to the press as daily directives; and that—

> "* * * the only reason for this campaign was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out."

Not a single fact or circumstance is cited in the opinion to justify this sweeping conclusion.

The opinion seems to presuppose a grand conspiracy in which all the people in the government were members, and that its object was to exterminate all Jews and that every anti-Semitic act of any defendant was directed toward that end. It seems to make no difference that such a conspiracy is not allowable under the law, is not plead in the indictment, and is not established by the evidence, and that no attempt was made to establish it.

There is not a particle of evidence that Dietrich knew anything about exterminations, and if he did not know, how could that have been his reason, assuming he was responsible for the daily directives?

Moreover, the conclusion assumes that people generally knew of these exterminations and therefore had to have their sensibilities blunted. This is an even wilder assumption.

It should be borne in mind that the IMT held that anti-Semitism was not a crime, and that Fritzsche who put out this same kind of propaganda over the radio was acquitted by that Tribunal.

But, aside from that, the evidence fails to show that Dietrich was even responsible for these daily paroles which are relied upon.

Dietrich was a sort of press secretary for Hitler during his rise to power. As Press Chief he controlled the Party press, but that is not material here. What is involved here is the daily parole.

The origin of the material which went into these daily paroles is rather clearly established. Goebbels was the Minister of Propaganda; he had a state secretary in his department for press, for radio, and for some other divisions of his ministry. Dietrich was the State Secretary for the Press.

Minister Goebbels held a conference every morning at which the propaganda line was announced orally by Goebbels. Other ministries were also represented, such as the Foreign Office and the OKW, and they suggested propaganda ideas. These were written up from notes taken by men from Dietrich's office in the Ministry. They were then submitted to Dietrich usually by telephone since he personally was always at Hitler's headquarters, and was a press representative for Hitler. Hitler was no amateur propagandist himself. He had ideas. These were communicated to Dietrich, whose suggestions were then given priority over those of Goebbels, not because Dietrich was superior to the Minister Goebbels, but because his voice was the voice of Hitler. He was regarded, and so far as appears, rightly, as expressing the wishes of Hitler. There is no evidence that Dietrich personally and on his own motion, ever originated a parole. The contents of these paroles cannot, therefore, be charged to him. It is claimed that he had the right to veto them and that they were all read to him for his approval before dispatch. It is true that he could and did exercise that right, but only because being at Hitler's headquarters, he was reflecting Hitler's ideas. He could not and so far as the proof goes, did not overrule his Minister on his own notion and responsibility.

As to the weekly or periodical service, Dietrich is not shown to have had anything to do with those. The evidence is undisputed that the weekly service, extracts from which are introduced in evidence, was carried on as a private enterprise and sold to periodicals, and were not submitted to or approved by Dietrich.

There was a service available to periodicals and for which of course no charge was made. But it was made up of collections of daily paroles.

Dietrich is not shown to be responsible for the particular daily directives on which the opinion relies and which were issued over a period of over 4 years. The daily paroles were, of course, secret, and had no effect so far as the public was concerned, except as they were reflected in the press. How they were reflected in the press does not appear. It is obvious, however, that expression of a mild brand of anti-Semitism would meet their demands. Many things, it will be noticed, are in the daily paroles, which do not require publication. Indeed many things are in them which, according to their terms, are not to be published.

It should be borne in mind that anti-Semitism was a part of the NSDAP program from the beginning, even before it came to power; that it characterized the propaganda line of the Ministry of Propaganda from its establishment; and that those facts do

not square very well with the Tribunal's unsupported conclusion as to the reason for them.

These daily paroles lay down an anti-Semitic propaganda line which is far from being admirable, but they do not prove a crime against humanity.

SCHWERIN VON KROSIGK

The opinion which convicts Schwerin von Krosigk of crimes against humanity in count five shows on its face that he is not guilty. He is charged with participation in the levying of fines against Jews and the confiscations of Jewish property.

