LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME X

THE I.G. FARBEN AND KRUPP TRIALS

LONDON
PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

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One of the aims of this series of Reports is to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied Courts number well over a thousand. The trials selected for reporting, however, are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed " Notes on the Case ", such comments of an explanatory nature on the legal matters arising in that trial as it has been thought useful to include. These notes provide also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume includes a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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FOREWORD

This volume contains two very important trials which have been held under the "Subsequent Proceedings" at Nuremberg. One is the Krupp case, in which the defendants were the directors and managers of that world-famous organisation, and the other concerns the great chemical combine, I.G. Farben. In both cases the operations of the respective concerns were not limited specifically to war production, but that did form a great part of their output and held a foremost rôle in the trials. Both cases involved the fundamental questions of the nature of crimes against peace and the nature of crimes of economic spoliation. Crimes against peace will be more fully examined and dealt with in Volumes XIII–XV of this series in which it will be sought to determine the essential character of these crimes as conceived in the international law of war. Crimes concerning property, however, have been more fully dealt with in the Note prepared by Mr. Brand, which appears on pages 159–66. He has sought to achieve in summary form an epitome of the main ideas which underlie this concept of war crimes, having regard to what happened in the last war. The summary is not limited to the two reports in this volume, but covers cases in the earlier Volume IX in which this topic and its various ramifications were dealt with and explored.

It is well known that the German war system depended essentially on exploitation by the Germans of the industrial resources and the production of the occupied countries. Closely associated with that was the use of what has been called slave labour, that is either the labour of deportees from occupied countries or the labour of the inhabitants themselves in those countries. Without the command and the ability to employ all these enormous resources of material and manpower it is, I think, clear that the German war effort could not have been continued as it was. In the same way the Germans were to a large extent fed by the agricultural products taken from the occupied countries. In a sense this economic exploitation as a system may appear to have been something novel in the history of war, and it therefore has called for special treatment in these volumes which seek to explain the various trials which have been held in respect of that particular crime. It would, however, be incorrect to refer to it as novel. It is certainly implicit in the Hague Convention No. IV of 1907 which deals not only with the specific heading of pillage, but also what is even more important with the protection of property rights of the inhabitants of occupied countries, and protects them against being made use of by the occupying power except in so far as is necessary for purposes of the occupying army in connection with expenses of the actual occupation, and subject always to the capacity of the occupied country. The Articles I have referred to are Articles 46, 47, 52 and 53. As a striking illustration of the scope of what was done, I may refer to the system of stripping an occupied country of its resources both in raw materials and in machinery and equipment, and sending them to Germany to strengthen the belligerent power to the detriment of the defence and resistance of the Allied nations.

I cannot here develop these topics at any greater length. I am content to refer to Mr. Brand's synopsis, and to the Articles of the Hague Convention as refuting the idea that crimes of this type were not sufficiently dealt with in the code of war crimes. I need not observe that " pillage " in the old sense, that is to say thefts by individual soldiers of the personal property of individual inhabitants, though it remains and must remain a war crime, is only a very minor portion of the war crimes which come under this heading.

I must, before I conclude this Foreword, refer to another matter which is of an entirely different subject-matter and which I think requires some discussion here. This volume of the series of war crime trials which the Commission has been publishing represents the completion of two-thirds of the total publication. At an early stage I attempted to explain in brief the purpose, scope and the method of these reports and I find that that has been widely understood in many quarters. I may refer to an intelligent, sympathetic and accurate review of Volume I which was printed in the *American Journal of International Law*, No. 42, of April, 1948. That review was by Professor Willard B. Cowles, Professor of Law in the University of Nebraska. He was in a position to understand what the Commission was attempting to do in these reports, since he attended meetings of the Commission for a time as a member of the United States delegation. Professor Cowles shows an understanding and knowledge of the reports, and of the difficulties which have faced those who have planned and carried out the scheme. One great difficulty arises from the nature of the materials which were alone available for the preparation of the reports. I will take the opportunity, in order to dispel certain misapprehensions on this point, to explain what those materials have been.

The reports on British trials have been written after a study of the verbatim transcripts of the trials involved. In the report of a Canadian trial in Volume IV and in the reports on Polish trials which have appeared and will appear in Volume VII and in a later volume, the complete transcript was also available, and, in the writing of the Australian reports which have appeared in Volume V and will appear in Volume XI, complete transcripts have been available with the exception that at times the arguments of counsel and the summing up of the Judge Advocate have been given in a summarised form.

For the preparation of the United States trial reports it has not always been possible to secure full transcripts, and certain of the American reports contained in the volumes have, therefore, been based upon summaries furnished by the United States authorities. When reports have been based upon such summaries, however, the fact has been noted in appropriate footnotes, which have appeared on page 46 of Volume I (relating to the Hadamar trial) and on page 56 of Volume III (relating to four short reports appearing in that volume).

In writing the French, Norwegian and Dutch reports other problems have had to be faced. No verbatim report is officially taken of Norwegian war crime trials, and it has not been possible for any such transcripts of French or Dutch trials to be forwarded to the United Nations War Crimes Commission. It has been necessary, therefore, to write the Norwegian,

Dutch and French reports upon the basis of the indictments and reasoned judgments delivered in the trials dealt with. The Chinese trial report which will appear in a later volume of these reports has similarly had to be based upon the judgment delivered in the trial.

