

**IN THE UNITED STATES MILITARY COMMISSION
AT GUANTANAMO BAY NAVAL BASE, CUBA**

UNITED STATES OF AMERICA)	
)	DEFENSE MOTION IN LIMINE:
vs.)	RIGHT TO CONFRONTATION
)	
IBRAHIM AHMED MAHMOUD AL QOSI)	

1. **Timing:** This motion is filed in a timely manner, as the Defense gave written notice of its intent to file the same on 15 September 2004.

2. **Relief Sought:** The Defense requests that the Commission not allow the Government to offer alternatives to live, in-person testimony.

The Government seeks to diminish the constitutional right to confrontation by substituting video teleconferencing (and perhaps affidavits) for live, in-person testimony. Justice Scalia answers such an effort: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."¹ The Defense agrees and requests that the Commission require live testimony of all Government witnesses.

3. **Facts:**

- A. To date, the Government has not given the Defense notice of intent to call any witnesses to provide evidence against Mr. al Qosi.
- B. Informally, the Government has identified one potential witness and has indicated the distinct possibility that they will offer this witnesses' testimony through video or audio conferencing.
- C. Through the very limited discovery provided to date, the Defense is left to speculate whether there will be any other witnesses.
- D. If there are additional witnesses, it is likely that the Government will seek to offer its "evidence" through means other than live, in-person testimony presented in the courtroom at Guantanamo Bay, Cuba.
- E. In particular, the Defense expects the Government to request video-teleconferencing, telephonic testimony, as well as affidavits and documents of various kinds in lieu of live, in-person testimony.

¹ See, *infra*, note 14.

4. Legal Analysis:

SOURCES OF LAW

The United States Constitution, the Uniform Code of Military Justice, international treaties and agreements, and customary international law, all bind this Commission as it decides issues of law. Rather than distinct from these sources of law, “Commission Law” is a subset (or amalgamation) of all of them. The Defense has prepared a “Memorandum of Points & Authorities,” (Attachment A) that in specific detail provides the legal reasoning why each of those sources of law bind this Commission and why the Commission need reference them in order to ensure a “full and fair trial” in this matter. With that Memorandum as a background, we turn to the specific issue presented here.

LAW – SPECIFIC PRINCIPLES

Confrontation: Department of Defense Military Commission Order [MCO] No. 1 (21 March 2002) provides that “The Commission may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.”² But to allow other than live, in-person testimony violates Mr. al Qosi’s right to confront the witnesses against him. While at the time MCO No. 1 was being drafted less than live, in-person testimony might have been arguably appropriate, after the United States Supreme Court decided *Crawford v. Washington*³ it no longer even arguably is.

The right to face-to-face confrontation of one’s accusers has biblical and Roman roots, is enshrined in English statutes beginning as early as the sixteenth century, and is an express requirement of the United States Constitution.⁴ More than 100 years ago, the United States Supreme Court in *Mattox v. United States* summarized the goals of the Confrontation Clause:

The primary object of [the Clause] was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.⁵

² MCO No. 1 at 6(D)(2)(a). Further Presiding Officer Memorandum No. 10 (4 Oct 04), ¶7(g) seemingly requires the Defense to waive a confrontation argument by either agreeing, or requesting of its own witnesses, to an alternative to live, in-person testimony. The Defense objects to that procedure for the reasons set forth herein.

³ ___ U.S. ___, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004).

⁴ See Richard D. Friedman, *Remote Testimony*, 35 U. Mich. L. Rev. 695, 696 n.7-8 (citing Acts 25;16 King James; Duke of Somerset’s Trial, 1 Howell’s State Trials 515, 520 (1551)); *Crawford*, 124 S.Ct. at 1359; U.S. Const. Amend VI.

⁵ 156 U.S. 237, 242-43 (1895).

While the right certainly has a constitutional component, even the constitutional protection is based on common law long predating the adoption of the United States Constitution:

The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.⁶

The Supreme Court in *Maryland v. Craig*⁷ and the Court of Appeals for the Armed Forces in *United States v. Anderson*⁸ state the general propositions of law in this area. Generally, the Confrontation Clause protects four rights: "(1) 'a personal examination' of the witness; (2) an oath requirement; (3) cross-examination; and (4) observation of the witnesses' demeanor by the trier of fact."⁹

Until *Craig* in 1990, the Supreme Court had ruled that confrontation under the Sixth Amendment required literal right to face-to-face confrontation.¹⁰ *Craig* changed the law to allow the right of confrontation to yield to an important public policy when the reliability of the testimony at issue is otherwise assured--essentially a two-pronged test: (A) necessity and (B) reliability, with the requisite finding of necessity being a case-specific one.¹¹

Craig and *Anderson*, and their federal and military progeny, however, developed the exception to the Confrontation Clause in one context--the child witness. Outside that context, no foundation of jurisprudence allowed further diminishing of the right to face-to-face confrontation of one's accusers. In fact, in *Crawford*, the Supreme Court severely undercut the analysis of *Craig* and *Anderson* by expressly overruling the "reliability and necessity" test--the Court focused the test on the testimonial nature of the statements and the right to test them through cross-examination.¹²

In fact, even before *Crawford*, the federal court system had already rejected just what the Government likely will attempt to do here. In 2002, the United States Supreme Court prevented an effort to relax the taking-of-testimony rule in federal court to allow testimony via two-way video conferencing. Federal Rule of Criminal Procedure 26

⁶ *Crawford*, 124 S.Ct. at 1359.

⁷ 497 U.S. 836 (1990).

⁸ 51 M.J. 145, 149-50 (C.A.A.F. 1999); see also *United States v. Daulton*, 45 M.J. 212, 218-20 (C.A.A.F. 1996)(judge ordering accused from courtroom during child's testimony violated accused's confrontation rights).

⁹ *United States v. Palacios*, 32 M.J. 1047, 1050 (A.C.C.A. 1991)(quoting *Craig*).

¹⁰ *Coy v. Iowa*, 487 U.S. 1012 (1988)("There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'").

¹¹ *Anderson*, 51 M.J. at 149-50.

¹² See *infra* note 19-21 and discussion.

currently provides that “the testimony of all witnesses shall be taken orally in open court ...” The proposed change would have allowed two-way video presentation in (1) exceptional circumstances, (2) where appropriate safeguards for the transmission are used, and (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).

The Supreme Court, which reviews and forwards approved proposed changes to Congress, did not approve this proposed change. In a stinging rebuke, Justice Scalia noted: “I share the majority’s view that the [proposed change] is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution” Surveying the law, Justice Scalia further noted: “As we made clear in *Craig, supra*, at 846-47, a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant’s presence*--which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant’s image.”¹³

The proposed change to the rule followed the decision in *United States v. Gigante*¹⁴ to use two-way, real-time video conferencing, and in fact was one of the bases for the proposed change. In *Gigante*, however, the court ruled that the *Craig* standard was only designed to constrain use of one-way, closed-circuit presentations and thus the court did not apply it to the two-way, real-time video conferencing that the court allowed there.¹⁵ By not applying *Craig*, the court did not require the prosecution to establish necessity, but allowed the lower standard of Fed.R.Crim.Pro. 15 that essentially only required a showing of unavailability as that term is defined by Fed.R.Evid. 804(a).

Because of this approach, *Gigante* was dead-letter law even before *Crawford*. First, the *Gigante* analysis misread *Craig*, in which the Supreme Court emphasized the importance of face-to-face confrontation in the presence of the accused, without focus on the method to avoid it.¹⁶ Second, many courts, particularly military courts, have applied *Craig* outside the context of one-way closed circuit television on numerous occasions.¹⁷ And third, perhaps more importantly, in rejecting the proposed changes to Fed.R.Crim.Pro. 26 that were expressly based on *Gigante*, the United States Supreme Court questioned its legal analysis.

In March 2004, *Crawford* resoundingly returned American jurisprudence to its original foundations, where confronting one’s accusers meant live, in-person confrontation. In

¹³ See United States Supreme Court Order, Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 29 April 2002, available at <http://www.supremecourtus.gov/orders/frcr02p.pdf> (last visited 7 October 2004).

¹⁴ 166 F.3d 75 (2d Cir. 1999).

¹⁵ 166 F.3d at 80-81.

¹⁶ 497 U.S. at 846.

¹⁷ See *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990); *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990); *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993); *United States v. Romey*, 32 M.J. 180 (C.M.A. 1991)(The child victim whispered her answers to her mother who repeated the answers in open court. The mother was certified as an interpreter); *United States v. Anderson*, 51 M.J. 145 (1999) (using screens and closed circuit television).

Crawford, the Supreme Court held that the Confrontation Clause was violated when the state trial court admitted a statement made by the defendant's wife to the police, notwithstanding the wife's unavailability to testify at trial due to the invocation of the marital privilege. Specifically, the Court held that "testimonial statements of witnesses absent from trial [are to be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."¹⁸

Further, though not providing a global definition of what a "testimonial" statement was, the Court made it clear that statements obtained during the course of interrogations squarely fit within the definition: "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."¹⁹

Additionally, the Court made clear that an opportunity to cross is not simply a good idea—it is a basic constitutional requirement for effective confrontation:

We do not read the historical sources to say that an opportunity to cross-examine was merely a sufficient, rather than necessary condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.²⁰

History and international law bolster the Supreme Court's confrontation analysis. The International Covenant on Civil and Political Rights gives an accused the right to "examine, or have examined, the witnesses against him."²¹ Article 75(4)(g) of the Additional Protocol I to the Geneva Conventions is the same. The statutes of both the International Criminal Tribunals for the former Yugoslavia and Rwanda have similar provisions.²² During Nuremberg, the Tribunals often required live, in-person cross examination in the face of prosecution efforts to offer evidence through affidavits.²³

ANALYSIS

In order to ensure Mr. al Qosi receives a "full and fair trial," he must have the right to confront his accusers. This does not mean the video screen where the image of his accuser may float, or a speakerphone from where his accuser's voice may emanate, or a document in which his accuser's words (or the words of an agent summarizing the words of an interpreter summarizing the words of an accuser) may lie. It means in court, face-to-face, live and in person. That is what the Constitution requires, and it is historically what confrontation requires.

