

# THE SIGNIFICANCE OF THE NUREMBERG TRIALS TO THE ARMED FORCES\*

## *Previously Unpublished Personal Observations by the Chief Counsel for the United States*

BY MR. JUSTICE ROBERT H. JACKSON

The armed services are naturally concerned as to what we were driving at at Nuremberg, and as to the principle on which the leaders of the German armed services were called upon to pay a penalty for their acts. Military men throughout the world wanted to know what it was that brought the German military men to that somewhat unhappy position. I propose to face that problem very frankly today and to discuss the effect of this trial on the profession of arms.

It is very difficult to carve out of this case just those things which relate to the military men because they were a part of a large conspiracy which involved the seizure of power in Germany, the rearmament in defiance of the Versailles Treaty, and during its early stages in secret, the raising and drilling of an army concealed as a labor corps in violation of that treaty, and a great many steps which cannot be separated from the main stream of

the case and treated as pertaining principally to military matters. If one were to deal with all the things that would be of particular interest to you, it would require much more time, both in preparation and in delivery, than I am able to give it, but I can give you some general idea of the law which we sought to establish and of the basis of the judgment against the service men who were condemned.

First of all, I think you should know that the idea of a trial of these German leaders did not originate among theoreticians of the legal profession. This plan originated in the War Department. This plan was pretty fully developed in the War Department before I was appointed. This plan was developed largely to implement the ideas and ideals of Secretary Stimson who for many years had advocated the outlawry of aggressive war, and who probably knows more about that subject than any statesman in the United States—and I refer to him as a statesman because his career shows a more farsighted understanding of what was going on in the world than that of any man I know. And oftentimes I cited him as my authority and sometimes didn't have much else, but I think I was well fortified with him.

When President Roosevelt went to Yalta he took a memorandum which had been approved by Secretary Stimson, Secretary Stet-

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\*A speech on the Nuremberg trials which was delivered by Mr. Jackson before a special group at the National War College, Washington, D. C., 6 December, 1946, is printed here in complete form, without introduction, by special permission of Mr. Jackson and the Commandant of the College. One of the principal points which Mr. Jackson seeks to clarify is the considerable misunderstanding in military and naval circles as to the exact objective of the prosecution. He offers proof that justice, in the form of hanging, was meted to *war criminals*, and not military men who were only following superior orders.

tinus and the Attorney General, Mr. Bidle. That was presented and discussed briefly, and I think very vaguely, at Yalta, and they referred it to the Foreign Ministers to prepare some implementation. The Foreign Ministers became engaged in other things, and eventually it drifted until it was left to me to negotiate agreement on behalf of the United States at London.

It might be well to quote what Mr. Vishinsky said when he came to Nuremberg. He said in substance that "The reason we were able to get an agreement was that it was left to lawyers instead of diplomats." Since Vishinsky was himself a diplomat as well as a lawyer I take it he was not referring disparagingly to one of his own professions. What he meant, and what I think is true, is we were given an unusual measure of authority. The subject was technical and a little troublesome, and they wished it onto us and let us go. We didn't have to debate the political questions which get involved some way with these things in the councils of nations. Our conferences were private conferences. The press was not in to publish rumors and stir up trouble as the press sometimes does in international affairs, and we were able to work out an agreement which reconciled four legal systems. Our own and that of the British were easy to reconcile; our own and that of the French were not so easy; our own and that of the Soviet Union are quite different. But we adopted a system by which these German prisoners would be given a fair hearing, and if there was any defense in the world for what they had done, it could be heard.

#### STIMSON'S INFLUENCE

In so doing we were carrying out this plan, which originated in the War Department. Secretary Stimson made important contributions in the early stages of the development

of the law against the wars of aggression. But he also has written, and I commend to your attention when it is published, an article for "Foreign Affairs." He is one of the few men who has really studied the documents before he wrote. There has been a great deal of comment on the Nuremberg trial written by people who didn't bother to read the documents. I don't mean to say that Secretary Stimson read all of the evidentiary documents, but he examined with great care the agreement, the speeches and the judgment, and he followed the case from beginning to end with a close attention.