First of all, it should be noted that he participated in these matters only to the extent of approving the provisions of decrees which were applicable to his office. Jewish matters were not his responsibility. He was, however, Finance Minister. It was universally recognized under German law that where he cosigned a decree which originated elsewhere, such cosignature meant only approval so far as the provisions applicable to his office were concerned. Under German law he was responsible only to that extent. The opinion rejected this admitted legal proposition. I do not see how it can be separated from the intent with which he acted. And unless criminal intent is regarded as having become obsolete in this case, it should be considered.

Moreover, many of the acts such as the Jewish fines took place before the war began and are not within our jurisdiction.

But disregarding all such considerations, the most that can be claimed is that he participated in depriving Jews of property. This cannot be a war crime because the victims were German nationals. It cannot be a crime against humanity because, merely depriving people of their property is not such a crime. There must be some mistreatment of the person as previously pointed out. Schwerin von Krosigk is not shown to have participated in any such mistreatment of the person of Jews or anybody else.

PUHL

The conviction of Puhl seems to me to be wholly unwarranted. The Reich Bank was organized on the Fuehrer principle. The president, who was Minister Funk, was the sole authority in the operation of the bank. There was no division of authority in the bank. Funk was supreme. He made the arrangements with Himmler to receive these articles. What Puhl did was to communicate that information to the appropriate receiving teller of the bank, at Funk's direction. There was no crime in that. He

had no knowledge then that these articles were obtained as the result of a crime. He supposed they were legitimate booty obtained by the Waffen SS in the campaign in Poland.

This is confirmed by his statement to the receiving teller 2 weeks later that the receipts must be about over. Moreover, the opinion recognized he acted innocently at the time. But the articles continued to come in and the nature and volume of the articles were such as to raise some question about their propriety. The evidence fails to show that Puhl knew this. He had no responsibility for the matter and no reason to keep in touch with it. But assume he did know about it. There was nothing he could do. He had no more authority to cancel an arrangement made by the president, than the office boy had.

The opinion seems to lay stress on the fact that he was a vice president, and the ranking officer in the bank when the president was absent, and that the president was frequently absent. This does not change the situation. It certainly does not authorize him to cancel an arrangement made by the president, as soon as the president left the bank. Moreover, it did not authorize him to assume the responsibilities of the president. In Funk's absence, Puhl merely communicated to the departments of the bank other than his own, what President Funk desired to be done. In other words, in Funk's absence, Puhl communicated to the operating men in the bank Funk's directions. Funk was running the bank whether present or not.

But the important thing is that Puhl had no authority whatever to overrule Funk. That certainly was no part of his responsibilities. He committed no crime either by act of omission or commission.

CONCLUSION

The foregoing examination of convictions under this count has been only for the purpose of illustrating methods of interpreting facts and law and determining guilt with which I am unable to agree. No useful purpose would be served by examining other convictions. The same or similar defects exist, however, in my judgment as to all of the findings of guilt in this count. This does not mean that in my opinion no findings of guilt are justified. It does mean that where a finding of guilt is justified, the opinion so exaggerates the guilt, that I cannot concur in it.

COUNT SIX

Count six is designated as, "War Crimes and Crimes Against Humanity: Plunder and Spoliation." It charges the defendants therein named with such crimes—

"* * * in that they participated in the plunder of public and private property, exploitation, spoliation, and other offenses against property and the civilian economies of countries and territories which came under the belligerent occupation of Germany in the course of its invasions and aggressive wars."

My inability to adhere to the decisions reached under this count arises chiefly from a difference of view as to what constitutes spoliation and what proof is necessary to establish it. Unfortunately, the opinion does not attempt to define the crime or lay down any standards or tests with reference to it. The Hague Rules are quoted, but many of the convictions do not appear to have much connection with or relation to those rules.

Here, as elsewhere, a better understanding of the legal concept on which the convictions rest, may perhaps be had by reference to the argument made on behalf of the prosecution. It is argued in this case that any benefit to the German economy arising from the occupation, or in any way connected with it, is unlawful.