¹⁸ 124 S.Ct. at 1369.

¹⁹ 124 S.Ct. at 1364.

²⁰ 124 S.Ct. at 1366-67.

²¹ ICCPR at ¶14(3).

²² See ICTY at Art. 21(4); ICTR at Art. 20.

²³ See International Military Tribunal (Nuremberg) Transcript Vol II, pages 384-85; Vol III, page 80-81; Vol VII, pages 264-66; Vol VII, page 361; Vol VII, page 419-23; Vol VIII, page 251-52; Vol XXI, pages 11-13 Vol XXI, pages 153-55.

Certainly any documents summarizing statements against Mr. al Qosi are testimonial in nature. These statements are the results of “law-enforcement” interrogations conducted by United States government agents in the United States, Cuba, and Afghanistan. Obviously Mr. al Qosi did not have an opportunity to test these statements (through cross-examination) at the time they were prepared. The analysis is over under *Crawford* and general principles of confrontation.

But even the alternatives to live testimony that MCO No. 1 contemplates, and that the Government intends to use, fail the historic and constitutional confrontation test. Essentially, the Government wants what the court in *United States v. Gigante* allowed. But even at the time, the Supreme Court expressly rejected an effort to codify the *Gigante* rule, finding the procedure used there (the procedure that will attempted to be used here) of “dubious validity under the Confrontation Clause.” Two years later in *Crawford*, the Supreme Court confirmed that it is of no validity.

To allow the use of the alternatives to live, in-person testimony in the face of the overwhelmingly clear decision of the United States Supreme Court in *Crawford* risks committing a miscarriage of justice, and depriving Mr. al Qosi of his due process right to a “full and fair trial.” History weighs against it, the Constitution forbids it, and the Commission should not allow it.

CONCLUSION

The Defense requests that the Commission not allow the Government to offer alternatives to live, in-person testimony.

5. Attachments:

- A. Memorandum of Points & Authorities, Applicable Law
- B. International Military Tribunal (Nuremberg) Transcript Vol II, pages 384-85; Vol III, page 80-81; Vol VII, pages 264-66; Vol VII, page 361; Vol VII, page 419-23; Vol VIII, page 251-52; Vol XXI, pages 11-13 Vol XXI, pages 153-55.

6. Oral Argument:

The Defense hereby requests oral argument before the Military Commission on this motion. Oral argument is necessary under the President's Military Order of 13 November 2001 to provide for a "full and fair" trial.

7. Legal Authority:

MCO No. 1 at 6(D)(2)(a). Further Presiding Officer Memorandum No. 10 (4 Oct 04), ¶7(g) seemingly requires the Defense to waive a confrontation argument by either agreeing, or requesting of its own witnesses, to an alternative to live, in-person testimony. The Defense objects to that procedure for the reasons set forth herein.

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51 M.J. 145, 149-50 (C.A.A.F. 1999); *see also United States v. Daulton*, 45 M.J. 212, 218-20 (C.A.A.F. 1996)

United States v. Palacios, 32 M.J. 1047, 1050 (A.C.C.A. 1991)(quoting *Craig*).

Coy v. Iowa, 487 U.S. 1012 (1988)

Anderson, 51 M.J. at 149-50.

United States Supreme Court Order, Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 29 April 2002, available at <http://www.supremecourtus.gov/orders/frcr02p.pdf> (last visited 7 October 2004).

166 F.3d 75 (2d Cir. 1999).

497 U.S. at 846.

United States v. Batten, 31 M.J. 205 (C.M.A. 1990)

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United States v. Williams, 37 M.J. 289 (C.M.A. 1993)

United States v. Romey, 32 M.J. 180 (C.M.A. 1991)

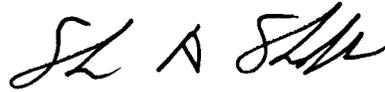
United States v. Anderson, 51 M.J. 145 (1999)

ICTY at Art. 21(4); ICTR at Art. 20.

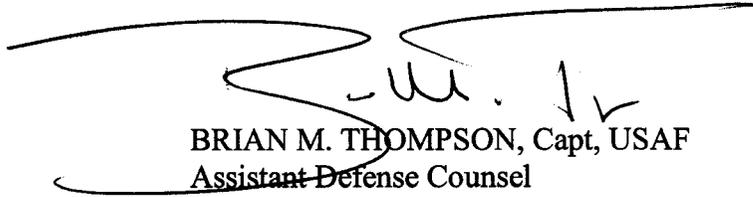
International Military Tribunal (Nuremberg) Transcript Vol II, pages 384-85; Vol III, page 80-81; Vol VII, pages 264-66; Vol VII, page 361; Vol VII, page 419-23; Vol VIII, page 251-52; Vol XXI, pages 11-13 Vol XXI, pages 153-55.

8. Witnesses:

- a. Any witnesses that might be determined as necessary after the Defense receives and reviews the government's response.
- b. Any witness the commission desires to summon to testify on the matters herein.



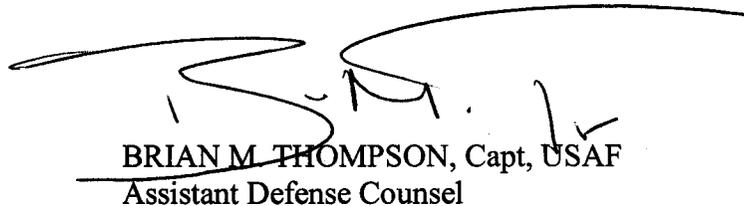
SHARON A. SHAFFER, Lt Col, USAF
Defense Counsel



BRIAN M. THOMPSON, Capt, USAF
Assistant Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that on _____ 2004, I sent this Defense Motion in Limine: Confrontation to the Presiding Officer, the legal assistant to the Presiding Officer, and the Prosecutor via e-mail.



BRIAN M. THOMPSON, Capt, USAF
Assistant Defense Counsel

**IN THE UNITED STATES MILITARY COMMISSION
AT GUANTÁNAMO BAY NAVAL BASE, CUBA**

UNITED STATES OF AMERICA)	
)	
v)	DEFENSE MEMORANDUM
)	OF POINTS & AUTHORITIES
)	[APPLICABLE LAW]
IBRAHIM AHMED MAHMOUD AL QOSI)	

The basic legal principles that bind this Commission are varied, yet familiar—the United States Constitution, the Uniform Code of Military Justice, international treaties and international customary law. Even at a most basic level, this Commission is guided by the fundamental requirement, the basic notion, that every person charged with a crime is entitled to “due process.”

SOURCES OF LAW

1. **Commission Law:** Nascent “Commission Law” in fact already demands that the rules, procedures, and decisions of the Commissions comport with basic notions of “due process.” The President has ordered that these Military Commissions are to be run to, at a minimum, provide for “a full and fair trial.”¹ As the Supreme Court has often noted, having a right to a “full and fair trial” is the equivalent of having the right to “due process.”² The terms are essentially interchangeable.

2. **Constitutional Law:** Though “due process” is deeply rooted in American constitutional jurisprudence, its historic origins long predate the adoption of the United States Constitution. The origins of due process can be traced to England in 1215, when the king promised nobles that “no free man” would suffer restraint “except by the lawful judgment of his peers or by the law of the land.”³ The Supreme Court in fact long ago recognized that due process is not a uniquely American value.⁴

3. But due process is an American value and the United States Constitution protects every accused’s right to it. Just as the Constitution protects the “due process” rights of

¹ President’s Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 3 C.F.R. 918 (2002)(hereinafter PMO, 13 Nov 01) at §4(c)(2).

² See, e.g., *Miller v. French*, 530 U.S. 327, 350 (2000).

³ Magna Carta, ch. 39, quoted in William Sharp McKechnie, *Magna Carta - A Commentary on the Great Charter of King John* 375 (2d rev. ed. 1914); see *Den v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (linking passage to Fifth Amendment’s Due Process Clause); cf. R.H. Helmholz, *NATURAL HUMAN RIGHTS: THE PERSPECTIVE OF THE IUS COMMUNE*, 52 *Cath. U. L. Rev.* 301, 316-18 (2003) (identifying sources of human rights, including right to due process, in earlier writings of medieval canonists).

⁴ *Ingraham v. Wright*, 430 U.S. 651, 674 (1976); see also *In re Oliver*, 333 U.S. 257, 266-71 (1948) (decrying the secrecy of the English Star Chamber, the Spanish Inquisition, and the French *lettres de cachet* in affirming that due process guarantees a right to public proceedings).

those accused of crimes in the United States, it likewise protects the “due process” rights of those accused of crimes who are being held at Guantánamo Bay, Cuba. Constitutional protections extend to non-citizens as well as citizens, regardless of whether their presence in an area of United States jurisdiction was “unlawful, involuntary, or transitory.”⁵ In the Guantánamo Bay detainee cases, the United States Supreme Court recently reaffirmed this principle in holding that the detention of persons such as Mr. al Qosi implicates “due process” concerns: “Petitioner’s allegations ... unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”⁶

4. In fact, in finding this to be the law, the Supreme Court approved a century’s worth of jurisprudence by holding that “the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.”⁷ Though the Court held that all constitutional provisions do not automatically apply extraterritorially (outside the United States), it did establish a high standard for determining that a constitutional protection does not apply:

For *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution “does not apply” overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.⁸

5. Essentially, therefore, before a constitutional protection can be determined not to apply to a Guantánamo Bay detainee, the Government must establish and the Commission must find that application of “conditions and considerations” render application of that “specific guarantee altogether impracticable and anomalous.”

