part of the orders and memoranda concerning each of these motions.

Dated this 12th day of December, 1949.

[Signed] WILLIAM C. CHRISTIANSON
WILLIAM C. CHRISTIANSON
Presiding Judge

[Signed] ROBERT F. MAGUIRE
ROBERT F. MAGUIRE
Judge

D. Orders and Memoranda on the Motions of Individual Defendants for the Correction of Alleged Errors of Fact and Law in the Judgment, 12 December 1949

1. VON WEIZSAECKER—ORDER AND MEMORANDUM OF THE TRIBUNAL AND SEPARATE MEMORANDUM OF PRESIDING JUDGE CHRISTIANSON

ORDER

On 10 May 1949 a motion was filed on behalf of the defendant Ernst von Weizsaecker praying that the Tribunal's judgment of 14 April 1949 be amended to revoke its findings of guilt against said defendant on counts one and five of the indictment, and that the defendant be released from custody. On 19 June 1949 the prosecution filed an answering brief to said motion and the defendant later filed a rejoinder to the prosecution's answering brief. It also appears that on 25 April 1949 the defendant joined in a petition for a plenary session of the Tribunal for the expressed purpose of "examining the judgment passed on 14 April 1949 by Military Tribunal IV."

The Tribunal having considered said motion and the briefs filed in relation thereto and being advised in the premises,

IT IS ORDERED that the defendant von Weizsaecker's motion as to count five be and the same is hereby in all respects denied. Von Weizsaecker's motion as to count one is sustained, the judgment modified *pro tanto* and his sentence is modified and reduced from 7 years to 5 years, and shall be deemed to have begun on 25 July, 1947.

Memorandum hereto attached is made a part of this order.

Dated 12 December 1949.

[Signed] WILLIAM C. CHRISTIANSON
WILLIAM C. CHRISTIANSON
Presiding Judge.

I concur in above as to count five but not as to count one. See my separate memo.

[Signed] ROBERT F. MAGUIRE
ROBERT F. MAGUIRE
Judge

[Signed] LEON W. POWERS*
LEON W. POWERS
Judge

MEMORANDUM

The defendant von Weizsaecker was convicted on two counts: one and five. He was acquitted on all other counts. As to count one, the Tribunal found him not guilty in connection with the aggressions against Austria, Poland, the United Kingdom, France, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, Russia, and the United States of America. It found him guilty because of his connection with the aggression against Czechoslovakia which took place on 15 March 1939 when Germany marched into that unfortunate country, dissolved it as a national entity, and attempted to incorporate it as a protectorate into the German State. Defense counsel insists that the Tribunal not only erred in its evaluation of the testimony, but that it erroneously considered evidence which had been rejected as inadmissible and that it has used evidence which the defense has never seen, and finally that it is prejudiced against the defendant.

Before discussing the main question, namely whether the Tribunal erred in its evaluation of the testimony and that the record not only fails to establish guilt but demonstrates the defendant's innocence, we shall advert briefly to the suggestions that rejected evidence was made one of the bases of the finding of guilt, that the Tribunal considered evidence which the defense has never seen, and that the majority of the Tribunal were prejudiced against the defendant. As to the first, the defendant asserts that document NG–5750, the minutes of the von Ribbentrop-Hitler meeting of 11 October 1938, was offered as Exhibit 325 in prosecution document book 204 and was rejected. Counsel for the defense overlooked the fact that this document was offered on 18 October 1948 as Exhibit C–348 and by order of the Tribunal was received in evidence on 15 November 1948. In a large number of cases where duplicate but separate offers were made of documentary exhibits, one or the other was rejected, and in some instances where an

* Judge Powers wrote a separate memorandum opinion (section E) concerning his signing of the Tribunal orders on the motions of the defendants von Weizsaecker, Steengracht von Moyland, and Woermann and concerning the absence of his signature on the Tribunal orders on the other individual motions.

offer was made of a document at a particular stage of the case an objection may have been made and sustained, and when re-offered at another stage or upon another point, admitted.

The document in question was properly admitted and considered by the Tribunal.