It is contended that Germany was required, under the law, to maintain herself and carry on the war with her own resources, and that if she used any of the resources of occupied countries to maintain herself or to carry on the war, a war crime was committed, regardless of the manner of acquisition. It was further contended that if German citizens bought into business enterprises in the occupied territories, and thereby obtained some control over such enterprises, and the general economy of the occupied territories, that that too was a war crime.

Agreement with this view, at least to some extent, appears to be reflected in the opinion.

Prior to the adoption of the Hague Rules of Land Warfare, a belligerent could do whatever he wished in occupied territories. The Hague Rules placed limitations on what could be done. Those rules contain certain prohibitions, a violation of which constitutes a war crime. Unless it appears that a defendant charged here violated some of these rules, there can be no proper legal basis for his conviction.

These rules provide, in Articles 46 and 47 that:*

"Pillage is formally forbidden,"

and that:

"* * * private property * * * must be respected."

Pillage is generally interpreted to meant simply stealing. The indictment, in place of using that term, uses the term in the

* Annex to Convention No. IV, 18 October 1907, War Department Technical Manual 27-251, Treaties Governing Land Warfare (United States Government Printing Office, 1944), Articles 46-47, page 31.

heading, "Plunder and Spoliation," and then in the first [sixth] count of the indictment, it expands to:

> "* * * exploitation, spoliation and other offenses against property and the civilian economies of the countries * * *."

In the argument it expands to include almost any form of contact with the economy of the occupied territory. So far as I am concerned, it seems to me that it still has to be "pillage" or some reasonable equivalent thereof, if it is to constitute a violation of Articles 46 or 47.

The opinion refers to the IMT judgment to support the proposition that there was extensive plunder and spoliation in the occupied countries. That such is the fact, may be accepted without question, but those activities were carried on by Goering through economic missions set up to work with the army and the civilian administration in the occupied territories.

What was done by that organization has little or no connection with the men charged here. Those were requisitions or forced exactions. They were contributions which the occupied territories were required or forced to make. What was said by the IMT has no bearing on whether or not these defendants are guilty of plunder and spoliation, in spite of the great reliance which the opinion and judgment in this case, seem to place on it.

Since the applicable Hague Rules are set out in the Tribunal's judgment, I shall here only refer to those which may have some direct bearing on the facts of this case.

Rule [Article] 46 provides that private property must be respected and cannot be confiscated.

Rule [Article] 47 provides that, "Pillage is formally forbidden."

Rule [Article] 52 provides:

> "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country."

This rule, which is frequently referred to, it will be noticed, has to do with requisitions only, and that it limits such requisitions to the needs of the army of occupation and provides that they must be in proportion to the resources of the country. Requisitions involve the taking of property without the consent of the owner, but payment of compensation. Attempts to apply these limitations to anything else than requisitions, is certainly not authorized by the Rules.

Rule [Article] 53 provides:

"An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."

Rule [Article] 55 provides:

"The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

Generally speaking, these are the rules relating to property which a belligerent occupant is required to observe as a part of the Rules of Land Warfare.

It will be observed that they contain no prohibition against purchases or sales of property located in the belligerent occupied territory. Indeed, it is difficult to see how private property could be respected, if the right to sell it were denied. Much private property, such as the products of factories and of farms, has value only as an article of sale or exchange. There are no prohibitions against purchases either by members of the armed forces or civilians of the occupying power in belligerently occupied territory.

Obviously, a sale represents a mutual agreement by the buyer and seller. It is a bilateral transaction. If it is not that kind of a transaction, but a taking of property by force or duress, it is not a sale but a form of requisition, even though a fair compensation is paid.

The opinion holds that the Hague Rules of Land Warfare apply to all territories occupied by Germany except Austria and the Sudetenland. The same exception, in my judgment, should be applied to Bohemia and Moravia. It was occupied by the German Army, completely subjugated and annexed to the Reich, as completely as was Austria, and there is no valid reason for making a distinction.