6. While in the area of immigration the Supreme Court has permitted limitations on constitutional rights, it has never extended that permission to criminal prosecutions. The Supreme Court made this clear over one hundred years ago, in *Wong Wing v. United States*.⁹ There, after noting that unequal treatment in violation of the constitutional protection of the Fifth Amendment was permissible in deportation matters, the Court held that that permission ceased once the federal government attempted to impose criminal punishment: where Congress “sees fit to ... subject ... the persons of such aliens to

⁵ *Matthews v. Diaz*, 426 U.S. 67, 77 (1976).

⁶ *Rasul v. Bush*, 542 U.S. ___, 124 S.Ct. 2686, 2698 n.15 (2004).

⁷ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990)(Kennedy, J., concurring)(citing with approval in *Rasul*, 124 S.Ct. at 2698 n.15).

⁸ *Verdugo-Urquidez*, 494 U.S. at 278 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957)(Harlan, J., concurring)).

⁹ 163 U.S. 228 (1896).

infamous punishment,” the ability to discriminate came to an end as: “even aliens shall not be held to answer for a capital or other infamous crime” without the protections afforded citizens under the Fifth Amendment.¹⁰ Since *Wong*, the Supreme Court has repeatedly reaffirmed and expanded upon the principle that the federal government may provide less than full constitutional protection to non-citizens in the immigration and foreign affairs areas, but may not punish non-citizens under different constitutional procedures.¹¹

7. Absent a governmental showing that for some reason they do not, all the constitutional protections enjoyed by those accused of crimes in the United States apply to Mr. al Qosi. These rights include, at a minimum, the prohibition against double jeopardy and self-incrimination, the right to confront witnesses, to a speedy and public trial in front of any impartial jury, notice of charges, the right to compel witnesses, and the right to effective assistance of counsel.¹² In fact, the fact that this Commission in developing rules and procedures has already codified some of these protections demonstrates that the rest should apply.

8. **International Law:** Furthermore, because the Constitution is alive in Guantánamo Bay, international treaties to which the United States is a party likewise apply. The Supremacy Clause of the United States Constitution provides that:

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹³

9. There are many such treaties applicable here to which the United States is a party. These include the Geneva Conventions III and IV,¹⁴ the International Covenant on Civil and Political Rights [ICCPR], and the Convention Against Torture and Other Cruel,

¹⁰ 163 U.S. at 237-38.

¹¹ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of “punitive measures ... all persons within the territory of the United States are entitled to the protection of the Constitution”) (internal quotation and citation omitted). See also *Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that “[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime”); *Rodriguez-Silva v. INS*, 242 F.3d 243, 247 (5th Cir. 2001) (noting that although the federal government has wide latitude to set “criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States,” it is settled that “an alien may not be punished criminally without the same process of law that would be due a citizen of the United States.”) (citing *Wong Wing*).

¹² U.S. Const., Amend. V-VI. These rights will be the subject of this, as well as many other, motions the Defense intends on filing with the Commission.

¹³ U.S. Const., Art. VI, cl. 2.

¹⁴ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317 [Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [Geneva IV].

Inhuman or Degrading Treatment or Punishment [CAT].¹⁵ Further, many international agreements to which the United States is not a party, announce principles of “customary international law” that are binding on the United States. As particularly relevant here, Article 75 of Protocol I of the Geneva Conventions¹⁶ details many fundamental trial rights to which accuseds are entitled. In fact, the United States has long recognized that this provision does announce customary international law that the United States is bound to follow.

10. Further, two pieces of executive action show that international law applies in these Commissions context. First, in an Executive Order dated 10 December 1998,¹⁷ the President specifically noted United States obligations under the ICCPR, CAT, and the Convention on the Elimination of All Forms of Racial Discrimination [CERD],¹⁸ and set United States foreign policy to fully “respect and implement” its obligations under international law. Second, the Preamble to the Rules for Courts-Martial (also an Executive Order) detail at various points the applicability of international law.¹⁹ In fact, Part I, ¶2(b)(2), expressly makes military commissions subject to international law:

Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions ... shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.

11. The Defense concedes that there is some debate among scholars whether, as a matter of law, the provisions of all the treaties that the United States is a party to are “self-executing.” In other words, whether adoption of the treaty automatically renders the treaty provisions the “law of the land,” (self-executing) or whether the treaty provisions only become the “law of the land” when Congress incorporates them in legislation (not self-executing). The better weight of argument and authority weighs in favor of finding that all the treaties that may have some application to this matter are “self-executing” and therefore entitled to automatic application.²⁰

12. But even if the Commission were somehow to be convinced that the applicable treaties are not “self-executing,” they still must be given persuasive effect consistent with basic canons of constitutional interpretation. As a matter of constitutional interpretation, treaties (international law) should be read to be consistent with domestic law whenever possible. As Chief Justice John Marshall's classic statement in *Murray v. The Schooner Charming Betsy* notes: statutes enacted by Congress “ought never to be

¹⁵ The President signed the treaty on April 19, 1988, and the Senate gave its advice and consent to ratification with certain conditions on October 27, 1990. Pub. L. No. 103-36, 2340, 108 Stat 463 (1994).

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1978, 1125 U.N.T.S. 4.

¹⁷ Implementation of Human Rights Treaties, Executive Order 13107 (dated December 10, 1998).

¹⁸ *Opened for signature* Mar. 7, 1966, 660 UNTS 195, *reprinted in* 60 AJIL 650 (1966).

¹⁹ Part I, ¶1 (“The sources of military jurisdiction include the Constitution and international law.”).

²⁰ See generally Jordan J. Paust, *Customary International Law And Human Rights Treaties Are Law Of The United States*, 20 Mich. J. Int'l L. 301 (1999).

construed to violate the law of nations if any other possible construction remains.”²¹
There is little, if any, dispute as to the validity of *Charming Betsy*.

13. Here, the President relies on the statutory authorization of the Uniform Code of Military Justice (UCMJ), particularly Articles 21 and 36, to justify empanelling this Commission.²² Therefore, should the Commission determine that the applicable treaties are not “self-executing,” and thus are not automatically the “law of the land” pursuant to the Supremacy Clause, *Charming Betsy* still requires that this purported statutory authorization—the UCMJ—be interpreted in a way that their procedures are consistent with international law. This is important, because military, statutory law—the UCMJ—applies in Commission proceedings.

14. **Military Law**: Whether based on statutory authorization or constitutional requirements, all provisions of the UCMJ are applicable to these Commissions. Article 36, cited by the President as authorization for empanelling these Commissions, states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (emphasis added)

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

15. The Court of Appeals for the Armed Forces (CAAF) has long held that the whole panoply of rules of statutory construction applies when interpreting the UCMJ.²³ In *United States v. Brinston*,²⁴ CAAF summarized these general principles in military law contexts:

- legislative intent in enacting a statute should be gleaned from the statute as a whole rather than from any of its parts
- “the entire act must be read together because no part of the act is superior to any other part”

²¹ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In *Charming Betsy* the Court held that the Nonintercourse Act of February 27, 1800, 2 Stat. 7, did not apply to a former resident of the United States who had moved to St. Thomas and sworn allegiance to the king of Denmark. The Court concluded that the Nonintercourse Act, which by its terms applied to persons under the protection of the United States, did not include the former resident, declaring that any other construction would depart from the customary international standards of diplomatic protection. The Court would not infer that Congress intended such a result. *Charming Betsy*, 6 U.S. (2 Cranch) at 8.

²² PMO, 13 Nov. 01; 18 U.S.C. §§821, 836.

²³ See *United States v. Brinston*, 31 M.J. 222, 226 (C.M.A. 1990).

²⁴ 31 M.J. at 226.

- “statutes in pari materia must be construed together.”²⁵

16. Here, as a matter of statutory construction, the language of Article 36 expressly provides that all provisions of the UCMJ are applicable to these Commissions. First, the plain language of Article 36 notes that it is subject to “this chapter.” Article 36 is located in a “chapter” entitled “Uniform Code of Military Justice” which comprises 145 sections—18 U.S.C. §801-946.

17. Further, statutory construction requires the Commission reads the UCMJ a “coherent whole,” being mindful that “the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.”²⁶ Such a reading here requires the Commission to follow all provisions of the UCMJ. To read Article 36 independent of the other provisions of the UCMJ would render them superfluous and the duty of the Commission is not to do that.

18. Article 36b even requires that any rules prepared by the Commission be “uniform” with all the rules and regulations issued pursuant to it. The Rules of Court-Martial (RCM) are issued pursuant to Article 36b and thus any rules of this Commission cannot by Congressional mandate materially diverge from the dictates of the RCM.

19. In any event, the Supreme Court has long ago decided that the procedural provisions of the UCMJ apply to a person in Mr. al Qosi’s position. In *In re Yamashita*,²⁷ the Court was presented with essentially the same argument: *i.e.* that “enemy combatants” were entitled to application of the procedural provisions of the Articles of War (the precursor to the UCMJ) during military commissions. The Court held that they were not, because they were not designated as persons to whom Article 2 of the Articles of War stated they applied.²⁸

20. Under the same analysis, the opposite now holds true. Now, Article 2 of the UCMJ (the successor to the same provision of the Articles of War) expressly enumerates Mr. al Qosi as a person who is subject to the Code: “persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary and which is outside the United States and is outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.”²⁹ This is Guantánamo Bay. This is Mr. al Qosi.

²⁵ See also *FTC v. Ken Roberts Co.*, 276 F.3d 583, 589 (D.C. Cir. 2001) (“in pari material--like any canon of statutory construction--is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context.”)(quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)).

²⁶ 310 F.3d at 902 (citations omitted); see also *Market Co. v. Hoffman*, 101 U.S. 112, 115-116, (1879).

²⁷ 327 U.S. 1 (1946).

²⁸ 327 U.S. at 20. Article 2 of the Articles of War then enumerated “the persons . . . subject to these articles,” who are denominated, for purposes of the Articles, as “persons subject to military law.” In general, the persons so enumerated are members of the Army and the personnel accompanying the Army. Enemy combatants are not included among them.