He says this: "The great undertaking at Nuremberg can live and grow in meaning, however, only if its principles are rightly understood and accepted. It is therefore disturbing to find that its work is criticized and even challenged as lawless by many who should know better. In the deep conviction that this trial deserves to be known and valued as a long step ahead on the only upward road, I venture to set down my general view of its nature and accomplishments." His conclusion is: "In the judgment of Nuremberg there is affirmed the central principle of peace, that the man who makes or plans to make aggressive war is a criminal. A standard has been raised to which Americans at least must repair, for it is only as this standard is accepted, supported, and enforced that we can move onward to a world of peace within the law."

You must recall that the United States found on its hands a considerable group of prisoners, that these prisoners in the judgment of the world were guilty of the most atrocious of crimes. They had started a war without cause, they had waged it without consideration either for their own code or any other law, and they had perpetrated all manner of atrocities on civilians. We tried to glean from existing law and codify defi-

nitions of the crimes we intended to prosecute. The law which underlies the Nuremberg trial I will read to you. It had to be quite general and as you will see a good deal had to be left to the discretion of the tribunal.

"(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder, ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

"(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

"Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

"Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires."

The real test of these definitions, which

are of course abstract, is the manner in which they were applied to leaders of the armed forces. Indicted individually before the tribunal was Goering, who was, as you well know, the builder and commander of the Luftwaffe; Keitel and Jodl from the Army; and Raeder and Donitz from the Navy. We also asked that the General Staff as a group be declared criminal. In order to declare any group criminal it was required under the terms of the charter that some individuals representative of the group be convicted. In other words, the group could only be declared criminal provided we tried and heard and convicted a representative who could speak for that group. Keitel and Jodl and Goering, of course, represented the General Staff and High Command; Raeder, Donitz, the Navy.

#### JUDGMENT UNPUBLISHED

It is unfortunate that the judgment has not yet been published in the United States, because the recital of the judgment against these individuals really shows what they were up to. This judgment is a very large document and I am not going to read it all, but I do think that there is no better way that you can see exactly what differentiates the conduct of these men from soldierly conduct than to see just what it was that was proved against them. From the beginning to the end of this case we made no contention that merely because a man was serving his country and the cause was not successful he should hang or be convicted. We recognized the realities of these things.

We were after the men who really promoted this war and caused all of this crime and suffering. Among those men certainly none was more of a leader in all fields than Hermann Goering. He was the man who brought all of the groups together into the

Nazi conspiracy. In many ways I think he was a much more influential and potent man than Hitler himself. He was the focus around which many men rallied who would not have rallied to Hitler, who after all was a vague sort of demagogue and a mystic. Goering was a practical fellow and I shall read to you what the Court found was proved at the risk of being tedious.

"Goering is indicted on all four counts. The evidence shows that after Hitler he was the most prominent man in the Nazi Regime. He was Commander-in-Chief of the Luftwaffe, Plenipotentiary for the Four Year Plan, and had tremendous influence with Hitler, at least until 1943 when their relationship deteriorated, ending in his arrest in 1945."

"He testified that Hitler kept him informed of all important military and political problems.

"From the moment he joined the Party in 1922 and took command of the street fighting organization, the SA. Goering was the adviser, the active agent of Hitler and one of the prime leaders of the Nazi movement. As Hitler's political deputy he was largely instrumental in bringing the National Socialists to power in 1933, and was charged with consolidating this power and expanding German armed might. He developed the Gestapo, and created the first concentration camps, relinquishing them to Himmler in 1934, conducted the Roehm purge in that year, and engineered the sordid proceedings which resulted in the removal of von Blomberg and von Fritsch from the Army. In 1936 he became Plenipotentiary for the Four Year Plan, and in theory and in practice was the economic dictator of the Reich. Shortly after the Pact of Munich, he announced that he would embark on a five-fold expansion of the Luftwaffe, and speed rearmament with emphasis on offensive weapons.

"Goering was one of the five important leaders present at the Hossbach Conference of 5 November 1937 and he attended the other important conferences already discussed in this Judgment."

As I say, it is very hard to separate these particular things from the evidence of the general conspiracy.

"In the Austrian Anschluss, he was indeed the central figure, the ringleader. He said in Court:

'I must take 100% responsibility. . . . I even overruled objections by the Fuehrer and brought everything to its final development.' In the seizure of the Sudetenland, he played his role as Luftwaffe chief by planning an air offensive which proved unnecessary, and his role as a politician by lulling the Czechs with false promises of friendship. The night before the invasion of Czechoslovakia and the absorption of Bohemia and Moravia, at a conference with Hitler and President Hacha he threatened to bomb Prague if Hacha did not submit. This threat he admitted in his testimony."

