MEMORANDUM

The questions raised by the motion of defendant Dietrich were considered in our opinion. They have been reexamined in connection with his motion and we find no error and no reason why we should not adhere to our findings and conclusions. His motion should be, and hereby is, overruled and denied *in toto*.

11. BERGER—ORDER AND MEMORANDUM OF THE TRIBUNAL

ORDER

On 6 May 1949 counsel for defendant Gottlob Berger filed a memorandum, dated 4 May 1949, calling the Tribunal's attention to alleged errors in the judgment in this case, in which judgment said defendant had been adjudged guilty under counts three, five, seven, and eight of the indictment. It appears that prior to the filing of the above memorandum defendant had joined in a petition for plenary session of the Tribunals for the therein expressed purpose of "examining the judgment" passed on 14 April 1949 by this Tribunal. It further appears that on 29 April 1949 a petition was filed by defendant with the Military Governor for the U. S. Zone of Germany, praying that (1) said judgment be vacated, or (2) that the sentence of Berger be reduced to a lesser period of confinement.

On 19 June 1949 the prosecution filed with the Secretary General an answering brief relative to the defense memorandum and motion concerning alleged errors in the judgment, and on 28 June 1949 a reply brief to the answering brief of the prosecution was filed in behalf of defendant Berger, praying that upon his motion of 4 May 1949, in conjunction with his brief of 28 April (plea to the Military Governor above referred to), the adjudication of guilt on the counts involved be revoked or the sentence reduced.

The Tribunal having considered the memorandum and motion of the defendant, and the arguments in support thereof, including those contained in the plea to the U. S. Military Governor of Germany as referred to in connection with defendant's memorandum and motion of 4 May 1949, and having considered the answering brief of the prosecution and the reply of defendant thereto, and being advised in the premises,

IT IS ORDERED, that the prayer for relief as contained in the defendant's memorandum of 4 May 1949 and in his reply brief of 25 June 1949 be, and the same is, hereby in all respects denied.

Memorandum hereto attached is made a part of this order.
Dated 12 December 1949.

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

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

MEMORANDUM

Defendant devotes considerable space in his memorandum to a listing of various items of both oral and documentary evidence introduced in his client's behalf, and which evidence he states (see page 10 of his memorandum) is "evidence that was not taken into consideration." Apparently counsel draws such conclusion from the fact that such evidence is not specifically referred to or commented upon in the opinion, which may well have been due to the fact that such items of evidence did not in the opinion of the Tribunal possess the value that counsel accords to it. Failure to specifically discuss such items of evidence cannot justifiably be taken to mean lack of consideration. On the contrary the thought and consideration given it may have impelled the Tribunal to its decision not to take up time and space in discussion of such evidence. To have exhaustively discussed all evidence, item by item, would unnecessarily have extended an already long judgment to unwarrantable lengths.

We will now discuss some of the alleged errors as they relate to the various counts of the indictment under which defendant was found guilty.

We have examined the defendant's motions relating to counts three and five, reread the record regarding the Mesny murder incident, and find no substance to the contentions therein contained. We may state that Meurer, when on the witness stand, testified on direct examination that when the intelligence officer drew attention to the fact that the name of the French general first selected to be murdered had been sent over open teletype, and thus secrecy imperilled, he, Meurer, immediately reported the matter to General Berger, who saw the point of these misgivings and approved Meurer's suggestion that Field Marshal Keitel should be informed of the situation. Meurer states that on the same day, he sent off a teletype letter to Marshal Keitel roughly to the effect that the use of open teletype endangered secrecy, and to put it to him to choose somebody else. Berger's motions regarding count three and count five should be and are hereby overruled and denied.

The arguments advanced by the defendant against the finding of guilt under count seven, generally stated, are to the effect that such finding is not adequately sustained by the evidence, and in connection therewith several claimed errors are specifically referred to.