The assertion that the Tribunal considered evidence which the defense has never seen, if true, would constitute a grave breach of judicial duty. It is, however, wholly without foundation in fact. Whether the defendant was interrogated by the prosecution prior to the trial and, if so, whether that interrogation was reduced to writing is unknown to the Tribunal. If such was the case, the Tribunal never saw such interrogations nor was it informed of their contents. The statement found on page 48 of the judgment was based solely on the record. (*Tr. pp. 9236–9237.*) The Tribunal gave no consideration either to the statement of the prosecution that von Weizsaecker had not mentioned "a word of his alleged resistance activities * * * to the prosecution in this case prior to his indictment" (*Prosecution Brief, p. 8*) or the statement of the defense that "already in the spring of 1947 when von Weizsaecker came to Nuernberg for this purpose Mr. Kempner, f.i., discussed extensively the Talleyrand parallel with von Weizsaecker in an interrogation which he attended as a free man." (*Defense Reply Brief, p. 134.*) Neither was a statement of evidence.

The defendant's testimony regarding this matter was as follows:

> "Q. Very well. In your examination before the IMT on the Raeder case did you say a single word in connection with your resistance activity?
>
> "A. I did not. I do not think so; I was not asked about it.
>
> "Q. When you gave affidavits for various subordinates for denazification purposes did you mention anything of your own connection with the resistance movement?
>
> "A. I did not. I am not a man to boast about himself.
>
> "Q. But would not that have been important in order to show your own position to the addressees?
>
> "A. I do not like to put myself in the limelight."

In attempting to reach an accurate evaluation of the facts relating to the defendant, it was unfortunate that his attitude was such as to cast doubt as to his frankness and candor. We found it necessary to advert to his exceeding caution on cross-examination, his claim of lack of recollection of events of importance and his insistence before testifying about many subjects that he be confronted with documents.

It now appears that this was primarily based on advice given him before and during the trial by both his American and German counsel. Men remember events even though they may be uncertain as to the exact language of documents. To advise any witness not to testify as to recollection of events unless a document should be produced regarding the same is improper, and had the Tribunal been informed that this advice had been given, its impropriety would immediately been made clear both to the counsel and the defendant.

The statements of the Court to which counsel refer in their motion as justification were made after it became evident that unless and until the documents relating to a subject matter were presented to the witness, testimony regarding the matter could not be elicited.

In considering von Weizsaecker's defense respecting each charge against him, the Tribunal endeavored to ascertain and determine the facts. Much of the defendant's own testimony regarding events was vague, as was that of many of his witnesses. Too often there was a lamentable failure to be definite either as to time, persons, or the substance of alleged conversations and acts. This characteristic extended not only to his own official actions but his connection with the so-called underground resistance movement. We have extended to the defendant not only the presumption of innocence, but in every case where there was doubt, and there were many of them, we have accorded him the benefit of the doubt.

The defendant now asserting that the Tribunal has not properly evaluated the testimony regarding his connection with the aggression against Czechoslovakia, it becomes our duty to reexamine the matter. Our order permitting such motions was prompted by a desire to correct any errors of law or fact which through inadvertence may have been made that they could be corrected and justice done.

We have reexamined the entire record relating to this phase of the case. We have, as we should, limited ourselves to the record and have declined to consider any extraneous matters, such as were included in defense counsel's communication of 8 July 1949, which beyond argument are not properly before us and should not have been submitted.

We held that von Weizsaecker did not originate this aggression and that in our opinion he did not look upon it with favor. We further held that inner disapproval is not a defense if the defendant became a party to, aided in, abetted, or took a consenting part therein. This is and always has been a fundamental principle of criminal law. To it we adhere.

Nevertheless, the serious question exists whether or not von Weizsaecker's connection with this aggression was of such a character and of such importance as to warrant a finding of guilt. To correctly answer this question, it is necessary to reconstruct the situation as it actually existed, keeping in mind all the manifold circumstances of the time, fraught as it was with tensions, beset by uncertainties, and affected by personalities and political situations existing not only in Germany but in England, France, Italy, and Czechoslovakia.

We held that the plan to swallow Czechoslovakia was Hitler's. It had the undoubted and enthusiastic support of von Ribbentrop. The incitement of Slovakia was a part of the scheme, the declaration of Slovakia's independence was induced if not commanded by Hitler; the fatal visit of Hacha to Berlin was a necessary corollary and one of the steps taken pursuant to that plan. The browbeating and, as the defendant himself said, the blackmailing pressure put upon the unfortunate President of the Czech Republic was carried out by Hitler and his immediate associates; the Wehrmacht embarked on its invasion hours before the Czech President had been overpowered by Hitler's threats. Von Weizsaecker did not participate in any of these steps, he did not advise that they be taken, and as we held, we do not believe that they had his approval. This of itself, however, would not exonerate him if, in carrying out Hitler's plan, he took a part either in lulling Czech suspicion or in misrepresenting the planned course of Nazi action, either to the French or the English, with a view to forestalling timely diplomatic or other action on the part of those nations. One may become *particeps criminis* by doing either.