And he admitted it was unnecessary from any military point of view.

"Goering attended the Reich Chancellery meeting of 23 May 1939"—that, you know, is merely six months before the war began—"when Hitler told his military leaders 'there is, therefore, no question of sparing Poland,' and was present at the Obersalzberg briefing of 22 August 1939. And the evidence shows he was active in the diplomatic maneuvers which followed. With Hitler's connivance, he used the Swedish businessman, Dahlerus, as a go-between to the British, as described by Dahlerus to this Tribunal, to try to prevent the British Government from keeping its guarantee to the Poles.

"He commanded the Luftwaffe in the attack on Poland and through the aggressive wars which followed.

"Even if he opposed Hitler's plans against Norway and the Soviet Union, as he alleged, it is clear that he did so only for strategic reasons; once Hitler had decided the issue, he followed him without hesitation. He made it clear in his testimony that these differences were never ideological or legal. He was 'in rage' about the invasion of Norway, but only because he had not received sufficient warning to prepare the Luftwaffe offensive. He admitted he approved of the attack: 'My attitude was perfectly positive.' He was active in preparing and executing the Yugoslavian and Greek campaigns, and testified that 'Plan Marita,' the attack on Greece, had been prepared long beforehand. The Soviet Union he regarded as the 'most threatening menace to Germany,' but said there was no immediate military necessity for the attack. Indeed, his only objection to the war of aggression against the USSR was its timing; he wished for strategic reasons to delay until Britain was conquered. He

testified: 'My point of view was decided by political and military reasons only.'

"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."

I shall not go into a recital of the war crimes and the crimes against humanity of which Goering was guilty. You followed those proceedings closely enough to know he was the prime mover of many of the persecutions and of the war crimes. I will come to a man who was less involved in the politics of the thing than was Goering. That is Keitel. Keitel was a subject of considerable controversy among the German military men. He was described by various of them as a "yes man," put into his position for the purpose of agreeing with Hitler. Certainly he always did finally agree with Hitler. He initiated many of the steps which Hitler took. He was described as a weak man by some of the other generals who were prisoners of war, who felt that he was promoted solely to serve the purposes of the Nazi regime. But the evidence showed—and if I have time I will point to some of his documents to indicate the nature of the evidence—that his activity went far beyond being a planner of merely military steps necessary to protect Germany's interest.

He was active in promoting the political phases of aggression. He received the golden party emblem from the Nazi Party, and he was the beneficiary of the very foul moves against von Blomberg and von Fritsch by which this clique came into power in the German military hierarchy.

Perhaps it would help if I explained first, rather than later, how this group which ultimately conducted the war got rid of some of

the men in Germany who were opposed to their aggressive plans. It was all told in great detail in the evidence. Some of it was told by other military men; some of it was told by civilians; a good deal was told by a former officer of the Gestapo. Von Blomberg, Minister of War, was not in favor of the extreme Nazi plans of aggression. He was in favor of rearming Germany so that Germany could cope with any possible enemy, and he was moving in the direction of a moderate rearmament of Germany.

But when he failed to go along with all the plans, the Nazi crowd, both military and civilian, planted in von Blomberg's office a prostitute who proceeded to marry von Blomberg. That was the plan from the beginning. The wedding was a widely advertised event, and Hitler attended. The Nazi papers published the fact that Hitler was present at the wedding and then they published her license as a licensed prostitute. The pretense that Hitler had thus been humiliated enabled them to get rid of Von Blomberg. An amusing sidelight was that after it was testified she was licensed in seven cities, she made a statement to the newspapers that she was not a prostitute in seven cities, that she was rarely out of Berlin.

Van Fritsch was another military man who did not sympathize with the Nazi plans and who thought their plans were going to lead to war. What did they do with him? They charged him with being a homosexual and held a trial at which Goering presided, one of the most farcical trials that could be imagined. They got rid of von Blomberg and they got rid of von Fritsch, and everybody on the outside knew when those moderates were driven out and when men like Keitel and Jodl came to the fore it meant the Nazi plan for aggression was going to be a success. It is against that background that

you have to view the activities of Keitel and Jodl.

### THE CASE AGAINST KEITEL

I return to the judgment as to the specific findings on Wilhelm Keitel.