In his memorandum of May 4, defense counsel for Berger points out, on page 9 thereof, three claimed errors in the Tribunal's treatment of count seven, one such error being numbered 25 and appearing on page 767 of the judgment; error numbered 26, appearing on page 770 of the judgment; and error numbered 27, also appearing on page 770 of the judgment. We will briefly comment on such claimed errors. The first of these claimed errors (No. 25) is based on the fact that the judgment states on page 767 thereof that "the evidence indicates that this youth conscription program was in the main compulsory, although defendant denies this." Defense counsel contends that the prosecution failed to sustain such charge, "The only evidence submitted, [NO–1819] Exhibit 2648, says: Hauptsturmfuehrer Brandenburg requests that, if at all possible, no pressure be used." Brandenburg was Berger's deputy or representative at the meeting where the foregoing statement was made. Counsel then refers to pages 83–86 of his petition to the Military Governor. We have examined again the evidence on this point. In the light of the evidence it appears entirely untenable for defendant to contend that the only evidence submitted was what he above refers to. It is only necessary to allude to specific evidence on this question as contained on pages 766 to 769, inclusive, in the judgment. Document Book 68 of the prosecution contains further evidence thereon. Further, the argument that Berger did not initiate the Heu-Aktion or the Luftwaffe helpers campaign, nor did he carry on these programs, as also contended in the defendant's petition to the Military Governor, is scarcely worthy of passing notice, in view of the various exhibits introduced in evidence, which clearly establish the defendant's close connection with the carrying out of such programs. We refer to [NO–1877 and NO–2016] Prosecution Exhibits 3387 and 3388, in Prosecution [Document] Book 68, which exhibits are only two of several, on this subject.

Alleged errors, numbers 26 and 27, may be discussed together, they referring to the same program, and both appearing on page 770 of the judgment. The program in question was one that contemplated among other things evacuation of Ukrainians from the Ukraine for conscription to labor.. Reference to such program is made on page 769 of the judgment, which recites the order issued by Himmler (June 1943) and received by Berger. It is contended by counsel for the defendant that the Tribunal was

not justified in stating with respect to such matter that: "The testimony of Berger was to the effect that he was not in favor of such an announced program and that, in fact, the mass evacuation provided for in Himmler's order was not carried out. In view of convincing evidence to the contrary, however, the Tribunal is obliged to reject the explanation and defense thus given by Berger."

Counsel then states in connection with the above: "The evidence does not contain such evidence to the contrary" and he refers to the brief submitted by him to the Military Governor, page 94 thereof.

Error 27 as alleged, also referring to the matter of the Ukrainians, is based on the fact above that the Tribunal cited the evidence of defense witness Braeutigam (page 770 of the judgment), to show that there had been by the fall of 1943 many Ukrainians evacuated from the Ukraine, such witness having stated: "* * * as is well known, in the autumn of 1943 the Ukrainians had already been evacuated to a large extent." The defense counsel (page 9 of his memorandum) quotes the testimony of such witness as follows, with the comment indicated: "* * * as is well known, in the autumn of 1943 the Ukraine had already been evacuated to a large extent, [that is, the troops had to withdraw from the Ukraine"]. The words in brackets are the comment of counsel. Reference is made to the transcript of such evidence as being on page 6629 of the German Transcript and page 6575 of the English Transcript.

After having discussed Berger's activities and participation in the youth conscription programs, the Tribunal stated on page 769 of the judgment: "The evidence with respect to slave labor indicates the further involvement of Berger in the slave-labor program." The judgment then goes on, pages 769–771, to discuss the evidence of further involvement. Then on page 770 of the judgment, after calling attention to the fact that Berger had received (June 1943) "a so-called top secret order from Himmler with respect to a program of enslavement of the male population of the north Ukraine and central Russia" (pages 769–770) "and that in fact the mass evacuation provided for in Himmler's order was not carried out. In view of the convincing evidence to the contrary, however, the Tribunal is obliged to reject the explanation and defense thus given by Berger."