²⁹ 18 U.S.C. §802(12).

21. Thus, the Supreme Court has decided and statutory construction dictates that all provisions of “this chapter” (the entire UCMJ), apply in the military commission context. Any Commission ruling must comply with the UCMJ provisions, and all procedures must be “uniform,” must not be contrary and must not be inconsistent. Essentially, if the UCMJ says something can or cannot happen, then this Commission by rule or decision cannot say the opposite.

22. **Due Process/“Full and Fair Trial”**: But even if the Commission were somehow to determine that Guantánamo Bay is a dark corner of the world where the light established principle of law does not shine, all of these sources of law (the Constitution, the UCMJ, international treaties and customary international law) should still enlighten what a “full and fair trial” requires. In other words, these sources of law are, at a minimum, persuasive of what due process means today.

23. At its heart, due process protects the right to a fair trial, which is “the most fundamental of all freedoms”³⁰-- “More than an instrument of justice and more than one wheel of the Constitution, it is the lamp that shows that freedom lives.”³¹ “Due Process is that which comports with the deepest notions of what is fair and right and just.”³² In other words, “[w]hether the trial be federal or state [or military], the concern of due process is with the fair administration of justice.”³³

24. What “due process” in a general sense means at a particular time and in a particular case is not subject to mathematical formulation. Rather, it is an evolving process, one that requires constant reflection on the state of human affairs. As the Supreme Court has eloquently stated:

“due process,” unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, “due process” cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, “due process” is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process.³⁴

³⁰ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

³¹ *Duncan v. Louisiana*, 391 U.S. 145, 156 n. 23 (1968) (quoting P. Devlin, TRIAL BY JURY 164 (1956) (internal quotes omitted)).

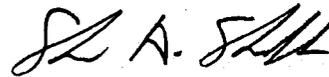
³² *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); see also *Argersinger v. Hamlin*, 407 U.S. 25, 47 (1972) (Burger, J., concurring) (“principle of due process “requires fundamental fairness in criminal trials”).

³³ *Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971).

³⁴ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

25. When creating new legal machinery from scratch (as the Commission will be doing if it does not rely on constitutional, international and military jurisprudence), reference to international law is not only appropriate, it is historically proven. From the beginnings of the Nation, the customary “law of nations” was considered the “the laws of the United States” and our courts often turned to it for guidance.³⁵ An author of *The Federalist Papers* urged decision-makers in the nascent United States to pay “attention to the judgment of other nations.”³⁶ The intent was to help produce decisions that would “appear to other nations as the offspring of a wise and honorable policy;” furthermore, “in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.”³⁷ If early Justices of the United States Supreme Court, confronted with novel legal questions, turned to international law with little compunction, so should this Commission.³⁸

26. **General Principles—Conclusion:** Unlike our Founding Fathers, this Commission has many more sources of law that should, at a minimum, guide its rules, procedures, and decisions. This Commission cannot simply abandon 800 years of Anglo-Saxon jurisprudence, more than 200 years of constitutional law, more than 100 years of international law, and 50 years of modern military law simply because it is expedient. To have any credibility, and to provide basic due process, these sources of law should inform the creation of Commission law.



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³⁵ *Henfield's Case*, 11 Cas. 1099, 1101 (C.C.D.Pa. 1793) (No. 6,360)

³⁶ *The Federalist* No. 63, at 407-08 (Alexander Hamilton or James Madison) (1st Modern Library ed., 1941).

³⁷ *Id.* at 407-08 (further asking “what has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had ... been previously tried by the light in which they would probably appear to the unbiased part of mankind?”).

³⁸ See Diane Marie Amann, *Guantanamo*, 42 Colum. J. Transnat'l L. 263 (2004).

"(1) Appoint a number of individuals enjoying the Chancellor's confidence but friendly to Germany, to positions in the Cabinet; (2) with the devised means to give the national opposition a role in the political life of Austria within the framework of the Patriotic Front; and (3) with amnesty for all Nazis, save those convicted of the most serious offenses."

This amnesty was duly announced by the Austrian Government and thousands of Nazis were released, and the first penetration of Deutsch-National into the Austrian Government was accomplished by the appointment of Dr. Guido Schmidt as Secretary of State for Foreign Affairs and Dr. Edmund Glaise-Horstenau as Minister without portfolio.

I now offer in evidence Document 2994-PS, which is an affidavit by Kurt von Schuschnigg, Foreign Chancellor of Austria, executed at Nuremberg, Germany, on 19 November 1945. I offer this as Exhibit USA-66. The defendants have received German translations of that evidence.

DR. LATERNSEER: In the name of the accused, Seyss-Inquart, I wish to protest against the presentation of written evidence by the witness Von Schuschnigg for the following reasons: Today, when a resolution was announced, with respect to the use to be made of the written evidence of Mr. Messersmith, the Court was of the opinion that in a case of very great importance it might possibly take a different view of the matter. With respect to the Austrian conflict this is the case, since Schuschnigg is the most important witness, the witness who was affected at the time in his position as Federal Chancellor. In the case of such an important witness, the principle of direct evidence must be adhered to, in order that the Court be in a position to ascertain the actual truth in this case. The accused and his defense counsel would feel prejudiced in his rights granted by the Charter, should direct evidence be circumvented. I must, therefore, uphold my viewpoint since it can be assumed that the witness Von Schuschnigg will be able to confirm certain facts which are in favor of the accused Seyss-Inquart.

I therefore make the motion to the Court that the written evidence of the witness Von Schuschnigg be not admitted.

THE PRESIDENT: If you have finished, the Tribunal will hear Mr. Alderman.

MR. ALDERMAN: May it please the Tribunal, at this point I am simply proposing to offer this affidavit for the purpose of showing the terms of the secret understanding between the German and Austrian Governments in connection with this accord. It is not for

any purpose to incriminate the Defendant Seyss-Inquart that it is being offered at this point.

DR. LATERNSENER: May I add to my motion that the witness, Von Schuschnigg, on 19 November 1945, was questioned in Nuremberg, and that if an interrogation on 19 November was possible, then a short time later—that is now—it ought to be possible to call him before the Court, especially as the interrogation before this court is of special importance.

THE PRESIDENT: The Tribunal will recess now to consider this question.

[A recess was taken.]

THE PRESIDENT: The Tribunal has considered the objection to the affidavit of Von Schuschnigg and upholds the objection.

If the Prosecution desires to call Von Schuschnigg as a witness, it can apply to do so. Equally if the Defense wishes to call Von Schuschnigg as a witness, it can apply to do so. In the event Von Schuschnigg is not able to be produced, the question of affidavit-evidence by Von Schuschnigg being given will be reconsidered.

MR. ALDERMAN: May it please the Tribunal, in view of the strategy and tactics of the Nazis' concessions as indicated in the portion of the Messersmith affidavit that I read, substantial concessions were made by Austria to obtain Germany's diplomatic formal assurance of Austrian independence and non-intervention in Austrian internal affairs.

The release of imprisoned Nazis presented potential police problems, and as Mr. Messersmith pointed out in a 1934 dispatch to the United States State Department quoted on Pages 12 to 13 of his affidavit:

"Any prospect that the National Socialists might come to power would make it more difficult to obtain effective police and judicial action against the Nazis for fear of reprisals by the future Nazi Government against those taking action against Nazis even in the line of duty. The preservation of internal peace in Austria was less dependent upon Germany's living up to her obligations under the accord."

Next, Germany's continuing program of weakening the Austrian Government. In the pact of 11 July 1936 Germany agreed not to influence directly or indirectly the internal affairs of Austria, including the matter of Austrian National Socialism.

On 16 July 1936, just 5 days later, Hitler violated that provision. I quote from Document 812-PS, which is Exhibit USA-61, the

A report from Henlein's staff, which was found in Hitler's headquarters, boasted of the offensive operations of the Free Corps. It is Item 30 of the Schmundt file, Page 54 of Document 388-PS. I read the last two paragraphs:

"Since 19 September, in more than 300 missions, the Free Corps has executed its task with an amazing spirit of attack,"—now, that word "attack" was changed by superimposition to "defense"—"and with a willingness often reaching a degree of unqualified self-sacrifice. The result of the first phase of its activities: More than 1500 prisoners, 25 MG's"—which I suppose means machine guns—"and a large amount of other weapons and equipment, aside from serious losses in dead and wounded suffered by the enemy."—And there was superimposed in place of "enemy", "the Czech terrorists."

In his headquarters in the castle at Donndorf, Henlein was in close touch with Admiral Canaris of the Intelligence Division of the OKW and with the SS and the SA. The liaison officer between the SS and Henlein was Oberführer Gottlob Berger (SS).

I now offer in evidence Document 3036-PS as Exhibit USA-102, which is an affidavit executed by Gottlob Berger; and in connection with that affidavit, I wish to submit to the Tribunal that it presents, we think, quite a different question of proof from the Schuschnigg affidavits which were not admitted in evidence by the Court. Schuschnigg, of course, was a neutral and non-Nazi Austrian. He was not a member of this conspiracy, and I can well understand that the Court rejected his affidavit for these reasons.

This man was a Nazi. He was serving in this conspiracy. He has made this affidavit. We think the affidavit has probative value and should be admitted by the Tribunal under the pertinent provision of the Charter, which says that you will accept in evidence any evidence having probative value. We think it would be unfair to require us to bring here as a witness a man who would certainly be a hostile witness, who is to us a member of this conspiracy, and it seems to us that the affidavit should be admitted with leave to the defendants, if they wish, to call the author of the affidavit as their witness. I should have added that this man was a prominent member of the SS which is charged before you as being a criminal organization, and we think the document is perfectly competent in evidence as an admission against interest by a prominent member of the SS organization.