"Keitel attended the Schuschnigg conference"—this is in connection with the Austrian Anschluss—"in February 1938 with two other generals. Their presence, he admitted, was a 'military demonstration,' but since he had been appointed OKW Chief just one week before he had not known why he had been summoned. Hitler and Keitel then continued to put pressure on Austria with false rumors, broadcasts and troop manoeuvres. Keitel made the military and other arrangements and Jodl's diary noted 'the effect is quick and strong.' When Schuschnigg called his plebiscite, Keitel that night briefed Hitler and his generals, and Hitler issued 'Case Otto' which Keitel initialed.

"On 21 April 1938 Hitler and Keitel considered making use of a possible 'incident,' such as the assassination of the German Minister at Prague, to preface the attack on Czechoslovakia. Keitel signed many directives and memoranda on "Fall Gruen," including the directive of 30 May containing Hitler's statement: 'It is my unalterable decision to smash Czechoslovakia by military action in the near future.' After Munich, Keitel initialed Hitler's directive for the attack on Czechoslovakia, and issued two supplements. The second supplement said the attack should appear to the outside world as 'merely an act of pacification and not a warlike undertaking.' The OKW Chief attended Hitler's negotiations with Hacha when the latter surrendered.

"Keitel was present on 23 May 1939 when Hitler announced his decision 'to attack Poland at the first suitable opportunity.' Hitler had said on 23 May 1939 he would ignore the neutrality of Belgium and the Netherlands, and Keitel signed orders for these attacks on 15 October, 20 November, and 28 November 1939. Orders postponing this attack 17 times until spring 1940 all were signed by Keitel or Jodl.

"Formal planning for attacking Greece and Yugoslavia had begun in November 1940. On 18 March 1941 Keitel heard Hitler tell Raeder complete occupation of Greece was a prerequisite to settlement; and also heard Hitler decree on 27

March that the destruction of Yugoslavia should take place with 'unmerciful harshness.'

"Keitel testified that he opposed the invasion of the Soviet Union for military reasons, and also because it would constitute a violation of the Non-aggression Pact. Nevertheless he initiated 'Case Barbarossa,' signed by Hitler on 18 December 1940, and attended the OKW discussion with Hitler on 3 February 1941. Keitel's supplement of 13 March established the relationship between the military and political officers. He issued his timetable for the invasion on 6 June 1941, and was present at the briefing of 14 June when the generals gave their final reports before attack. He appointed Jodl and Warlimont as OKW representatives to Rosenberg on matters concerning the Eastern Territories."

And the Rosenberg administration of the Eastern Territories, in which Keitel was found to have had a part is elsewhere found to be one of the most atrocious chapters in human history.

"On June 16 he directed all army units to carry out the economic directives issued by Goering in the so-called 'Green Folder,' for the exploitation of Russian territory, food and raw materials."

The war crimes of which Keitel is convicted should be of interest.

"On 4 August 1942 Keitel issued a directive that paratroopers were to be turned over to the SD."

The judgment does not at this point go on to say, but it elsewhere appears that this was equivalent to death.

"On 18 October Hitler issued the Commando Order which was carried out in several instances. After the landing in Normandy, Keitel reaffirmed the order, and later extended it to Allied missions fighting with partisans. He admits he did not believe the order was legal but claims he could not stop Hitler from decreeing it.

"When on 8 September 1941, OKW issued its ruthless regulations for the treatment of Soviet POW's, Canaris wrote to Keitel that under international law the SD should have nothing to do with this matter. On this memorandum in Keitel's handwriting, dated 23 September and initialed by him, is the statement: 'The objections

arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures.' Keitel testified that he really agreed with Canaris and argued with Hitler, but lost. The OKW Chief directed the military authorities to cooperate with the Einsatzstab Rosenberg in looting cultural property in occupied territories.

"Lahousen testified that Keitel told him on 12 September 1939, while aboard Hitler's headquarters train, that the Polish intelligentsia, nobility and Jews were to be liquidated. On 20 October, Hitler told Keitel the intelligentsia would be prevented from forming a ruling class, the standard of living would remain low, and Poland would be used only for labor forces. Keitel does not remember the Lahousen conversation, but admits there was such a policy and that he had protested without effect to Hitler about it.