The IMT made the distinction on the ground that Bohemia and Moravia had not been annexed to the Reich. But this does not seem to be the fact. It had been annexed. Prosecution Exhibit 1152 (*1397–PS*) is a decree annexing it to the Reich. True, it is given the name of "Protectorate," and a certain apparent autonomy is given to it. But these were grants from the Reich and could be changed at the will of the Reich.

Bohemia and Moravia no longer had any vestige of sovereignty of its own. It became Reich territory and the Reich exercised sovereignty over it as completely as over any other part of its territory. It only exercised it in a little different way. It was not belligerently occupied territory, and the Rules of Land Warfare should not be applied to it.

The situation is different with reference to all the other countries occupied by the German Government in the course of its wars which began on 1 September 1939, some months after both Austria, Bohemia, and Moravia were annexed. They did not completely subjugate and conquer any territory which they occupied as a belligerent in the course of those wars.

Even though a country may be completely occupied, as long as it has not surrendered, but, with the aid of allies, carries on the war, the issue remains undetermined, the occupation continues to be a belligerent occupation. It cannot be changed by an attempt to annex such territory or any part thereof. This was the situation as to all the countries occupied, except France.

The situation as to France seems to me to require a little different treatment, although I realize that in making the suggestion I am faced with the overwhelming weight of opinion of the Nuernberg Tribunals. It is the general rule, which the Hague Convention seems to recognize, that a general armistice, while it does not end the war, fixes the rights of the parties during the armistice period and takes priority over the rules of belligerent occupation to the extent that it enlarges the rights of the occupant.

It seems to me that whatever may have been done in France, in accordance with the armistice agreement and in cooperation with the government of France, should not, therefore, be held criminal on the ground that it violates the Hague Rules of Land Warfare. Those rules are not limitations on the right of a sovereign government to enter into agreements. The reasons given for avoiding such a conclusion—some of them inconsistent—seem entirely unsatisfactory to me.

Our problem here is to determine whether the particular defendant charged, violated these Hague Rules of Belligerent Occupation, for they contain the only rules and customs of war referred to in the definition of the crime. It is not claimed by the prosecution that there are other rules and customs of war which have become so universally practiced and accepted, as to entitle them to recognition here.

KEPPLER

Keppler is convicted as a member of the Aufsichtsrat of DUT. The nature of this organization has been discussed in this sep-

arate opinion in connection with count five. There is no occasion to repeat it here. It is sufficient to say that it was a corporation set up at government expense and supplied with public funds as well as large credits from banks in order to enable it to render a service to those who were forced to resettle in the Reich. To call it a "spoliation agency" is, in my judgment, entirely incorrect. Nothing quoted from the testimony of the witness Metzger changes that picture. Indeed, it appears that what the DUT did, with reference to liquidating a settler's property in the place from which he moved, was in pursuance of a power of attorney. When, then should it be called "seizure"?

The only compulsion was apparently that of circumstances over which the DUT had no control. If a settler was required to move and denied the right to take his furniture and equipment, he had to dispose of it. The DUT was there as a service organization to help him with that task. It not only looked after the liquidation of his property for him, but loaned him additional sums to become rehabilitated in his new location.

It should not be forgotten that this organization served only ethnic Germans who were coming to the Reich to become citizens. Germany was interested in winning their good will and loyalty. DUT was a means to that end. It is hardly likely that it would start out by plundering them and seizing their property. The evidence, in my judgment, fails to show that it did.

But even if in individual cases, the officer in charge did use some force, there is no evidence that such was the policy of DUT or that Keppler, as a member of the governing board, knew about it. Certainly it was not set up for that purpose. (See discussion of Keppler under count five.) Such a policy is inconsistent with its purposes. Under such circumstances, something more would have to be shown to convict Keppler of crime. It would have to appear that he knew and approved of such illegal tactics.