We are still of the opinion, concerning the final operation against the Czech Republic, von Weizsaecker became convinced that, if undertaken, neither France nor England would go to war in protest against what the defendant himself admits was a plain breach of the language and the spirit of the Munich Agreement, and that he therefore viewed this aggression of Hitler's as less dangerous to Germany than either Hitler's demands before Munich, which preceded, or the Polish maneuvers which succeeded it, and that his efforts to inform and warn the Western Powers were less positive and were in fact half-hearted. We find no reason to change our evaluation of the Altenburg report or our findings that the defendant von Weizsaecker was aware of Hitler's plans, even though he may not have been kept informed of precisely when or how they were to be put into execution. He so testified. (*Tr. p. 7731.*)

The judgment refers to his conference of 22 December 1938, with Coulondre, the French Ambassador, those with Magistrati of the Italian Embassy held on 28 December, and the reply to the British note of 8 February 1939 regarding the Czechoslovakian guaranty, which was prepared under the defendant's supervision and in part, at least, by him; his interview of 22 February 1939 with the Czech Chargé d'Affaires, and his conference of 3 March 1939 with Mastny, the Czech Minister. These are the essential documents relating to von Weizsaecker's participation in the aggression against Czechoslovakia. The statements which he made on 15 and 18 March to the French and British Ambassadors, both of which took place after the aggression, were cited and are important only as they may throw light upon von Weizsaecker's actual state of mind and feeling and enable the Tribunal to determine the truth or falsity of the claims he now makes of distaste for and disapproval of Hitler's action.

None of these documents put von Weizsaecker in an amiable light or evidence either distaste or disapproval, contain many statements which von Weizsaecker knew and admits were false, and were official attempts to justify what he admits to have been unjustifiable. Nevertheless, we are here concerned with the legal effect of acts and not questions of individual or diplomatic morality.

It must be conceded that he made no attempt to mislead the Czechs, either as to the precarious situation in which their country was placed or as to the intentions or attitude of Germany, and it is apparent from von Weizsaecker's comments that the Czech Minister and Chargé d'Affaires were under no illusions as to the danger in which their country was placed and had little doubt as to Hitler's plans. Nor can there be any doubt that the statement of the German position given to the French and British Governments was such as to put them on notice that Germany repudiated the agreement which Hitler had made in Munich regarding the guaranty of the remainder of the Czech State. It could not and did not allay either into a sense of false security.

Had the evidence disclosed that von Weizsaecker had either joined in making or carrying out the planned aggression or that, knowing it, he had attempted to deceive the Czechs, the British, or the French regarding the same, a verdict of guilty would be imperative.

After a careful examination of the entire record concerning his connection with the aggression against Czechoslovakia, we are convinced that our finding of guilt as to that crime was erroneous. We are glad to correct it. The judgment of guilt against the

defendant von Weizsaecker as to count one is hereby set aside and he is hereby acquitted under count one.

In discussing the question of defendant's guilt under count one, the Tribunal commented upon the failure of the witness Burckhardt to appear for cross-examination, and for that reason declined to consider what purported to be portions of his diary. The question of the production of the entire diary and the appearance of Dr. Burckhardt for examination was the subject of a number of conferences with counsel for the prosecution and the defense. It is the recollection of members of the Tribunal who were present at these conferences that they were informed that Dr. Burckhardt's government would not permit him to produce the remainder of the diary because of comments therein contained relating to living persons, or permit him to be cross-examined regarding the matter, and that the diary was finally received for what the Tribunal, under the circumstances, might consider it to be worth. We recognize the language difficulties which existed in carrying on these conferences, and it may well be that a misunderstanding arose and either counsel did not accurately express himself or the Tribunal did not correctly understand him. Under these circumstances, the comment referred to may be unjust both to Dr. Burckhardt and to his government, a matter which the Tribunal would greatly regret. We therefore expunge our remarks regarding both. Having acquitted the defendant von Weizsaecker on the charges as to which the diary entry is alleged to have been material, it is unnecessary to say more.