DR. STAHLER: Mr. President, the Defense objects to the use of this document. This document was drawn up as late as 22 November 1945, here in Nuremberg, and the witness Berger could, therefore, be brought to Court without any difficulty. We must insist that he be heard here on the subjects on which the

Prosecution wishes to introduce his testimony. That would be the only way in which the Defense could have an opportunity of cross-examining the witness and thereby contribute to obtaining objective truth.

[Pause in the proceedings while the Tribunal consulted.]

THE PRESIDENT: The Tribunal upholds the objection and will not hear this affidavit. It is open to either the Prosecution or the defendants, of course, to call the man who made the affidavit. That is all I have to say. We have upheld your objection.

MR. ALDERMAN: If the Tribunal please, I had another affidavit by one Alfred Helmut Naujocks which, I take it, will be excluded under this same ruling, and which, therefore, I shall not offer.

THE PRESIDENT: If the circumstances are the same.

MR. ALDERMAN: Yes, I might merely refer to it for identification because it is in your document books.

THE PRESIDENT: Very well.

MR. ALDERMAN: It is Document 3029-PS.

THE PRESIDENT: Very well. That also will be rejected as evidence.

MR. ALDERMAN: Yes. Offensive operations along the Czechoslovakian border were not confined to skirmishes carried out by the Free Corps. Two SS-Totenkopf (Deathhead) battalions were operating across the border in Czech territory near Asch.

I quote now from Item 36 in the Schmudt file, an OKW most-secret order, signed by Jodl, and dated 28 September. This appears at Page 61 of the Schmudt file:

"Supreme Command of the Armed Forces, Berlin, 28 September 1938; 45 copies, 16th copy; most secret.

"Subject: Four SS-Totenkopf battalions subordinate to the Commander-in-Chief Army.

"To: Reichsführer SS and Chief of the German Police (SS Central Office) (36th copy).

"By order of the Supreme Command of the Armed Forces the following battalions of the SS Deathhead organization will be under the command of the Commander-in-Chief of the Army with immediate effect.

"Second and Third Battalions of the 2d SS-Totenkopf Regiment Brandenburg at present in Brieg (Upper Silesia).

"First and Second Battalions of the 3d SS-Totenkopf Regiment Thuringia, at present in Radebeul and Kötzschenbroda near Dresden.

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All the material to which I have so far referred emanated from circles of the highest commanding officers of the German Army.

THE PRESIDENT: General, on this document of General Müller, does it appear where that document was made and where General Müller is now?

GEN. ZORYA: The photostat bears a date written in General Müller's hand. This date is 8 January 1946.

THE PRESIDENT: Where?

GEN. ZORYA: If I might have a look at the photostatic copy which I have just presented to the Tribunal, I would be able to tell you where the date is written.

THE PRESIDENT: Yes, but there are many prisoners-of-war camps. We want to know which one and where it is.

GEN. ZORYA: In a camp located near Moscow.

THE PRESIDENT: Has this document got any authenticating signature on it at all? So far as we are concerned, isn't it simply a photostatic copy of a writing by somebody?

GEN. ZORYA: Mr. President, this document, like all other documents which have been submitted so far by the Soviet Delegation, is a noncertified photostatic copy.

Taking into consideration the wish of the Tribunal and in execution of this wish the Soviet Prosecution took measures to ensure that only the originals of these documents or documents whose authenticity is certified will be presented in complete order to the General Secretary. This will be done in the course of several days and all the material will be given in best order to the General Secretary.

THE PRESIDENT: Can you tell us where the writer of the document is now?

GEN. ZORYA: I am hardly in a position to say more than I have already. If the Tribunal will permit me, I can consult my colleagues, make inquiries, and report to the Tribunal as soon as possible on the general's whereabouts.

THE PRESIDENT: Well, we will adjourn now. That will enable you to consult your colleagues.

[A recess was taken.]

DR. NELTE: Mr. President, to my regret I must present the same objections to this document submitted by the prosecutor of the Soviet Union under USSR-149, and must submit the same request

which I made this morning. As far as I know, the High Tribunal have not yet made a decision in regard to this question.

THE PRESIDENT: I beg your pardon, Dr. Nelte. The Tribunal has already made a decision.

I think it would be better if, when defendants' counsel go to the place from which they wish to speak, they would arrange these earphones before they speak.

I say the Tribunal has already made a decision which governs this case. They pointed out the other day to counsel for the Soviet Union that documents which were not identified as authentic documents, must be identified as authentic, and the Soviet prosecutor at that time undertook to certify that all documents which he made use of were certified as authentic documents. And if they are not so certified, they will be struck out of the record. That ruling applies to this document.

This document is a document which appears to be a document, a letter, or report to the Government of the Soviet Union, but it does not contain upon its face any certification showing that it is an authentic document. The Counsel for the Soviet Union said before we adjourned, that he undertook—as he had already undertaken—to produce a certificate that the document was an authentic document; that is to say, that it was written by the person who purported to write it, and in those circumstances, the Tribunal accepts the document provisionally.

If no such certificate is forthcoming, then the document will be stricken from the record.

DR. NELTE: If I understand you correctly, the Tribunal will accept a letter written to the Soviet Government or a statement as documentary evidence for the contents of this statement.

THE PRESIDENT: Certainly. I have already said provided that it is certified as an authentic document. I have said that more than once.

DR. NELTE: In this way, every letter sent to the Prosecution or the Government of the Soviet Union or to any other Prosecution would become documentary evidence by the certification that it has actually been written by the person who signed it, which would make it impossible for the Defense to cross-examine the witness.

THE PRESIDENT: That depends on where the witness is. We are dealing with witnesses who are scattered all over the globe, and as we are informed that it is not the practice in the Soviet Union for affidavits to be made in such cases, the Tribunal considers such a document to fall within Article 19—provided it is an authentic document.

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We are affording the defendants' counsel the greatest assistance in bringing witnesses to this Court, but we cannot undertake to bring witnesses from all over the world upon questions which are very often of very little importance.

DR. NELTE: I quite appreciate the difficulties, and I am grateful to the Tribunal for their willingness to assist us. Therefore I only request to ascertain in each case where the person, who has made that statement, has his residence, so that the Defense may try to reach him.

THE PRESIDENT: Yes. If the witness is in, or in the immediate vicinity of, Nuremberg, the Tribunal would think that it was only fair, if such a document as this were to be put in evidence, that he should be produced for examination or cross-examination by the defendants' counsel, but we do understand that the man who wrote this letter is not in the vicinity of Nuremberg. We have no reason to think he is, and I am reminding defendants' counsel that they can always apply, if they think right, to issue interrogatories which would be put to any such person as this who has written such a document as this.

DR. NELTE: Thank you.

GEN. ZORYA: I have availed myself of the recess to make inquiries about General Müller. General Müller is in a prisoner-of-war camp, Number 27, in Krasnogorsk, in the Moscow region.

May I continue my statement?

THE PRESIDENT: Certainly.

GEN. ZORYA: All the material, Your Honors, which I have mentioned to date emanated from circles of the Supreme Command of the German Armed Forces. If I can so express myself, General Müller belonged to the middle category of German generals. He was Chief of Staff of an army; he commanded an army group. His testimony reflects a series of events which may be considered worthy of attention, since they explain the circumstances accompanying Germany's preparations against the Soviet Union.

I wish to refer to Page 40 of the document book. There you will find the first page of General Müller's statement. The first paragraph, Page 1, of the statement is marked with red pencil. I now proceed to quote from it:

"The preparation for the attack on the Soviet Union began as early as July 1940. At that time I was first general staff officer in the staff of Army Group C at Dijon in France. General Field Marshal Von Leeb was commander-in-chief. This army group consisted of the 1st, 2d, and 7th Armies, which were occupation armies in France. Besides this, Army

a commissar or a communist in almost every prisoner of war. Then there is recorded the following question of the investigating officer and the reply to it:

"Investigating Officer: 'Did the Führer say anything about an order which should be issued on the subject?'"

"Witness: 'What I have just said was his order. He said that he wanted it carried out even if no written order followed.'"

After Halder's deposition, in the document book on your table, there is an extract from the deposition of the former Deputy Chief of the Operations Section of OKW headquarters, General Warlimont, dated 12 November 1945. He was testifying on oath before Lieutenant Colonel Hinkel of the American Army. This document is the result of work accomplished by our American colleagues. The American Prosecution has kindly placed this document at our disposal, which we in turn submit to the Tribunal as Exhibit Number USSR-263(a) (Document Number USSR-263(a)). I think the Defense Counsel wishes to submit another request to the Tribunal. I therefore cede my place.

DR. NELTE: Mr. President! Regarding General Warlimont, we have the same reasons which I just mentioned regarding Generaloberst Halder. General Warlimont is also present in Nuremberg and is at your disposal for examination in the court. Concerning the importance . . .

THE PRESIDENT: What do you want to request now?

DR. NELTE: My application consists in the request to disallow the use of the document which the Soviet Prosecutor has just wished to read out loud, and to direct that the witness, Warlimont, now present in Nuremberg, be called as a witness.

THE PRESIDENT: The Tribunal has just ruled that the interrogation of General Halder may be used, but if it is used—and it is being used—he must be submitted for cross-examination by counsel for the defendants. What more do you want?

DR. NELTE: I am not speaking about Generaloberst Halder but about General Warlimont.

THE PRESIDENT: I thought we had already ruled upon General Warlimont; that he had to be called—that is, only yesterday or the day before.

DR. NELTE: I believe that this ruling has escaped the memory of the Soviet Prosecutor, otherwise he would not be reading this document out loud but would be introducing General Warlimont to the Court in person.

permitted by these orders are bound to result in wanton and unpunished murder, even though officially the law of violence has been abolished.

"This is obvious from the directive regarding the use of weapons against recalcitrance. The guards and their commanding officers, who often do not understand the language of the prisoner of war, will not be able to know whether the prisoners' disobedience was due to recalcitrance or to a misunderstanding of the orders. The principle that use of weapons against Soviet prisoners of war is, as a rule, justified absolves the guards from any duty of making reflections about their actions."