The opinion also indicates that the DUT is criminal because other agencies of government committed crimes. I cannot follow this reasoning. Once it is embarked upon, there is no limit to it. It could as well be said that Darré, for example, is guilty of murder of numerous people in the occupied portion of Russia, because, as Minister of Food, he had charge of the Food Estate and supplied the food that maintained the Einsatzgruppen in that territory; that it was all a part of one operation and the feeding of the troops an essential part, without which the murders could not have been committed. This may seem fanciful, and indeed it is, but it is the same principle on which Keppler is held to have committed the crime of spoliation, insofar as the opinion rests on the proposition that DUT is criminal because some other

agency of government was guilty in bringing people to the Reich, or expelling people from it.

Indeed the Food Estate was far more essential to the operations of the Einsatzgruppen than DUT was to Germanization. People could be moved around and brought into the Reich without any welfare organization like DUT to look after them, and try to mitigate the hardships of their resettlement, but the Einsatzgruppen could not operate at all without the Food Estate.

The conviction of Keppler for being a member of a governing board of a welfare organization is, in my opinion, wholly unjustified.

LAMMERS

I am unable to understand the basis for the conviction of Lammers. He exercised no authority in the occupied territories, and fixed no policy to be pursued there. So far as I can determine, his conviction rests on his personal stature and his knowledge of what others may have been doing, or proposed to do, and the fact that he formulated Hitler decrees.

It seems to be important at the outset to clarify Lammers' position in the government, and the responsibilities of that position.

The Chancellery is a purely service organization which was set up to perform the various detailed tasks connected with the office of the Chancellor. It is a secretariat. It is the Chancellor's office. It serves him much as the less elaborate organization under a secretary serves the President of the United States.

It gathers information and reports for the Chancellor, makes investigations for him, and in general furnishes facilities to keep him advised as to functioning of various governmental departments. It is the contact between the Chancellor and the various ministries. All decisions, directives and other communications of the Chancellor are properly channeled through the Chancellory. All approaches to the Chancellor are made through the Chancellery. In short, it serves as a secretarial office for the Chancellor, in the civilian sector of government. It apparently has nothing to do with the armed services.

It prepares such documents for the Chancellor as he may require.

It makes no decisions with reference to government policy. It is not an executive agency, and therefore, not engaged in enforcing any policies. Decisions which come out of the Chancellery are the decisions of the Chancellor. Hitler was the Chancellor.

Among the tasks performed by the Chancellory was the preparation of decrees which have the effect of laws. Lammers as the head of the Chancellery was particularly well qualified for this task. He was an expert in the field of constitutional and administrative law, and a skilled technician in the drafting of laws. But he acted only as a technician in the formulation of laws and decrees. The substance of the laws and decrees was supplied by others. Hitler, in the case of Fuehrer decrees, and the Cabinet members in the case of Cabinet decrees.

He is held responsible for having drafted Hitler's decrees. It is undisputed that in all such cases, Hitler, as Chancellor, gave directions as to the substance and content of such decrees, and what Lammers did was to formulate them as a technician, for Hitler's signature.

It was the practice for Lammers to cosign Hitler decrees prepared by him. It is not contended by anyone that his signature was necessary to the validity of such decrees. Hitler's power to enact decrees was not dependent upon Lammers joining him. Lammers signature was a certifying signature. It had significance only as between Lammers and Hitler. By it, he certified that he had followed Hitler's instructions as to consultations with others, and ascertained what, if any, objections existed before preparing the decree, and that he would properly distribute or publish the decree after its execution.

The position of head of the Chancellery ordinarily carried the title of State Secretary, and that was Lammers' title in the beginning.

Hitler gave him the title of "Minister," but that did not alter his functions. As a minister he had no ministry. It entitled him to attend Cabinet meetings, but after his appointment, few, if any, were held. He was also given the title of "Chief of the Chancellery," but that only affected his relations with the people working in the Chancellery. It did not enlarge his jurisdiction otherwise.

In my judgment, he cannot properly be held guilty of a crime on the basis of his having prepared and signed with Hitler, Fuehrer decrees. His relationship to those decrees, and responsibility for them, was not substantially different in principle than that of the stenographer who typed them. They were not his decrees, they were Hitler's, and he could not be said to have had a criminal intent in preparing them, even in cases where they required for their execution, the commission of a crime.