We believe from the evidence we are not justified in making any alteration or modification in the judgment on these contentions of defense counsel. To say that "there is not evidence to the contrary" as defense counsel here states is merely rhetorical argument. Attention was called in the judgment to the letter of

Berger, written by him 14 July 1943 to Himmler, discussing the labor program, and there he states in part to Himmler as follows: "I would suggest that after the termination of the actions in central Russia and north Ukraine, a strong action for labor conscription in Lithuania is initiated." With respect to claimed error 27, to contend that the testimony of Braeutigam establishes that the mass evacuation ordered by Himmler was not carried out, is likewise untenable. The transcript record states that Braeutigam testified: "* * * as is well known, in the autumn of 1943 the *Ukrainians* had already been evacuated to a large extent." [Emphasis supplied.] Counsel quotes such testimony as being "* * * the *Ukraine* had already been evacuated to a large extent" [emphasis supplied], and then goes on to explain that evacuation of the Ukraine, meant that the German soldiers had been obliged to withdraw from the Ukraine. This is an unwarranted assumption, and is based on an incorrect translation of Braeutigam's testimony [*Tr. p. 6575*], for the unchallenged transcript record states that the *Ukrainians* had been largely evacuated in the autumn of 1943, instead of the Ukraine. Even if the witness had used the term Ukraine, small justification exists for the interpretation here given by the defense counsel to the effect that this meant evacuation of German soldiers, and not Ukrainians.

Furthermore, the Tribunal in its judgment (page 770) refers to reports showing the carrying out of such evacuation program. The exhibits are not specifically referred to in the judgment, but we will note some of them here: Prosecution Exhibits 3344, 3345, and 3346 [NO–2007, NO–2008, NO–2009], all in Prosecution Document Book 68. There are also others. The fact that it is claimed in counsel's brief that Berger did not see these reports, even if that were true, does not detract from the value of these reports in proving that an evacuation program was going on during the times in question, and that the Ukrainian people were the unwilling victims.

The Tribunal does not find in the contention of counsel, as shown in his memorandum or in his petition to the Military Governor, proper and adequate basis for the modification of its judgment with respect to its findings against defendant Berger under count seven.

12. SCHELLENBERG—ORDER AND MEMORANDUM OF THE TRIBUNAL

ORDER

On 26 May 1949, a motion was filed in behalf of defendant Schellenberg praying that the Tribunal's judgment of 14 April

1949 be amended to revoke its findings of guilt against said defendant on counts five and eight 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 on 30 June 1949 the defendant filed a rejoinder to the prosecution's answering brief.

It also appears that on 25 April 1949 the defendant joined in a petition for plenary session of the Tribunal for the purpose of "examining the judgment passed on 14 April 1949 by the Military Tribunal IV." The Tribunal having considered said motion and answering brief of the prosecution and the defendant's rejoinder to said answering brief and being fully advised,

IT IS ORDERED that Schellenberg's motion as to counts five and eight be, and the same is, hereby in all respects denied.

Memorandum hereto attached is made a part of this order.

Dated 12 December 1949.

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

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

MEMORANDUM

The questions raised by the motion of defendant Schellenberg were considered in our opinion. They have been reexamined in connection with his motion and we find no error and no reason why we should not adhere to our findings and conclusions. His motion should be and hereby is overruled and denied *in toto*.

13. SCHWERIN VON KROSIGK—ORDER AND MEMORANDUM OF THE TRIBUNAL

ORDER

On 10 May 1949 defendant Schwerin von Krosigk filed a motion for amendment of the judgment in this case with respect to counts five and six, under which said defendant was convicted, calling attention herein to alleged errors of law and fact. On 19 June 1949 the prosecution filed an answering brief to said motion and on 30 June 1949 the defendant filed a rejoinder to the prosecution's answering brief. It also appears that on 25 April 1949 this defendant joined with others in a petition for a plenary session of the Tribunals for the therein expressed purpose of "examining the judgment passed on 14 April 1949" by the Tribunal in this case.

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