The defendant complains that his handwritten memorandum was incorrectly quoted as reading "to be selected by the police" while the proper translation as shown in Document Book 60 is "described in detail of the police record." This exhibit was offered and received on 18 March 1948 and on that occasion the prosecution stated that the proper translation was as we have stated. (*Tr. p. 3525.*) The defense made no objection and the Tribunal thereupon made the necessary correction in its copies of the document. Corrections of this kind were by no means unusual. Before the end of the trial the prosecution and defense agreed on many hundreds of such corrections, which were laboriously made in the court records. But if we assume that the translation quoted is erroneous, and for the purpose of our present ruling we make this assumption, and that the translation suggested by the defendant is accurate, no different conclusion is permissible. It was not contended that the Jews whose names were found in the police records in France were themselves criminals. Such notations amounted merely to a registration. Even if it were conceded that Jews whose names appeared upon those

records were of the criminal classes, deportation in Germany to slave labor or death would be no less a violation of international law.

We found von Weizsaecker and Woermann guilty because when an official inquiry was made as to whether or not the Foreign Office had any objection to these deportations they answered in the negative, in face of the fact that they both knew and realized that the proposal was a clear violation of international law. So far as guilt is concerned it is immaterial whether the victims were to be selected by the police or whether they were "described" in detail in police records. No claim is made that these Jews who were described in the police records were in fact criminals.

The defendants von Weizsaecker and Woermann insist that our judgment against them on count five is based upon the false hypothesis that at the time they had knowledge of the extermination program established in Auschwitz. Such is not the fact. We were and are convinced beyond reasonable doubt that both were aware that the deportation of Jews from occupied countries to Germany and the East meant their ultimate death. No one can read the record concerning the Dutch Jews and have any question as to the fact.

[Pros.] Exhibits 1677, 1678 and 1679 [*documents NG–2805, NG–2710, and NG–3700*], Book 60 B, concern some 600 Dutch Jews who in 1941 were deported to Germany. Woermann in reporting this to von Ribbentrop and von Weizsaecker stated that Bene had informed him as the result of the slaying of a W. A. man by unidentified Jewish assassins "400 Jews have been brought from the Netherlands to Germany to *'work'* here." (The italics are Woermann's.) In October 1941, Albrecht reported von Weizsaecker that the Swedish Minister had stated that his requests for permission to visit the concentration camp at Mauthausen where these Jews had been confined had not been granted, and renewed his request, calling attention to the fact that more than 400 of them, mostly young men, had already died, and that it appeared from the death lists that these deaths appeared to have occurred on certain days each time. We have referred to the other details regarding this incident in the judgment.

In an attempt to persuade us that these concentration camps, including Auschwitz, were merely labor camps and not murder factories until after 1942, the defense has offered much testimony. An analysis reveals that great care was exercised not to state that prior to that time Jews merely labored and were not murdered, but to emphasize that the *mass* murder program had not been instituted until after 1942, when convoys of Jews were

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driven into the gas chambers immediately on arrival at the camps. Nevertheless, the carefully guarded language used in these affidavits and in this testimony makes no attempt to deny that for several years before that date starvation, privation and labor to exhaustion, death, and indiscriminate murder was the order of the day. The Mauthausen incident which related to the Dutch Jews establishes this.

The majority of the Tribunal gave consideration to and found themselves under the necessity of rejecting the views expressed by one of its members, Mr. Justice Powers, "That no ground therefor based on foreign politics existed for objection * * * so the so-called consent of von Weizsaecker and Woermann was merely the recognition of the fact that conditions were absent which gave them the right to object on the ground of foreign policy."

We were and are of the opinion that the learned Judge misconceived both the facts and the law. The Foreign Office was the only official agency of the Reich which had either jurisdiction or right to advise the government as to whether or not proposed German action was in accordance with or contrary to the principles of international law. While admittedly it could not compel the government or Hitler to follow its advice, the defendants von Weizsaecker and Woermann had both the duty and responsibility of advising truthfully and accurately. Being the only official repository of international usage and duty and being itself charged with matters relating to foreign politics, its leaders could not avoid responsibility by merely considering whether or not, irrespective of legal right, a crime under international law could be successfully committed, either with or without the consent of the government of the nationals affected by the proposed action, putting aside the question of whether in given cases the alleged consent of the second government was voluntary or induced by fear or threats. We have no hesitation in holding that in such a case a crime against humanity is committed by the responsible heads of the consenting government as well as by those of the state which actually commits such crimes. The likelihood either that a crime against international law can be concealed or that offenders will be so successful that no prosecution is to be apprehended constitutes no defense. If anything, such action constitutes matters of aggravation. We know of no principle of law, national or international, which asserts that murder becomes legal because a natural person or a state gives its consent thereto.

