We must and do adhere to the finding made in this count. Errors or discrepancies claimed, do not appear upon examination to constitute warrantable basis for modification of the judgment with respect to this count.

There is no merit in the defendant's motion to set aside his conviction under count eight. His motion to set aside his conviction under this count should be and is hereby overruled and denied.

7. LAMMERS—ORDER AND MEMORANDUM OF THE TRIBUNAL

ORDER

On 10 May 1949, the defendant Lammers filed a memorandum with respect to alleged errors of law and fact in the judgment herein, under which said Lammers was convicted on counts one, three, five, six, seven, and eight of the indictment.

On 19 June 1949, the prosecution filed an answering brief to said defendant's memorandum, and on 28 June 1949, the defendant filed a rejoinder to said answering brief.

It appears that on 25 April 1949, the defendant joined in a petition for plenary session of the Tribunals, for the therein expressed purpose of "examining the judgment" rendered by the Tribunal on 14 April 1949.

It further appears that on 29 April 1949, the defendant filed with the Military Governor for the U. S. Zone of Germany, a petition therein designated as "Petition for Reopening the Proceedings concerning Dr. Hans-Heinrich Lammers (Case 11)," which petition is referred to, and in effect by reference made a part of the memorandum hereinbefore referred to, which memorandum does not pray for correction of alleged errors complained of, but represents that "There are so very serious and irreparable deficiencies in the proceeding and the judgment, and such critical violations of the generally recognized principles of criminal and procedural law occurred, that the chances offered by the Court to apply for a correction of errors to Military Tribunal IV is not adequate to repair them." Said memorandum then states that, "If the judgment in these proceedings is not to be the act of a powerful and arbitrary victor, but is supposed to administer justice, the only thing that can be done is a reopening of the trial against the defendant Dr. Lammers."

The Tribunal having considered said memorandum and the representations therein contained, and above set forth, and being advised in the premises, and having considered the arguments in

the answering brief, and the reply of the defendant thereto, and being advised in the premises,

IT IS ORDERED that the representations contained in said memorandum as hereinbefore set forth verbatim, be and the same are hereby 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 petition for plenary session of Tribunals is not before the Tribunal for determination, but insofar as it contains arguments that were made in behalf of this defendant, it is here considered.

The petition to the Military Governor of the U. S. Zone of Germany, and above referred to as having been filed by the defendant, and praying that said proceedings be reopened, is, of course, not within the jurisdiction of this Tribunal. We refer to it here, only because it is by reference in effect made a part of the memorandum which was directed to this Tribunal.

As indicated in the foregoing order the memorandum does not contain a prayer for correction of errors; in fact, the memorandum itself does not specifically allude to any. It does not request that the errors alleged in the petition to the U. S. Military Governor for Germany be corrected. We therefore are not required to here make any corrections. The prayer to the Military Governor of the U. S. Zone of Germany, however, is based upon such palpable misstatements with respect to the conduct of the trial of defendant and the contents of the judgment, that inasmuch as such petition is made a part of the memorandum by reference, we deem it our duty to generally correct the unwarranted representations made therein.

Counsel for the defendant in the course of his petition to the Military Governor, above referred to, has made a series of *exaggerated, false,* and inflammatory statements concerning the judgment, and the majority of the Tribunal rendering such judgment. An example of such statement is the following, contained on page 2 of the said petition to the Military Governor: "I shall prove in the following pages that the Tribunal (with the exception of the dissenting judge) completely ignored the testimony given by

defense witnesses, did not in a single instance or with a single word discuss them, and probably did not even read them." And again on page 3 of said petition we have the following: "From almost every line of the majority opinion against the defendant Lammers a prejudice of the Tribunal against this defendant must be concluded."

In the course of counsel's arguments contained in said petition to the Military Governor, he relies heavily upon the dissenting opinion for support. It appears that said dissenting opinion is to him *Alpha* and *Omega* in this matter, and from it he repeatedly, and at times at great length, quotes what he deems to be supporting arguments. In view of this, it becomes necessary that we here make some specific references to the unwarrantable conclusions that the dissenting opinion expresses with respect to the majority views, and in which dissenting expressions defense counsel seems to strongly concur. We will here make reference to but a couple of illustrations of many typical unsubstantiated conclusions contained in the dissenting opinion, and from which defendant's counsel takes so much comfort. These indicate in a measure that defense counsel in relying upon the dissenting opinion for support is indeed depending upon an exceedingly infirm crutch.