"On 16 September 1941, Keitel ordered that attacks on soldiers in the East should be met by putting to death 50 to 100 Communists for one German soldier, with the comment that human life was less than nothing in the East. On 1 October he ordered military commanders always to have hostages to execute when German soldiers were attacked. When Terboven, the Reich Commissioner in Norway, wrote Hitler that Keitel's suggestion that workmen's relatives be held responsible for sabotage could work only if firing squads were authorized, Keitel wrote on this memorandum in the margin: 'Yes, that is the best.'

"On 12 May 1941, five weeks before the invasion of the Soviet Union, the OKW urged upon Hitler a directive of the OKH that political commissars be liquidated by the Army. Keitel admitted the directive was passed on to the field commanders. And on 13 May Keitel signed an order that civilians suspected of offenses against troops should be shot without trial, and that prosecution of German soldiers for offenses against civilians was unnecessary. On 27 July all copies of this directive were ordered destroyed without affecting its validity. Four days previously he had signed another order that legal punishment was inadequate and troops should use terrorism.

"On 7 December 1941, as already discussed in this opinion, the so-called 'Nacht und Nebel' decree, over Keitel's signature, provided that in occupied territories civilians who had been accused of crimes of resistance against the army of occupation would be tried only if a death sentence

was likely; otherwise they would be handed to the Gestapo for transportation to Germany.

"Keitel directed that Russian POW's be used in German war industry. On 8 September 1942 he ordered French, Dutch and Belgian citizens to work on the construction of the Atlantic Wall. He was present on 4 January 1944 when Hitler directed Sauckel to obtain four million new workers from occupied territories.

"In the face of these documents Keitel does not deny his connection with these acts. Rather, his defense relies on the fact that he is a soldier, and on the doctrine of 'superior orders,' prohibited by Article 8 of the Charter as a defense.

"There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive had been committed consciously, ruthlessly and without military excuse or justification."

Time will hardly permit the reading of the judgment as against Jodl, Donitz and Raeder, but it shows a similar course of conduct. In each case the Tribunal took up and carefully considered every denial made by any defendant either of this testimony against him or of the documents. In some few instances documents were claimed to be capable of a different interpretation and in only two or three instances were any of the nearly 4,000 documents denied. These men were convicted, not on testimony by their enemies, they were convicted on their own signatures. Keitel's own lawyer at the conclusion of the testimony and when he summed up the case said to the Tribunal and wrote in his brief; "It is possible to meet some of the specific questions. It is impossible to shake the indictment as a whole."

Jodl, kept a diary, a very dangerous practice, and in it Jodl recited from time to time his participation in various of these crimes. I shall not have time to review the evidence at length, but I would like to point out to you a few samples of these documents just to show you the kind of evidence that was used, because I think the concrete act which

you bring forward against a man under an indictment is more helpful in understanding the indictment than the abstract phraseology of lawyers, which sometimes isn't too intelligible even to lawyers.

You will recall that against Keitel there was a finding that in the aggressive action toward Austria which did not result in war, he was active in its political as well as its military aspects. Document 1775-PS, which was in evidence and on which the Tribunal acted is signed by Keitel. I will read the part of it that shows what he was advising the Fuehrer.

"The OKW is asking the Fuehrer's decision, concerning the following proposals:

"Orders will be given immediately, after the detailed numbers and letters have been released by the Leader, for accomplishment."

One is unimportant.

"2. Spread false, but quite credible news, which may lead to the conclusion of military preparations against Austria."

He described the method by which the false news should be spread. In connection with this Jodl's diary showed that according to Jodl's entry of February 11 of 1938 Schuschnigg was being put "under heaviest political and military pressure."

"In the afternoon General K. asks Admiral C and myself to come to his apartment. He tells us that the Fuehrer's order is to the effect that military pressure by shamming military action should be kept up until the 15th."

You recall the proposal came from Keitel himself.

"Proposals for these deceptive maneuvers are drafted and submitted to the Fuehrer by telephone for approval."

And he recites the effect of them on Austria.

#### PLANS TO PROVOKE CAUSE FOR INVADING CZECHOSLOVAKIA

When aggressive action came against Czechoslovakia the participation of Keitel

and Jodl was political as well as military. As I have said, you have to interpret the specific acts against the background by which Keitel and Jodl got into power. The first of the summary of the discussions between Keitel and the Fuehrer on Czechoslovakia was this from Document 388-PS.

"1. Strategic surprise attack out of a clear sky without any cause or possibility of justification has been turned down as result would be hostile world opinion which can lead to a critical situation. . . .