In this connection, attention is again called to the holding of Tribunal No. V, Case 7. In that case the chief of staff to a commander, was directed by the commander to issue and distribute

an order for the shooting of hostages at the ratio of 50 to 1, for every member of the armed forces killed by the people of an occupied territory. He prepared the order, signed it himself with his own name, and distributed it to the army. He was held not to be criminally liable. It was not his order, it was the commander's, and it was held that in what he did, no criminal intent existed. It appears that a chief of staff holds a far more responsible position with reference to his commander than Lammers held toward Hitler.

For example, a chief of staff is an adviser to the commander. Lammers was not an adviser to Hitler. A chief of staff is a deputy to the commander, and in the absence of the commander, he is in command. Lammers was not a deputy to Hitler, and did not exercise any of his functions during his absence. If a chief of staff is not to be held liable under the circumstances cited, then a *fortiori,* Lammers cannot be held liable for having formulated Hitler decrees. Moreover, the order signed by the chief of staff required the commission of a crime for its execution. The decrees signed by Lammers did not.

The opinion lays stress on his educational qualifications and his learning in the field of constitutional and administrative law. But that is not a crime. Indeed, it may be due to that fact, and his complete appreciation of the limitations on his position, which kept him out of the policy-making and policy-executing field. It is significant that while nearly everybody else in the Reich government was quarreling over their various competencies and reaching out for power, Lammers never became involved in this. He stayed strictly in his own field.

An effort is made in the opinion to show he had "a certain influence." But all that appears is from his own testimony, and that shows that he influenced decrees at times so far as they related to administrative machinery, that is, he would suggest using an existing organization to carry out the function, rather than create a new one.

He also testified that he used that influence to modify Hitler's tendency to depart from the decencies. How that can prove that he had any influence or tried to exercise any influence to induce Hitler to commit spoliation, I am unable to see.

The opinion states that Lammers cooperated with the program of spoliation. What is meant by such a statement is not clear. People on a highway who hastily vacate the road to make way for a speeding bandit on his way to rob a bank are cooperating with the bandit, but one would hardly say they were guilty of robbing the bank.

Lammers' cooperation must be judged by the things he did, as cited in the opinion. The things he did on which stress is laid are significant. He formulated a decree at Hitler's direction to appoint Seyss-Inquart Commissioner in Holland, and made him subject to Goering's order. This is the sort of thing which, under the name of cooperation, makes Lammers guilty of spoliation according to the opinion. In my judgment it proves nothing.

His distribution of reports and forwarding of reports and other documents, as a part of the work of the Chancellery, seems to be regarded as cooperation also. But it proves only his knowledge that spoliation activities were taking place, if it can be assumed he read all of the reports and documents which passed through his Chancellery. In my view, that does not constitute a crime.

For Lammers, or any other defendant, to be held guilty, it should appear, beyond a reasonable doubt, that he committed some act having a causal connection with spoliation, and did it with the intention of committing spoliation or having it committed. There is no such showing in this record, in my judgment.

What is said here with reference to the responsibility of one who, as a technician, and as a part of his regular work, prepares decrees, at the direction of others who prescribe the content, is equally applicable to the consideration of Lammers' guilt under count five, and to the defendant Stuckart in both counts five and six, to the extent that his guilt is based on the fact that he prepared such decrees.

RASCHE

Rasche was a member of the Vorstand of the Dresdner Bank and active in its affairs. The Dresdner Bank was the second largest commercial bank in Germany. It had many branch banks in Germany and owned many affiliates in other European countries. In Germany much of the financing of industry is done by banks, and Rasche had many contacts in the world of business and industry. In addition he maintained good relations with the government, and especially with the Ministry of Economics.

It has already been indicated that in my judgment there could be no spoliation as a war crime in Bohemia and Moravia because they were a part of the Reich and not belligerently occupied territory.