One of the basic matters in this case, and which the majority, at least, gave a great amount of study, was the question of Lammers' authority and policy-shaping power, and his actual participation in the furthering and carrying out of Hitler's plans and aims. This was referred to at various points in the judgment, and was quite exhaustively discussed in our treatment of count six, of the judgment. We there quoted at considerable length from the defendant's own testimony, given by him when examined by his own counsel in his own behalf. See pages 610–613, inclusive,* of the judgment (English). Defense counsel, in his petition [28 April 1949] to the Military Governor, however, quotes from Judge Powers' dissenting opinion on this phase of the case, at some length. (Pages 9 to 13 of said petition.) We will here quote but a paragraph of such dissenting opinion as same appears near the top of page 12 in said petition [p. 116 et al. of dissenting opinion]:

> "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

* Page numbers cited herein, refer to mimeographed record of judgment and petitions.

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." [Emphasis supplied.]

The petition (on top of page 13 thereof) then states at the end of the lengthy quotation from the dissenting opinion from which the above excerpt was taken: "The findings in the majority opinion are already refuted by dint of this dissenting opinion," and then at the bottom of that page, counsel again states: "The fact, which has been again and again emphasized by the defense, that the cosignature of the defendant was merely of an authenticating and certifying nature was completely ignored by the majority opinion." He then proceeds to *"prove"* this point by alluding to [NG–1230] Prosecution Exhibit 426, a Fuehrer decree of 1 April 1944, and he quotes therefrom as to the powers of the Reich Minister and the Chief of the Reich Chancellery. A careful perusal of such document, and a consideration of the evidence of defendant's own giving, shows that this argument of the defense counsel is entirely a wishful assumption. What power and authority Lammers actually exercised is the important thing here. In this connection let us refer to parts of the testimony given by defendant himself, to wit, a portion of his examination as appears on page 610 of the judgment (English):

"A. * * * I *was responsible for seeing to it that the Fuehrer's wishes* were *properly* and *suitably formulated*, and, secondly, I had to see to it that as far as the contents of the law went, the ministers concerned had been heard." [Emphasis supplied.]

It would seem that it would occur to the author of the dissenting opinion and to the counsel for the defendant that such powers are a bit unusual for one whose powers they would liken to those of a "stenographer." We submit that it does not matter much what you call defendant under such circumstances. He is an active participant in the crimes of the one whose "wishes" as to such crimes he saw to, to use his own words, "were properly and suitably formulated." The foregoing is but a small portion of the evidence heard from the lips of the defendant himself, and which the writer of the dissent heard, or should have heard, as he was present when it was given by the defendant. We do not propose to comment on this phase of the matter further, except to observe that it is characteristic of the assurance with which unsubstantiated conclusions are stated throughout the dissenting opinion, and the manner in which they are sought to be fortified by the use of utterly inapplicable metaphors and similes. We take the

liberty to refer to one more statement in the dissenting opinion which is likewise illustrative. We refer to a quoted statement from such dissent, appearing on page 93* of the petition to the Military Governor, where the petition states:

> "Judge Powers made the following commentary on this:
> " '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 that they are guilty of robbing a bank'."

We wish to remind counsel that *affirmative acts* of participation and cooperation by this defendant were shown in the furtherance and carrying out of the spoliation program. It is nothing short of ridiculous to compare the *passive acts* of people on a highway getting out of the way of a bandit, to the situation of the defendant with respect to the program of spoliation, as revealed by the evidence.

The assertions made by the defendant himself in the course of testifying before the tribunal, and the arguments heretofore made by counsel, would indicate that in their view only Hitler could be responsible for all the crimes of the Nazi regime; that no one, despite his active participation in perfecting and carrying into effect the plans and aims of Hitler, would be guilty also, because such participant and collaborator did not have the right of ultimate decision in the matter—such right of decision resting with Hitler. We need not comment on such a view.