"2. Action after a time of diplomatic clashes, which gradually come to a crisis and lead to war."

That was the one they adopted.

"3. Lightning-swift action as the result of an incident (e.g. assassination of German ambassador in connection with an anti-German demonstration.)"

The proof was supplemented by oral testimony to show that they planned that anti-German rioting would be instigated including assassinating their own ambassador to give the provocation necessary for the war. Keitel then revised the plan, improved on it somewhat, and sent another draft to the Fuehrer. In the revised estimate of the possibilities he said: "Invasion without suitable obvious cause" is turned down therefore.

"Rather will the action be initiated either:

"a. After a period of increasing diplomatic clashes and tension, which is coupled with military preparations and is made use of to push the war guilt onto the enemy. Even such a period for tension preceding the war however will terminate in sudden military action on our part, which must come with all possible surprise as to time and extent, or

"b. By lightning-swift action as a result of a serious incident, through which Germany is provoked in an unbearable way and for which at least part of the world opinion will grant the moral justification of military action.

"b. Is militarily and politically the more favorable."

Then Jodl signed the following memorandum on the Czechoslovakia incident proposal:

"Operation (Aktion) Gruen will be set in motion by means of an 'incident' in Czechoslovakia which will give Germany provocation for military intervention. The fixing of the exact time for this incident is of the utmost importance.

"It must come at a time when weather conditions are favorable for our superior air forces to go into action and at an hour which will enable authentic news of it to reach us on the afternoon of X minus 1."

When they got ready for the aggressive war against Poland, Keitel made his own memorandum, Document 795-PS, in which he recited that he conferred with the Fuehrer and the Fuehrer had informed him that they "were to furnish Heydrich with Polish uniforms." Following the oral evidence through, Keitel furnished Heydrich, who was the head of the Gestapo, with the Polish uniforms. They dressed up some Polish concentration camp people in Polish uniforms and had the Polish concentration camp inmates make an attack on a German radio station, and that was the incident which provided the propaganda to show that Germany was provoked to war.

It is that sort of specific thing, which proved what these men were up to was not the mere planning of war on a military basis. Keitel and Jodl, Raeder and Donitz had all become parts of the Nazi effort to make a war where none existed before, to induce decisions to go to war and to create the fight. Time will not permit going into detail as to all of the evidence, of course. The War Department is publishing in eight volumes the documents which were used in evidence. It is a long task to summarize it, of course, I hope that a more adequate job of summarizing what was proved against military characters will be done by someone better able than I am to do it. I am only giving you a preview of what might be done if somebody who knew the military point of view much better than I do could go about this task.

So far as war crimes are concerned, there was very little effort made to contend that Germany lived up to the laws of war. In fact, Goering testified in substance not only that they didn't, but that they didn't expect to. It is a matter which I think calls for serious consideration on the part of the United States. I will read only an extract from Goering's testimony which shows you the attitude that the high Nazi command took on the rules of warfare. Goering testified:

"The Hague Convention was for land warfare. When I scanned it over on the eve of the Polish campaign I was reading the articles and I was sorry I had not studied them much sooner. If I had done so, I would have told the Fuehrer that with these rules as they had been put down paragraph by paragraph a modern war could not be waged, but that in a modern war with its technical improvements the stipulations of 1906 and 1907 would have to be changed in order to have a new type of warfare."

I am not so sure that Goering isn't right about it, and I am going to venture outside of my role to suggest that the subject needs serious consideration on the part of the United States. Certain countries are parties to these various agreements in reference to the rules of land warfare, the treatment of prisoners and the like; some countries are not. There is little doubt, I suppose, that if we were to have a war in which we should be on the opposite side of England, for example, prisoners of war would be treated pretty much as they are now, because that is the temper of the people. But if we were to become involved in a war with certain other nations, our men taken prisoners by them would not be treated according to the standards of these conventions, first, because they are not required to, not being parties to these conventions; second, because their standards of living are such if they tried to treat our prisoners of war as we treat prisoners of war,

I suppose their public opinion wouldn't stand for it. The rules would require them to treat the prisoners of war much better than their own people lived, and we could not expect them to do it—nor would they submit to inspection by a supervising power.