Nor is there merit to the condition that the evacuation had already been finally decided upon prior to 4 March 1941 and

thereafter it is immaterial whether the Foreign Office gave or withheld its consent. We have no doubt that Hitler and the Nazi police organizations had planned and desired to do what was finally done, namely to deport these unfortunate Jews from France to their death in the East. This, however, does not negative the importance of the fact that before the act was committed inquiry was made of the department of the Reich, whose duty it was to pass and advise upon questions of international law, as to whether or not it had any objection to the proposal. The only advice it could give within its sphere of competence and the only objection it could raise from an official standpoint was that the proposed program did or did not violate international law, and whether, irrespective of its legality, unfavorable foreign political developments would arise. If the program was in violation of international law the duty was absolute to so inform the inquiring branch of the government. If, notwithstanding this, the latter concluded to proceed, the Foreign Office and its officials would have fulfilled their official duty and would be entitled to exoneration. Unfortunately, for Woermann and his chief von Weizsaecker, they did not fulfil that duty. When Woermann approved the language "the Foreign Office has no misgivings" and von Weizsaecker changed it to the phrase "has no objections," which phrases so far as this case is concerned are almost synonymous, they gave the "go ahead" signal to the criminals who desired to commit the crime. Under such circumstances, it is idle to speculate as to whether or not contrary advice would have been followed. There is a vast difference between saying "no" and saying "no objection." The first would exonerate, the second is criminal.

There is no merit in the assertion that Woermann had no competence in the matter in question. Luther's Department Germany did not act without obtaining the consent and without following directive of its superiors, Woermann and von Weizsaecker. It submitted the matter to them and acted in accordance with their approval.

We have carefully reviewed the evidence both of defense and prosecution relating to the convictions of the defendants von Weizsaecker and Woermann on count five, and have considered the motions relating thereto. We overrule and deny the motions and adhere to the findings of guilt as stated in our judgment.

Judge Christianson dissents from the Tribunal's action in setting aside the defendant von Weizsaecker's conviction under count one, and his memorandum setting forth his views follows.

SEPARATE MEMORANDUM OF JUDGE CHRISTIANSON WITH RESPECT TO ORDER AND RECOMMENDATION THAT CONVICTION OF DEFENDANT VON WEIZSAECKER UNDER COUNT ONE BE SET ASIDE AND HIS SENTENCE REDUCED

I am unable to concur in the order or recommendation of the majority with respect to the conviction of defendant von Weizsaecker under count one. I cannot agree that the majority of the Tribunal in the original judgment erroneously evaluated the evidence with respect to said matter as is now indicated to be the view of my colleagues with respect to the defendant von Weizsaecker's conviction under count one.

A re-examination of the evidence with respect to the actions of defendant von Weizsaecker in connection with the aggression against Czechoslovakia deepens my conviction that said defendant is guilty under said count one. I am therefore unable to concur in the order or recommendation of my colleagues that the conviction of said von Weizsaecker under count one, be set aside and his sentence reduced.

[Signed] WILLIAM C. CHRISTIANSON

2. STEENGRACHT VON MOYLAND—ORDER AND MEMORANDUM OF THE TRIBUNAL AND SEPARATE MEMORANDUM OF PRESIDING JUDGE CHRISTIANSON

ORDER

On 20 May 1949 the defendant Steengracht von Moyland filed a motion praying that his conviction under counts three and five be quashed. Briefs regarding these motions were filed on behalf of the defendant and the prosecution.

The defendant Steengracht von Moyland also joined in a petition for plenary session of the Tribunal for the purpose of "examining the judgment" rendered in this case on 14 April 1949.

The Tribunal having considered the motions of the defendant, the briefs, and the record in the case and being advised in the premises,

IT IS ORDERED that the defendant's motion as to count three is sustained, the judgment modified *pro tanto* in that his conviction under count three is set aside and the judgment of sentence is modified and reduced from 7 years to 5 years, and shall be