With respect to the contention of counsel that the proceedings were not fair, and that the defendant was discriminated against, and that the Tribunal was prejudiced against defendant, we wish to make a few brief observations.

Defendant was charged under all the counts of the indictment. He had throughout the trial an able and exceedingly diligent counsel. Although the prosecution completed the presentation of its case in March 1948, this particular defendant by reason of his position as fixed for the order of presenting the defendants' cases did not have to commence the presentation of his defense until early September 1948, when he took the stand in his own behalf and spent approximately 12 days in presenting his case in chief. Following this there was a rather lengthy cross-examination, after which the defendant testified on redirect examination by his own counsel. In the course of his examination the defendant was given great latitude, although the Tribunal did endeavor to keep

* See page 118 of mimeographed dissenting opinion.

the defendant on factual evidence, when he again and again sought to argue the law from the witness stand. He was repeatedly told that the law could be later argued by his counsel. With respect to documentary evidence, the Tribunal gave to this and other defendants all possible assistance in order that they might examine old Reich records under the control of American and British authorities. Any intimation to the contrary is not true. A vast mass of documentary material, much of it cumulative and not of much probative value, was introduced by the defendant in his behalf, and contrary to what defense counsel now asserts very boldly, the majority of the Tribunal spent a great deal of time and effort in sifting this evidence and studying same. The fact that after such examination, it was determined that it did not constitute valid and persuasive refutation of the many affirmative acts of participation and collaboration of defendant in the crimes charged, and for that reason may not have been given space for specific discussion in the judgment, is certainly not evidence of a failure to consider defense material, but that after evaluation it was not deemed sufficient to rebut the evidence of affirmative collaboration.

That the Tribunal accorded to this defense counsel all assistance it could give him with respect to the examination and procurement of defense evidence in the document center in Berlin is apparent from the fact that as early as 26 February 1948, the Tribunal made an order in favor of this defendant for that purpose, and again on 17 June 1948 it made another order at the behest of defendant's counsel authorizing one Mr. Fritz Kunze to examine and study documents in the Document Center in Berlin in connection with the preparation of the defense of defendant Lammers.

The defense counsel complains that some of the defense witnesses were required to give their testimony before commissions appointed by the Tribunal. It should be noted here that such testimony went into, and became a part of, the Official Record transcript of the Tribunal, and was part of the evidence in the case which was considered by the Tribunal, and which was the subject of argument and briefs of counsel on both sides before the rendition or preparation of the judgment in this case.

In this connection, we wish to make some things clear with respect to the taking of evidence before commissions in this case, and in that connection it should be remembered that the Tribunal was, under the provisions of the law and ordinances under which it operated, under positive duty to conduct as expeditious a trial as possible, consistent with fairness.

Article V (*e*) of Ordinance No. 7, in defining the powers of the

Military Tribunals, states that among such powers is the power "to appoint officers for the carrying out of any task designated by the Tribunals *including the taking of evidence on commission.*" [Emphasis supplied.]

It appears that the Charter annexed to the London Agreement, and also made an integral part of Control Council Law No. 10, contains a similar provision—Article 17 (*e*). It appears that the taking of evidence before commissions was extensively employed during the IMT proceedings.

The contention of defense counsel that such procedure was prejudicial to his client is absolutely without merit. In this connection we wish to call attention to statements made by this Tribunal in a memorandum attached to an order made by the Tribunal with reference to objections then made with respect to such procedure. Such order and memorandum are dated 17 August 1948 and filed in the Court Archives at Nuernberg on 19 August 1948, and there given Document No. 921. For convenience of everyone concerned, however, we quote from such memorandum, as same contains an adequate answer to the contentions of defense counsel with respect to unfairness and prejudice. We quote (pp. 474–475, Order and Judgment Book) :

MEMORANDUM

* * * * * * *

"In making this order, the Tribunal desires to reiterate that it is under a duty to conduct these proceedings as expeditiously as is possible and consistent with fairness to all parties concerned. It wishes to emphasize, however, that, although the order here in question was made to facilitate the trial, such order would not have been made if the Tribunal had not been satisfied, beyond a shadow of a doubt, that no prejudice would result to the defendants therefrom.