I think it is a serious question whether we should not reconsider the provisions of these agreements in the light of modern conditions to determine just where we might stand in event another war breaks upon mankind. We may depend upon it that some of the potential enemies of the United States would not be governed by these agreements. I think it is a serious question whether these rules should be allowed to stand in their present conditions in the face of the challenge which Goering throws out, and Goering is not the only man who has that same view of the impossibility of waging total war within these obsolete rules.

#### NAZIS REALIZE HORRORS OF WAR TOO LATE

The attitude of the Nazi in Germany toward the war simply isn't the same as the attitude even of the toughest of Americans or the toughest of the other western peoples. They simply do not see in the sort of things they did the same wrong that we would see in them. They haven't the same standard of treatment of each other. They saw nothing very horrible about the war until it hit them.

One of the most illuminating things that happened in Nuremberg was a little cross-examination of Ribbentrop before the trial began. He sent me a letter which looked to me as though it had been written for propaganda purposes eventually, and I called him in to have a stenographic report of a few questions about it in order to deflate it in case it should ever be published for such purposes. In the course of the interrogation he kept

saying, "This awful war! Oh, this terrible war!" I stood it about as long as I could, and finally said, "Ribbentrop, when did this war begin to impress you as an awful war?" I thought he would at least smile, but he was as solemn as an owl. There wasn't a spark of humor about him, and he said in all seriousness, "I will tell you. It was when I heard the Americans had landed in Africa."

That is what impresses them as awful about the war, and it was not an awful war in any of its aspects up until it began to go wrong for them.

In prosecuting them on the charge of aggressive war-making there has never been the slightest thought that we wanted to or were making criminal the ordinary work of planning a nation's defense. I have no doubt that there are plans as to what would be done by the United States in almost every eventuality that could be conceived. I hope there are such plans. If there are not such plans, I would think somebody has been guilty of negligence. That nations may find themselves engaged in wars, of course, is a contingency which everybody has to reckon with. That it is the business of the professional soldier to be ready to protect his country we take for granted. That it is his business to embroil his country in a war we cannot admit, and that is the essence of the charge against these German defendants.

They not only planned, but they incited a nation to war. Our position I think was made fairly plain through the trial. The judgment as to the charges against the General Staff I think were read to you yesterday, and I will not go into them again. The position we took, and which was the position of the United States, was stated in my opening address, and copies of that are available. In it the case against all the different elements among the defendants was brought together, against the businessmen, the finan-

ciers, the politicians, the military men. The whole group is there treated together and the case on the facts together with the legal propositions on which we were proceeding more completely set forth than in my closing address. As against the military men this was the position which the United States took officially at the opening and adhered to throughout the trial:

"We have also accused as criminal organizations the High Command and the General Staff of the German Armed Forces. We recognize that to plan warfare is the business of professional soldiers in every country. But it is one thing to plan strategic moves in the event war comes, and it is another thing to plot and intrigue to bring on that war. We will prove the leaders of the German General Staff and of the High Command to have been guilty of just that. Military men are not before you because they served their country. They are here because they mastered it, along with these others, and drove it to war. They are not here because they lost the war but because they started it. Politicians may have thought of them as soldiers, but soldiers know they were politicians. We ask that the General Staff and the High Command, as defined in the Indictment, be condemned as a criminal group whose existence and tradition constitute a standing menace to the peace of the world."

#### DEFENSE OF SUPERIOR ORDERS

A good deal has been said about the defense of superior orders because that is the position taken by all of the military men. You will note that we didn't proceed against men who were far down in the chain of command. I think the defense of superior orders would be recognized, of course, in many, many circumstances. It can hardly be recognized when you are dealing with the superiors themselves, men on the level of these, of the General Staff. But on the defense of superior orders I will show you the position which the United States took, again quoting from the opening which also was the opening on behalf of all four powers:

"The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility.

"Even the German Military Code provides that:

'If the execution of a military order in the course of duty violates the criminal law, then the superior officer giving the order will bear the sole responsibility therefor. However, the obeying subordinate will share the punishment of the participant: (1) if he has exceeded the order given to him, or (2) if it was within his knowledge that the order of his superior officer concerned an act by which it was intended to commit a civil or military crime or transgression.'

"Of course, we do not argue that the circumstances under which one commits an act should be disregarded in judging its legal effect. A conscripted private on a firing squad cannot expect to hold an inquest on the validity of the execution. The Charter implies common sense limits upon immunity. But none of these men before you acted in minor parts. Each of them was entrusted with broad discretion and exercised great power. Their responsibility is correspondingly great, and may not be shifted to that fictional being, 'the State,' which cannot be produced for trial, cannot testify, and cannot be sentenced."