Omitting two paragraphs not directly relating to this matter, I quote as follows:

"The organization of camp police equipped with clubs, whips, and similar weapons, even in camps where all labor is done by the prisoners, is against military rule and tradition. In addition the military authorities thus give into other hands the means for applying punishment without providing adequate control as to how these means are employed."

I wish to quote one more sentence taken from Paragraph 5 of these notes—you will find it on Page 194:

"Appendix 2 contains a translation of the Russian decree regarding prisoners of war which is in accord with the basic principles of international law as well as with the rules of the Geneva Convention."

I shall refrain from quoting the rest of the document as it is of little interest. This document is signed by the Chief of the Foreign Counterintelligence Service, Admiral Canaris. It includes directives containing instructions relating to the treatment of Soviet prisoners of war, dwelling in detail on such sections which Canaris considered as violations of the basic principles of international law and of the Geneva Convention.

I should like to supplement this document with a few excerpts from the minutes of the interrogation by Dr. Wengler, a former counsellor of the Foreign Counterintelligence Service of the OKW. This document is submitted to the Tribunal as Exhibit Number USSR-129 (Document Number USSR-129). Wengler was questioned by me on 19 December 1945, and his testimony is important for purposes of evaluating the line of conduct both of the OKW and Keitel himself.

DR. NELTE: Mr. President, I ask that the document, Exhibit Number USSR-129, which the Russian Prosecutor intends to read, should not be read, but that the witness mentioned in this document,

Dr. Wengler, be called personally to testify in Court, if the Soviet Prosecution is willing.

This document, USSR-129, is a record of an interrogation of Dr. Wengler, who was active in Counterintelligence Service in the OKW. It is a question of determining whether the nonapplication of the Geneva Convention as regards Russia is due to the fault of the German Government, the OKW, and the Defendant Keitel. I do not need to state that the clarification of this question is of the utmost significance in judging the responsible persons, not only because of the Counts in the Indictment, but because of the terrible guilt in face of the German people, if the testimony given by this witness should be true. The witness was interrogated in Nuremberg on 19 December 1945. Whether he is still here or in Berlin—he gave his address at the time of the inquiry—I cannot say. But I do believe that the basic decisions of the Tribunal concerning the interpretation of Article 21 of the Charter will justify my request in this respect since, firstly, the summoning of the witness from Berlin does not entail great difficulties, secondly we are concerned with a question of such tremendous significance, even in this setting, that the personal testimony and interrogation by this Tribunal should not be replaced by the mere lecture of the minutes of an inquiry.

THE PRESIDENT: Have you anything you wish to say in answer to that objection?

COL. POKROVSKY: With your permission I should like first of all, in order to clarify the matter, to ask where the witness actually is at the present moment? He is not in Nuremberg. He was brought here especially for this interrogation under the greatest technical difficulties. The interrogation was conducted according to all the rules of our judicial proceedings, so that this document could be submitted to the Tribunal and accepted as evidence, if the Tribunal so judges, according to Article 19 of the Charter.

All the problems concerning this subject, which were of interest to the Soviet Prosecution, are already sufficiently clear from the Document Number USSR-129, which we submit to you, and I see no possibility of having this witness brought here in the near future. Maybe the representatives of the Defense Counsel imagine that it is very easy to produce him, but I do not see any technical possibility of bringing him here a second time. And I repeat that, if the Tribunal does not consider it feasible to accept this document in the suitable manner in which we have formulated it, then we would even agree to refrain from submitting it as evidence and to replace it by other evidence—even though we believe it to be incorrect. But we consider it easier than to bring the witness here a second time. That is all I have to say in reply to this request.

THE PRESIDENT: Did you say that you could not bring the witness here, and that as you could not bring him here you would not press the introduction of the document?

COL. POKROVSKY: No, I put it differently. I said that we insist that this document be admitted, since the Tribunal has the right, according to Article 19 of the Charter, to accept this document as evidence. But if we were to choose between two possibilities, either by adding this evidence to the record or by summoning the witness a second time, the technical obstacles which prevent us from so doing would compel us, by preference, to accept the exclusion of this document from the record, in order to avoid any repetition of the difficulties already experienced. We consider that the document is quite correctly compiled, in accordance with all the rules of the Charter, and that the Tribunal should receive it as evidence according to Article 19 of the Charter.

THE PRESIDENT: The Tribunal would like to know first of all, why is it difficult or impossible to bring the witness to Nuremberg in the same way that he was brought to Nuremberg in December 1945; and secondly, has Dr. Nelte and have the other defendants' counsel got full copies in German of the document?

COL. POKROVSKY: Dr. Wengler was interrogated in his native German tongue. The original of his record, of his interrogation, has been submitted to the Tribunal in an adequate number of copies, which are at the disposal of the Defense Counsel.

As regards the technical difficulties, I cannot, at present, undertake to give the Tribunal a precise description of all the technical difficulties reported to me by my collaborators, since I can no longer remember them. But I do know that, when they were working on this matter, establishing the existence of the witness, searching for him, bringing him here, they—my collaborators—declared that they could do this once but that they would not be able to do it a second time. Consequently, Dr. Wengler, a free agent, was here in Nuremberg, not for 1 day, but for many days, precisely for the time needed adequately to clear up all the questions which were of interest to us and to interrogate him, since we foresaw the impossibility of summoning him a second time.

THE PRESIDENT: The Tribunal would like to know where the deponent, the witness, was brought from when he was brought to Nuremberg.

COL. POKROVSKY: From Berlin. He was brought the last time from Berlin.

THE PRESIDENT: Then is he now in Berlin?

COL. POKROVSKY: I do not undertake to answer this question now without making further inquiries. He is not interned.

THE PRESIDENT: Now, Dr. Nelte, do you want to say anything?

DR. NELTE: I should just like to refer to the last page of the minutes, where the address is given: Dr. Wilhelm Wengler, Berlin-Hermsdorf, Ringstrasse Number 32. We are simply concerned with the question: Which technical difficulties are involved to bring this witness from Berlin to Nuremberg a second time? Of course, I do not know whether the witness is in Berlin, but I assume that he is there.

THE PRESIDENT: The Tribunal will adjourn.

[A recess was taken.]

THE PRESIDENT: The Tribunal will allow the deposition to be put in evidence, should the Soviet Prosecutor decide to do so. If the document is put in evidence, the Tribunal will desire that the Prosecutor should secure the attendance of the deponent as a witness for cross-examination. If the Prosecution is unable to secure the attendance of the deponent as a witness, then the Tribunal will itself attempt to secure the attendance of the deponent as a witness, for cross-examination.

COL. POKROVSKY: I can report to the Tribunal that I attempted to employ the time spent by the Tribunal in deliberating this problem in discovering if we could bring this witness back again and that I did not receive a conclusive reply from my organization. According to the wish of the Tribunal, I shall omit the topic of his cross-examination and shall only refer to it again if I am informed by my collaborators that we can once more bring the witness before the Tribunal. This would seem to me in accordance with the wishes of the Tribunal.

THE PRESIDENT: Colonel Pokrovsky, I am not quite sure that you appreciated quite what I said. What I said was that you are at liberty to put in the document now, if you wish to do so. That is one thing. But, if you do so, you must attempt to secure the attendance of the witness, and should you fail to do so, the Tribunal will attempt to secure the attendance of the witness; but the document will still be in evidence and will not be struck out, although, of course, it will be open to the criticism that it is only a deposition or an affidavit and that the witness has not been produced for cross-examination and therefore the weight that attaches to the testimony will not be so great as it would be if the witness had been produced for cross-examination.

Is that clear?

COL. POKROVSKY: Wengler was interrogated by me...

THE PRESIDENT: I fear I used inaccurately the word "affidavit." It is only an interrogation. It is not made upon oath and that, of course, will be taken into consideration. But the point is that you can put in the document now if you decide to do so. That is a matter for your discretion. If you do so, you must attempt to secure the attendance of the witness for cross-examination. If you are unable to get him, then the Tribunal will attempt to get him here for cross-examination.

COL. POKROVSKY: When reporting to the Tribunal on the measures we had adopted, I started from the point of view that the Tribunal desired that each witness, whose testimony had been read into the record, could, if necessary, be summoned to appear before the Tribunal for a supplementary cross-examination. That is why I have already attempted to find out whether we can call up this witness now, and since I have not yet received any definite answer from our organization, I wish to invite the attention of the Tribunal to the possibility that we will simply abstain from mentioning these minutes now, as we only need them for the confirmation of one point, already confirmed by a document which has just been presented to the Tribunal. This is the report signed by Canaris. What is the meaning of Wengler's interrogation? The meaning of Wengler's interrogation is that it shows that the OKW knew of the treatment meted out to the Soviet prisoners. Canaris said the same.

THE PRESIDENT: I think you must decide, Colonel Pokrovsky, whether you wish to put in the document or not. If you wish to put in the document, you may do so, but I do not think it is right for you to state the contents of the document and at the same time not to put it in. If you wish to put it in, then you must try to secure the attendance of the witness, and if you cannot secure the attendance, the Tribunal will try to secure it.

COL. POKROVSKY: I consider that Wengler's testimony is not important enough for us to pay so very much attention to it. If we can find this witness, we shall examine him at a later date.

THE PRESIDENT: Very well.

COL. POKROVSKY: In the light of the documents read into the record, and also in view of the protest of the German prisoners of war in Camp 78, which shows how humanely the Soviet authorities treated German military prisoners of the German Army, the sentence from Appendix I of Operations Order Number 14 of the Chief of the Security Police and the SD, concerning the treatment of Soviet prisoners of war, is nothing less than a brazen insult. This sentence can be found on Page 7 of the document submitted to the Tribunal as Exhibit Number USSR-3 (Document

SIXTY-EIGHTH DAY

Tuesday, 26 February 1946

Morning Session

THE PRESIDENT: I wanted to explain the Tribunal's decision with reference to General Halder and General Warlimont.