"Article V, paragraph (*e*) of Ordinance 7, in defining the powers of the Military Tribunals, states that they shall have the power 'to appoint officers for the carrying out of any task designated by the Tribunals including the taking of evidence on commission.' The Charter also contains a similar provision, and it appears that the taking of evidence before commissions was extensively employed during the IMT proceedings.

"The contention of some of the defendants that they are being discriminated against by the order in question, because commissions were scarcely used during the presentation of the prosecution's case, is clearly without merit. This becomes clear to anyone who considers the conditions prevailing in this case. The case has been in progress for over seven months. At the

close of the prosecution's case, the Transcript record of evidence taken before the Tribunal was exceedingly voluminous and, in addition thereto, thousands of exhibits had been received in evidence. For over three and a half months since the close of the prosecution's case, the defendants have been engaged in presenting respective cases. The record which, as above indicated, was exceedingly voluminous at the commencement of the defendants' cases, has been greatly lengthened during the three and a half months of their presentation, and hundreds of additional exhibits have been introduced in their behalf. Several more weeks will be required to complete the taking of evidence. When all the evidence to be introduced has been received, and the case is finally submitted to the Tribunal, the Tribunal will have before it for consideration a transcript record of stupendous proportions and several thousand exhibits, altogether comprising such a voluminous record as is rarely submitted to a Tribunal.

"The members of the Tribunal feel that they are endowed with fairly good memories; they realize, however, that it would be sheer foolhardiness for them to make a decision upon the evidence introduced before the Tribunal by the prosecution, in the light of the impressions retained in their memories from the times several months ago, when hundreds of items of evidence were introduced. The Tribunal must, under such circumstances, rely upon the record transcript of evidence and the exhibits introduced, in giving final consideration to such evidence. Inasmuch as the Tribunal must and will do this with respect to the prosecution's evidence, similar treatment of the defendants' evidence surely will result in no discrimination against the defendants. The fact that the transcript record in one instance is made up of evidence which was partly received before commissions and partly before the Tribunal itself makes no real difference between the records of the prosecution and the defense, for the record coming partly through the commissions is as correct with respect to competency and relevancy as is the record made from evidence which was introduced almost entirely before the Tribunal, for the Tribunal has final decision on questions of admissibility of evidence offered before the commission.

"Therefore, when the record is finally submitted to the Tribunal, so much thereof as comprises the record of the defendants' cases will, for all practical purposes, represent as clearly and completely all evidence taken in their behalf as will the record of the prosecution represent the evidence in its case.

From the records thus made, it will be possible for both sides to thoroughly argue and brief the evidence for the Tribunal.

"In the light of these considerations, the Tribunal is of the opinion that the objections urged against the order of 23 July 1948 are without merit, and therefore the motion of defendants to rescind such order is denied. 17 August 1948. WCC"

Subsequent events have given emphasis to the statements made in the foregoing memorandum, for upon completion of the case the transcript record (exclusive of the judgment) comprised 28,085 pages, and there were in evidence a total of 9,067 documentary exhibits.

It must also be remembered that practically all of the oral evidence was offered in the first instance in the German language, which required translation. The value of inflections, emphasis, etc., on the part of the witness is therefore almost entirely lost on hearers who do not understand the German language and must rely on translation. This, of course, is as true of prosecution as defense witnesses.

We believe that the observations we have in the foregoing memorandum made with respect to the arguments and claims of defense counsel that his client did not have a fair trial by an unbiased Tribunal indicate the untenability of his contentions.

8. STUCKART—ORDER AND MEMORANDUM OF THE TRIBUNAL

ORDER

On 6 May 1949 a memorandum was filed in behalf of defendant Stuckart relative to alleged errors in the Tribunal's judgment in this case, in which judgment said defendant was convicted under counts five, six, and eight of the indictment. Said memorandum contained a prayer that said judgment be amended to adjudge said defendant not guilty under said counts. On 19 June 1949, the prosecution filed an answering brief to said memorandum, and on 28 June 1949, the defendant filed a rejoinder to said answering brief of the prosecution.

It appears that prior to the filing of the above memorandum the defendant 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 the Military Tribunal IV."

The Tribunal having considered said memorandum and the motion therein contained, the answering brief of the prosecution and the defendant's rejoinder thereto, and being advised in the premises,