Rasche's activities there will not, therefore, be considered in detail. He made many purchases, but the evidence that they lacked the character of bilateral transactions, and were not arrived at by the ordinary process of negotiation between seller and buyer, and did not represent the free choice of both parties to the trans-

action, is far from convincing. Indeed, it does not seem to be the chief reliance for conviction. The offense seems to consist in acquiring these properties regardless of how real and fair the purchase, because to do so was an offense against the economy of Bohemia and Moravia, and led to control or domination of the economy of the territory. This will be more clearly shown in what follows.

Rasche is convicted for his activities in Holland. He neither bought nor sold property there. The Dresdner Bank owned at least a controlling interest in a bank in Amsterdam known as the Handelstrust West. It was a Holland banking corporation, with its own staff of officers. It maintained a securities department, which handled securities on a commission basis. Its service was to bring seller and buyer together. Through this department, many properties and securities of enterprises in Holland were sold to German capitalists or industrialists. There is no evidence that it exercised any force or duress to complete these transaction.

Indeed the indictment [paragraph 54] does not charge that these transactions were accomplished by any force. It charges:

> "The defendant Rasche directed and supervised activities of the Dresdner Bank and its affiliates in occupied western areas involving economic exploitation, including particularly activities involving transfer of control of Dutch enterprises to selected German firms through the process called 'Verflechtung,' which was an 'interlacing' of Dutch and German capital and economic interests."

It will be observed that the offense charged here is the mere "transfer of control" of Dutch enterprises to German owners; it assumes they are voluntary. It charges that, in spite of that fact, it is a crime. It is doubtful whether the evidence shows the sales arranged by Handelstrust West involved control.

But assume that they did. And I think it may be assumed also that the purpose in many instances was to secure control of enterprises in order to insure that they would produce for the German economy and war effort, and that high prices were offered and paid for enterprises with that object in view. But if this were a crime who would be guilty of it? Possibly the parties to the transaction, and even the broker who arranged the transaction. But how about the stockholder in the bank which acted as broker? But Rasche was only an officer of a bank which held stock in the bank which acted as broker. But were these transactions crimes? There is no article in the Hague Rules of Land Warfare which prohibits them. Under such circumstances I do not see how it can be said that they violate the rules and customs of war.

It is not likely that any useful purpose will be served by discussing other individual convictions. If it is obvious that some acts of actual spoliation were committed, such as Pleiger's taking over the deWendel plant in France, and Stuckart's taking the records of an International Society from Amsterdam to Berlin, but these are so joined with other alleged acts of spoliation which go under the name of "participating" in a program, or "cooperating" with a program that the guilt of any defendant convicted is exaggerated, and, therefore, I am unable to concur in the opinion as to any defendant convicted under this count.

To illustrate further what results from convictions based on "participation" consider the letter which Schwerin von Krosigk wrote to Goering and others concerning the activities of the agencies addressed, in the eastern territories. The letter starts out by saying the Reich expected to gain financially from the occupation of these territories, and points out that certain vital materials can be obtained more cheaply from such territories. But the letter goes on to complain about the administration of the territories and the large sums being paid to German nationals for services rendered in the territory, and that was the obvious purpose of the letter. This is said to prove participation, and is strongly emphasized in the opinion. I am unable to see that it proves anything, except that Schwerin von Krosigk, as Finance Minister, was concerned about the waste of public money in an extravagant and wasteful administration of the territories.

To say that the letter constitutes participation in spoliation it must be assumed that the statement in the letter, that the Reich expects financial gain from the occupied territories, is a recognition of the fact that spoliation is occurring, and that his failure to protest or resign constitutes consent to it, and that such consent constitutes participation. I cannot concur either in the premises or the conclusion. The opinion contains many similar illustrations.

Acts of this character, which do not cause any pillage or plunder, and are not intended to do so, fall far short of proving spoliation.

CONCLUSION

I have attempted by explanation and illustration to show why I am unable to concur in the convictions under counts one, three, five, and six.

Except as may have been heretofore otherwise expressed herein, I raise no questions and express no dissenting views as to the decision of the Tribunal concerning counts two, four, seven, and eight.