Would Dr. Nelte kindly come to the Tribunal?

I wanted to ask you, Dr. Nelte, whether you were the only one of the defendants' counsel who wished to call General Halder and General Warlimont?

DR. NELTE: No, besides myself, so far as I know, my colleagues Dr. Laternser, Professor Dr. Kraus, and Professor Dr. Exner have called both General Halder and General Warlimont.

THE PRESIDENT: Very well, I understand.

Then the Tribunal's decision is this: The Tribunal ordered, when the Soviet prosecutor wished to put in the affidavits of these two generals, that if they were put in, the witnesses must be produced for cross-examination. But in view of the fact that defendants' counsel have asked to call these witnesses themselves, the Tribunal is willing that the defendants' counsel should decide whether they prefer that those two generals should be produced now, during the Prosecution's case, for cross-examination, or should be called thereafter during the defendants' case for examination by the defendants, in which case, of course, they would be liable to cross-examination on behalf of the Prosecution.

But it must be clearly understood, in accordance with the order which the Tribunal made the other day—either yesterday or the previous day, I forgot which it was—that these witnesses, like other witnesses, can only be called once, and when they are called, each of the defendants' counsel who wishes to put questions to them must do so at that time.

Now, if there were any difference of opinion among defendants' counsel, one defendant's counsel wishing to have these two generals produced now during the Prosecution's case for cross-examination, and other defendants' counsel wishing to have them called hereafter as witnesses on their behalf during the course of their case, then the Tribunal consider that in view of the order which they have already made, Generals Halder and Warlimont ought to be produced and called now. And the same rule would apply then.

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They could only be called once, and any questions which the other defendants' counsel wish to be put to them should be put to them then. But the decision as to whether they should be called now or whether they should be called during the course of the defendants' case is accorded to defendants' counsel.

Is that clear?

DR. NELTE: I request to hear the decisions of the various Defense Counsel at the beginning of the afternoon session...

THE PRESIDENT: Yes, certainly, certainly. You can let us know during the afternoon session, at the beginning of the afternoon session, what the decision of defendants' counsel is.

DR. NELTE: Thank you.

THE PRESIDENT: Yes, Colonel Smirnov.

MR. COUNSELLOR SMIRNOV: I continue the quotation of the political report of Professor Paul Thomsen, which was already submitted at yesterday's afternoon session to the Tribunal. Your Honors will find it on Page 116 of the document book. I start quoting—and quote only two short excerpts from this political report:

"I consider it is my duty, although I am only here in the East on a specific scientific mission, to add a general political outline to my actual reports. I must admit, openly and in all honesty, that I return home with the most grievous impressions.

"In this fateful hour of our nation every mistake we make may result in the most disastrous consequences. A Polish or a Czech problem can be crushed because the biological forces of our people are sufficient for that purpose.

"Remnants of people like Estonians, Lithuanians, and Letts have to adapt themselves to us or they will perish. Things are quite different in the immense Russian area, of vital necessity to us as a basis for raw materials."

Here I interrupt my quotation and continue on Page 117 of the document book, Paragraphs 10 and 11—I quote:

"I do not dare to voice an opinion on the economic measures, such as, for instance, the abolition of the free market in Kiev, which has been taken as a heavy blow by the population, since I am in no position to observe the entire situation. The 'sergeant major attitude,' the beatings and shouting in the streets, the senseless destruction of scientific institutions which is still going on as strong as ever in Dniepropetrovsk, should cease immediately and be punished severely.

"Kiev, 19 October 1942; Professor Dr. Paul W. Thomsen."

end that you, as other German generals, acted only as soldiers, and that the so-called "ideological war" was conducted by Hitler and his colleagues. Did I understand that correctly?

VON MANSTEIN: Yes.

GEN. ALEXANDROV: My American colleague reminded you yesterday about your own decree in which you spoke about the annihilation of the Soviet political system and other measures to be taken in the occupied territories. You also stated that you were aware of the decree of Field Marshal Von Reichenau about the conduct of the troops in the East. Witness, was such a decree, in your opinion, prompted by a military sense of duty, or by any other consideration?

VON MANSTEIN: No, it was certainly issued only out of a military sense of duty. In connection with this, I should like to add that these ideas were appearing in every newspaper and were, of course, promoted by higher authorities. They certainly did not originate with us. We, together with our soldiers, conducted the war in a military manner.

GEN. ALEXANDROV: Do you not think that such decrees can only be explained by the fact that their authors were not generals brought up in the military tradition, but in the Hitlerite tradition?

VON MANSTEIN: I did not quite understand that. May I ask you to explain the meaning of the question again.

GEN. ALEXANDROV: I will repeat it. Do you not think that such decrees, political decrees really—I mean the order issued by Reichenau—do you not think that such decrees can only be explained by the fact that their authors were not generals brought up in the military tradition, but generals brought up in the Hitlerite tradition?

VON MANSTEIN: I can only speak for myself, for my own order. That I personally was nothing more than a soldier, to that I think every one of my subordinates and my superiors can testify. I was not a political general, nor was I, shall we say, a National Socialist general in the sense in which you mean it. This order was a consequence of the growing danger of the partisans, and of the necessity to make it clear to our soldiers that they could not afford to be so careless, and that they must be aware that the fight on both sides was an ideological fight. The order itself is composed of two entirely different parts. Part One, which deals with the necessity of safeguarding the rear against attack, *et cetera*, and with the alertness of the soldiers, contains some ideas about the meaning of this struggle. When the order speaks of the extermination of the system, then it means the political system, and not human beings, it means exactly what is today meant when the other side speaks

of the extermination of National Socialism. Part Two I would say contains my own ideas, it states what has to be done positively, and it also states quite clearly that the soldiers must avoid all arbitrary action, and that any violation of soldierly honor will be punished. I believe that this order is evidence of the fact that I conducted the fight as a soldier, and not as a politician.

GEN. ALEXANDROV: What you were during the war is best shown by your own decree, and the Tribunal will be able to judge it.

My last question. Did you know what measures the High Command of the Armed Forces initiated for the purpose of conducting biological warfare?

VON MANSTEIN: Biological warfare? I do not know at the moment what you mean by the expression "biological warfare." Would you explain that, please?

GEN. ALEXANDROV: The use of various types of dangerous bacteria in warfare. That is what I mean by "biological warfare."

VON MANSTEIN: No. I knew nothing about it. I have never heard of a bacteriological war or of poison warfare.

GEN. ALEXANDROV: You will now be shown several details of this plan for biological warfare, and you may then be able to recall it. I am submitting to the Tribunal Document USSR-510, which consists of the affidavit of the former Major General and Professor of the Military Medical Academy in Berlin, Walter Schreiber. I am reading it into the record.

"In connection with the Trial of the Major War Criminals in Nuremberg, I, as Professor of Hygiene and Bacteriology of the Military Medical Academy in Berlin and former Major General of the Medical Corps of the German Army, consider it my duty to our people who have undergone such severe trials and to the whole world, to disclose one more page of Germany's preparation for war which has not been touched upon in Nuremberg. Aside from the former political and military leadership of Germany a large part of the guilt is borne by German scientists and particularly by German doctors. Had that type of weapon which was being prepared been used, it would have meant putting to a shameful and evil use the great discoveries of Robert Koch, whose native country was Germany and who was a great teacher..."

THE PRESIDENT: Dr. Latenser, counsel for the Defense, would like to say something.

DR. HANS LATENSER (Counsel for General Staff and High Command of the German Armed Forces): I should like to raise an objection. On looking through the document, I have discovered that

the author of this affidavit is raising particularly grave accusations. I do not know against whom these accusations are directed, but I should like to ask that the author of this document appear as a witness, so that I may cross-examine him.

THE PRESIDENT: Where is he?

GEN. ALEXANDROV: I can answer that, Mr. President. The former Major General Walter Schreiber is now in the Soviet Union as a prisoner of war. If the Tribunal think it necessary to have Walter Schreiber testify here as a witness, the Prosecution will not object.

DR. LATERNSEER: I think that if he is making such a serious allegation he should appear here in person.

THE PRESIDENT: General Alexandrov, could you inform the Tribunal how long it would take to get this witness Schreiber brought here for the purpose of cross-examination?

GEN. ALEXANDROV: We shall take all steps to get the witness here in the shortest possible time, but I cannot guarantee that or state a number of days, since the distance is rather great. I would like the Tribunal to take this into consideration. However, regardless of whether the witness is going to be brought here or not, I request the permission of the Tribunal to have this document presented in this cross-examination.

DR. LATERNSEER: May I be allowed to reply to that?

THE PRESIDENT: Dr. Latenser, you can make your objections, if you wish to do so now, and then the Tribunal will consider the matter when they adjourn. We don't propose to allow the document to be presented now at the moment. We will consider the matter when we adjourn.

DR. LATERNSEER: I request that the Tribunal decide that the document must not be read until Walter Schreiber can appear here as a witness.

THE PRESIDENT: Your application is that the document should not be admitted unless the witness is brought here for further examination?

DR. LATERNSEER: I should like to go even further. Mr. President, and apply that the document should not be admitted at all, since the witness is now going to be produced by the Prosecution, and can then state these facts under oath.

GEN. ALEXANDROV: Mr. President, may I oppose the application of the defense. It seems to me that the affidavit of Walter Schreiber could and should be read during the cross-examination of the witness Von Manstein, regardless of whether Walter Schreiber

will or will not appear here as a witness. A photostat of his affidavit is before the Tribunal; it is certified by the Extraordinary State Commission, which is the plenipotentiary of the Soviet Government. Therefore, regardless of what the Tribunal may decide about calling Walter Schreiber as a witness, I insist that the document, which I put in as USSR-510, be accepted by the Tribunal and that I be given an opportunity of reading it into the record during the present cross-examination.

