To: General Donovan  
From: Dr. Pathy  
Subject: Translation and Critique of Schlabrendorff's Opinion  

The main criticisms of the attached opinion of Herr von Schlabrendorff could be summed up as follows:

1. The Master Plan is not sufficiently substantiated.
2. The charges against the individual defendants are not specific.
3. The war crimes lack objectiveness (especially the Katyn Forest incident) and the listing is not complete.
4. The General Staff should not be indicted as a whole, but only the members after 1938.
5. The Reichs Cabinet should not be indicted as a whole, but such indictment should be limited to those ministers who did not retire, or who participated in murders of June 30, 1944.

As to point No. 1, the criticism seems justified. The Master Plan, as defined by Mr. Justice Jackson in his report to the President, and as the writer of the opinion would himself like it to be, could not be incorporated in the Indictment because the evidence as it stands today would not have supported it. If, during the pre-trial period or at the trials, some direct proof should be obtained, the Master Plan could be redefined. As the Indictment today stands, the
Master Plan has been broken down into political and doctrinal aims, the weakest part being the former. This part of the Master Plan has been limited to the abrogation of the Treaty of Versailles, the re-acquiring of territories lost during World War No. 1 and inhabited by people of German blood, and acquiring of further territory on the theory of living space. But the theory of living space, unless it is stretched beyond reasonable limits, can not very well be considered as the central core of the Master Plan.

2.

The Indictment contains a conspiracy count which states a cause of action justifying the conviction of the defendants as responsible members of the conspiracy. But when we come to consider their personal responsibility outside of the conspiracy for specific acts which allegedly have been committed, the charges appearing in Annex A can not be said to be in any way specific. Paragraph "a)" of Article 16 of the Charter declares "that the Indictment shall include full particulars specifying in detail the charges against the defendants." With respect to the previous draft of the Indictment about a month ago (in a memorandum of which a copy was sent to Mr. Justice Jackson) we repeatedly drew the attention of the drafters to this deficiency, saying "as to the biographical Annex we have the impression that they constitute in their present shape some 24 miniature indictments with the same qualities and defects of the main Indictment, e. g., too specific in the narrative part and not
specific enough in the charges." The defect might be cured in taking
care of the specific charges in the trial briefs or in the finding
of facts by the prosecution or by the Court.

3.

The criticisms against count 3 are two-fold. The Indictment
contains charges which should not be included, and certain charges
which are not listed should be included. The main objection is the
Katyn Forest incident. Since the Indictment has already been lodged,
there seems only one way to remedy this defect, and that is to try to
convince the Russian prosecutor either to drop this charge in any
future amendment to the Indictment, or simply not to offer proof with
respect to it at time of trial. As to the charges which are not
listed, including the two Hitler Orders (the opinion speaks about
three Orders but lists only two), an amendment of the Indictment is
possible at any stage of the proceedings.

4.

One way not to declare the German General Staff a criminal
organization, despite its listing as such by the Indictment, would be
that representative members of the General Staff, including those not
listed among the 34 first defendants, should ask leave of the Tribunal,
according to Article 9 of the Charter, to defend the organization and
prove that its members or some of them resisted the Nazi movement the
best they could. This procedure would serve a double purpose. First,
to have the General Staff or representative members unfold the Nazi
methods, and the various incidents which occurred between the General Staff and the Nazi Party. Second, that in case this is proved, it would also serve as a proof that the International Military Tribunal might dispense from declaring an organization charged to be criminal as such if the evidence grants such finding.

5.

Applying the same criticism to the indictment of the Reichs Cabinet as a whole, it seems more difficult to agree with this criticism. It is a known fact today that the Reichs Cabinet was nothing less than an instrument of the Nazi Party to express in legal form its illegal orders. It might very well be true that one or the other member of the Reichs Cabinet could not and should not be charged with any specific crime, but it is also true that it would very much weaken the conspiracy count if any of those persons who detained the key and policy-shaping positions in the Nazified German political movement could be allowed to escape responsibility. The only exception could be done with those ministers who had no real ministerial functions, but were only either ministers without portfolio or had just a honorific title. The fact of resignation, together with the time of resigning and other pertinent facts, may always be adduced by the defense in at least mitigation of culpability.

In this connection it would be very interesting to have the
writer of the opinion consider whether the fact that the Nazi Party as such is not indicted does not in a very serious way endanger the future historical appraisal of these trials.

A. F. P.

October 19, 1945