There have been objections, too, that we were proceeding against men for aggressive acts without a sufficient definition of aggression. It is true that the Charter did not define aggression. The reason it did not define aggression is that it is a very difficult thing to define and it wasn't necessary for the purposes of this case. On behalf of the four powers at the opening, I took the position that there was definition sufficient for the

purposes for that trial, in other sources of international law and in common usage of the terms. And we cited the Litvinov Agreement by which Russia undertook not to aggress against Estonia, Latvia, Turkey and Afghanistan. The definition is a good one and the application is not difficult. Quoting again from my opening statement:

"An 'aggressor' is generally held to be that state which is the first to commit any of the following actions:

- (1) Declaration of war upon another State;
- (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;
- (3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;

"And I further suggest that it is the general view that no political, military, economic, or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance which is to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression."

There is an instructive document which I trust will be made available in printed form at some time. It is the argument made by General Telford Taylor for the conviction of the German General Staff and High Command as a "Group" or "organization." The conviction of the General Staff, as you know, failed because it was held not to be a sufficiently cohesive group to warrant a declaration of criminality as a group. The argument made by General Taylor, will show clearly that there was no purpose to brand the General Staff as criminal except as the General Staff had departed from the normal course of military planning and had entered into the political effort to bring on the war. There was no purpose here to convict or brand as criminal the entire profession of arms. It is very significant that while the

Tribunal said it could not convict the General Staff as a criminal organization, it went on to say of the General Staff:

"Although the Tribunal is of the opinion that the term 'group' . . . must mean something more than this" General Staff was shown to be, "it has heard much evidence as to the participation of these officers in planning and waging aggressive war, and in committing war crimes and crimes against humanity. This evidence is, as to many of them, clear and convincing.

"They have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women and children. They have been a disgrace to the honorable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow Nazis would have been academic and sterile. Although they were not a group falling within the words of the Charter, they were certainly a ruthless military caste. The contemporary German militarism flourished briefly with its recent ally, National Socialism, as well as or better than it had in the generations of the past.

"Many of these men have made a mockery of the soldier's oath of obedience to military orders. When it suits their defense they say they had to obey; when confronted with Hitler's brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed.

"The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said.

"Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment."

#### WEHRMACHT BETTER THAN SS

It is fair to say, by and large, that the Wehrmacht was a far more decent organization than the more Nazified military formations. There is nothing in the history of modern warfare that has ever come to my attention that compares with the conduct of the SS and the purely Nazi formations. I think the worst of the military men who were

brought up in the old military tradition, it would not be unfair to say, were better than the best of the Nazis, the purely Nazi formations. I know that there is great admiration in many circles for the military proficiency of the German General Staff, but these men who came into power by throwing the men of the Von Blomberg and Von Fritsch type out, and forcing others into retirement certainly didn't represent the best even in the German military tradition.

I am frank to say it always annoys me greatly to hear the American or the British or the French military profession compared to the German of World War II when I know the record of what the German has done. A great many people have said, "Well, you have set up a rule that means that if we lose a war we can be tried." That is true, gentlemen. If you lose a war I think you will be lucky even to be tried. These men have had what they never gave anybody else; they have had a chance to be heard, and the judgment shows that the Tribunal has considered most carefully every argument they can make for their individual innocence, that is, the opportunity was given to them which was never given to men in their positions before. The precedent we have set is

not that fallen enemies may be killed—that is old—the precedent is that they shall not be killed without proof of crime and fair hearings.

The trial was not an effort wholesale to condemn men because they fought for their country. It was an effort to determine whether they were guilty of crime and to hear every argument they could make in support of their conduct. I think it is extending them a decency, extending an opportunity which hasn't been customary to extend before. You will see that the Tribunal in several instances, particularly with the naval officers, weighed their arguments and gave them weight, and gave them sentences proportionate to the lesser degree guilt they found.

Instead of fearing the fact that you might have a trial if you lose a war—and I hope to God you never will—I think the military profession ought to feel grateful that hereafter if this precedent is followed men will not be shot merely because they have lost a war; they will be brought in, given an opportunity to explain their relations and positions, and at least before they are executed will have had an opportunity to be heard. That is something in advance of the art.