THE PRESIDENT: No, General Alexandrov; the Tribunal has said that they will not admit the document at this stage. We propose to adjourn at 11:30 and will then consider the application. I observe that the affidavit was made in April 1946 and there was plenty of time to bring the witness here.

GEN. ALEXANDROV: The question of bringing the witness here has never had to be considered up to now. If the Tribunal commands me not to use the document, I shall not be able to ask the witness the questions which arise out of the affidavit of Walter Schreiber. Moreover, I shall thereby be prevented from putting questions on Walter Schreiber's affidavit at another stage of this Trial.

THE PRESIDENT: General Alexandrov, you will be able to ask him the question after the Tribunal has decided upon the admissibility of the document; that is to say, if it is decided as to its admissibility, can you not ask him then? But he has already said he knows nothing of biological warfare.

GEN. ALEXANDROV: He does not know what is in the affidavit of Dr. Schreiber. I have no further questions at the moment, Mr. President.

THE PRESIDENT: Is there any further cross-examination?

DR. LATERNSEER: Field Marshal, you were questioned about the order, or alleged order, by Quartermaster General Wagner, which prohibited the feeding of prisoners of war from supplies of the Armed Forces. I would like to ask you, do you know that Generaloberst Halder, during a visit to the front on the occasion of a conference at Orsha, actually ordered that the food supplies to the troops should be cut so that prisoners of war could be better fed?

VON MANSTEIN: That is not known to me, because it did not take place in my area. I do know that in the winter of 1941-42 I had to reduce the rations for my army in the Crimea since supplies from home did not arrive in sufficient quantity on account of the shortage of railroad transportation, and also since we could not completely strip the country of all food reserves to feed the population and the prisoners. As far as I can recollect, we reduced the meat ration at that time, and I know that I expressly prohibited

character in keeping with the SA. The question of Germanization, *et cetera*, played no role in our work.

SIR DAVID MAXWELL-FYFE: I would like you to look at the procedure. "The Chief of Staff..."—that was Lutze in 1941, he was still alive then; in the next paragraph, it states, "The Chief of Staff visited these territories in the East and West, and gained a clear insight into the service, not only in the main cities but particularly in the small and smallest garrisons of the SA."

Did the Chief of Staff take his deputy with him on any one of these visits, that is, yourself?

JUTTNER: I was with him once in the East, but not in the West. SIR DAVID MAXWELL-FYFE: Perhaps you were fortunate that you went into the Eastern territory. Did you ever go to Vilna?

JUTTNER: No.

SIR DAVID MAXWELL-FYFE: Let me see if you can help us from your immense knowledge of the SA, which you spoke of this morning. Did you know an SA officer called Hinkst, who was the staff commandant at Vilna?

JUTTNER: What is the name?

SIR DAVID MAXWELL-FYFE: Hinkst.

JUTTNER: No, I do not know him.

SIR DAVID MAXWELL-FYFE: Just think. You say you don't remember him, the town commissioner at Vilna?

JUTTNER: No.

SIR DAVID MAXWELL-FYFE: You remember, at Vilna, the old barracks were taken over and were known as the SA Kaserne, the SA Barracks. Did you know that?

JUTTNER: I have never been in Vilna in my life, and I do not know who was working there for the SA or any other office.

SIR DAVID MAXWELL-FYFE: Did you know that one of the groups formed was a group in Vilna?

JUTTNER: No.

SIR DAVID MAXWELL-FYFE: It was a very interesting group, but they did not have to do quite as big a job as the SS; however, they killed 10,000 Jews in the autumn of 1941. You say you never heard of that?

JUTTNER: I did not understand that.

SIR DAVID MAXWELL-FYFE: What I am putting to you is that in September of 1941, 10,000 Jews were killed in Vilna and the people who rounded them up from the ghetto, the people who took them out to be killed, were the SA Detachment in Vilna.

JUTTNER: I deny that quite emphatically. The SA had nothing to do with these matters and the SA did not take part in it. We had no SA in Vilna.

SIR DAVID MAXWELL-FYFE: Then we will just have a look at this affidavit. Will you look at this affidavit?

THE PRESIDENT: Did you sign this document that was just put to you—this report?

JUTTNER: Yes.

SIR DAVID MAXWELL-FYFE: Would you look at Document Number D-964, which is an affidavit by M. Szloma Gol. My Lord, that is GB-597. I am so sorry, My Lord, that is Page 55. I beg Your Lordship's pardon.

This gentleman says:

"I am a Jew and lived in Vilna, Lithuania. During the German occupation I was in the Vilna ghetto. The administration of the Vilna ghetto was managed by the SA. The Town Commissioner of Vilna (Stadtkommissar) was an SA officer called Hinkst. The Landkommissar for Vilna was an SA officer called Wolf. The adviser on Jewish questions was an SA officer called Murer."

Do you remember an SA officer called Wolf or an SA officer called Hinkst in Lithuania?

JUTTNER: I have never heard either the name Wolf or the name Hinkst and I emphatically deny that we had any SA group in Vilna.

HERR BÖHM: I beg your pardon, Mr. President. These charges which are being alleged against the SA are all so tremendous, and are so obviously unknown to the witness, that I must request that this witness Gol be brought here and examined, in case it is intended to make use of this affidavit or its contents. If he is here in Nuremberg, he can be examined before the Court.

SIR DAVID MAXWELL-FYFE: Mr. Gol is here and my friend can ask him any questions that he would like. He can produce the actual articles taken from the dead bodies of the Jews who were shot.

THE PRESIDENT: Is this man here in Nuremberg?

SIR DAVID MAXWELL-FYFE: My Lord, yes, he is in Nuremberg. Of these six affidavits, I have kept four and that covers, I think, the principal allegations. I have kept Gol, Belg, Sigall and Klibart. The other two had to go to their work which has been found for them, and, My Lord, I felt, in view of what they already suffered, it's not quite right to keep them all back. However, I kept four and I submit that the Defense has ample opportunity for any cross-examination.

THE PRESIDENT: Are they all on the same topic?

SIR DAVID MAXWELL-FYFE: My Lord, no. They deal with Vilna, Kaunas and Schaulen, My Lord, three places.

THE PRESIDENT: Sir David, do you propose to use or to read all of these affidavits now, or to use them for cross-examination?

SIR DAVID MAXWELL-FYFE: My Lord, I was proposing to put the main points of them in for cross-examination and show on what the affidavits are based. I did not mean to read them through. From these affidavits I have selected about three points to read.

THE PRESIDENT: Yes, Dr. Böhm.

HERR BÖHM: Before these affidavits are read, I should first like to ask that these affidavits be checked as to their authenticity. The document you will receive is Number D-964.

THE PRESIDENT: We are considering your application at the moment, that the man should be called for cross-examination. Surely that is sufficient.

HERR BÖHM: No, only provided that this document, this affidavit, which was submitted here, is perfectly genuine and has been signed.

THE PRESIDENT: Sir David has said that the man is here. You can ask the witness if it is true.

HERR BÖHM: I have no reason to introduce a witness, Mr. President, who has not deposed an affidavit.

THE PRESIDENT: No one is suggesting that you should introduce him as your witness. Your application is the application which we are now considering, that is, that he should be brought here for cross-examination, but that does not make him your witness.

HERR BÖHM: Mr. President, I requested that he be examined under the condition that he has actually deposed an affidavit.

SIR DAVID MAXWELL-FYFE: The original affidavit is before the witness, and I am told it was sworn to before Major Wurmser. The actual statements which the deponent made before he signed are shown in the original copy.

HERR BÖHM: I am objecting for the reason that my document does not show that it was signed.

THE PRESIDENT: Give us the original. It really would be better, Dr. Böhm, if you would take the trouble to look at the original before you made objections of this sort.

HERR BÖHM: Mr. President, I did not make any accusations. I only asked you to ascertain whether it is signed, for there is no signature on my document.

THE PRESIDENT: Sir David, in the interest of saving time, would it be sufficient if two of these affidavits were used and two of the witnesses were called for cross-examination?

SIR DAVID MAXWELL-FYFE: My Lord, I suggested three, since it covers three towns, Vilna, Kaunas, and Schaulen. I shall willingly restrict myself.

THE PRESIDENT: The Tribunal will allow these affidavits to be used in cross-examination provided the three deponents are called for cross-examination. It would be most convenient if they should be called directly after this witness has been cross-examined and re-examined.

SIR DAVID MAXWELL-FYFE: I see I am in a slight difficulty about Schaulen, because both deponents who had to go are to deal with the Schaulen episode. My Lord, I have a witness... I am so sorry, it is my fault, I must admit I said Schaulen; it should have been Kaunas. I will do that, My Lord, I will put the facts in the affidavit and I will only use the affidavits in regard to Vilna and Schaulen, and both the deponents are here.

THE PRESIDENT: Then, the Marshal will have those witnesses ready when the evidence of this witness is finished in order that they may be called for cross-examination if Dr. Böhm wants to question them.

SIR DAVID MAXWELL-FYFE: My Lord, we will do so. They will be here. I want to question the witness here with regard to Vilna.

THE PRESIDENT: Sir David, I see it is now 25 minutes to twelve. Before you do that, we had better recess.

[A recess was taken.]

SIR DAVID MAXWELL-FYFE: My Lord, I have selected three of these witnesses to cover each of the towns: Szloma Gol, who will deal with Vilna; and Kagan, who will deal with Kaunas; and Kibart, who will deal with Schaulen.

My Lord, they are out of Court, so that they will not hear the cross-examination, and are available when the time comes.

HERR BÖHM: Mr. President, I can waive the examination of these witnesses. I have no objection if these affidavits are used, because in this connection I can clarify the facts of the case with the witness Kibart in cross-examination. These people had nothing whatever to do with the SA, and the witness Jiltner will clear up the matter. They were officials in the Ministry for Eastern Affairs, and they were no more regarded as SA men there than one could regard a soldier in the Wehrmacht, for example, as an SA man