A difficulty of another kind has been met with in the writing of the "Subsequent Proceedings" trials held before United States Military Tribunals in Nuremberg. Here the available material has been too great to permit of an exhaustive treatment within the time limits set down by the trust under which the Law Reporting has been carried on. Most of the "Subsequent Proceedings" trials have occupied a time which is almost comparable with the duration of the trial held before the International Military Tribunal itself, and the resulting transcripts have been correspondingly voluminous. Reports of the eight "Subsequent Proceedings" trials which have been dealt with and will be reported in these volumes have therefore been based upon a thorough study of the indictment and judgment in the respective trials and of the speeches and briefs of the prosecuting and defence counsel. The pressure of time has prevented a complete reading of the oral and documentary evidence admitted at the trials, and the summary of evidence which appears in each of the reports has been condensed from the judgment of the court. It is thought that, once this fact has been made clear, the reports will retain their usefulness from the historical point of view, while from the point of view of building up a jurisprudence of war crimes law it is entirely in order, and in fact essential, to accept the view taken by the Tribunal itself of the facts before it, because these were the facts to which the Tribunal intended its statements of law to relate.

The United States authorities in Nuremberg are themselves planning to establish a series of volumes dealing in rather more detail with each of the "Subsequent Proceedings" trials. With greater resources at their command they will be able to devote a volume or more to each trial and to provide a selection of the oral and documentary evidence put before the Court in each of these trials and a selection of the arguments of counsel, in addition to reprinting the indictment and the judgment in its entirety in each case.

I may add that the trials on which the reports appearing in our volumes have been based have varied greatly in the amount of legal argument put forward in the course of their proceedings, and in their overall legal interest; consequently the reports themselves vary considerably in length. It would be unfair, for instance, to expect all British trials to contain the same amount of legal debate as did the Belsen Trial, an early British trial in which many fundamental issues were raised and debated, thus rendering unnecessary a similar length of discussion in individual subsequent British trials.

Of the two reports in the present volume, Mr. Aars Rynning has been responsible for the drafting of the outlines of indictments and evidence, and has shared with Mr. Brand the task of arranging the legal matter contained in the judgments delivered. Mr. Brand, as Editor of the series, has written the notes on the two cases.

WRIGHT.

London, *December*, 1948.

CASE No. 57.

THE I.G. FARBEN TRIAL

TRIAL OF CARL KRAUCH AND TWENTY-TWO OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG,

14TH AUGUST, 1947-29TH JULY, 1948

Liability for Crimes against Peace, War Crimes, Crimes against Humanity and Membership of Criminal Organisations of leading German Industrialists.

Carl Krauch and the twenty-two others indicted in this trial were all officials of I.G. Farben Industrie A.G. (Interessen-Gemeinschaft Farbenindustrie Aktiengesellschaft). The I.G. Farbenindustrie A.G. itself was not indicted in this trial, but it was alleged by the Prosecution that Carl Krauch and the other twenty-two accused " acting through the instrumentality of Farben and otherwise " had, during a period of years preceding 8th May, 1945, committed Crimes against Peace, War Crimes and Crimes against Humanity and participated in a common plan or conspiracy to commit these Crimes—all as defined in Control Council Law No. 10. These crimes were said to include planning, preparation, initiation and waging wars of aggression and invasions of other countries, as a result of which incalculable destruction was wrought throughout the world, millions of people were killed and many millions suffered, deportation to slave labour of members of the civilian population of the invaded countries and the enslavement, ill-treatment, terrorisation, torture and murder of numerous persons, including German nationals as well as foreign nationals ; plunder and spoliation of public and private property in the invaded countries pursuant to deliberate plans and policies, intended not only to strengthen Germany in launching its invasions and waging its aggressive wars and secure the permanent economic domination by Germany of the continent of Europe, but also to expand the private empire of the accused ; as well as other crimes such as the production and supply of poison gas for experimental purposes on and the extermination of concentration camp inmates, the supply of Farben drugs for experiments on such inmates,

participation in the Reich Slave Labour programme, the employment of forced labour, concentration camp inmates and prisoners of war in work having a direct relation to war work and under inhuman conditions, membership of criminal organisations, etc.

One of the accused, Brueggemann, was found unfit to stand trial.

All of the accused were found not guilty in so far as they had been charged with Crimes against Peace and with participation in the conspiracy (Counts I and V).

The accused Schneider and the two others were also acquitted in so far as they had been charged with membership of a criminal organisation (the S.S.) under Count IV.

Krauch and thirteen of the other accused were acquitted on all points charged against them under Count II (Plunder and Spoliation), whereas Schmitz and seven others were partly found guilty and partly not guilty under this Count.

As to Count III (Participation in the Slave Labour Programme, etc.) none of the accused were found guilty in so far as they had been charged with criminal responsibility for the production and supply of poison gas and drugs to the concentration camps, whereas Krauch and four others of the accused were found guilty of the charges alleging the employment of prisoners of war, forced labour and concentration camp inmates in illegal work and under inhuman conditions. The remainder of the accused were acquitted on all points charged against them under this Count.

The thirteen convicted, including Carl Krauch, were sentenced to terms of imprisonment ranging from seven to one and a half years.

In its Judgment the Tribunal dealt with a number of legal questions, as set out in the report.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court before which this trial was held was a United States Military Tribunal set up under the authority of Law No. 10 of the Allied Control Council for Germany, and Ordinance No. 7 of the Military Government of the United States Zone of Germany.(1)

2. THE INDICTMENT

The accused, whose names appeared in the Indictment, were the following: Carl Krauch, Hermann Schmitz, Georg von Schnitzler, Fritz Gajewski, Heinrich Hoerlein, August von Knieriem, Fritz ter Meer, Christian Schneider, Otto Ambros, Max Brueggemann,(2) Ernst Buergin, Heinrich Buetefisch, Paul Haefliger, Max Ilgner, Friedrich Jaehne, Hans Kuehne, Carl Lautenschlaeger, Wilhelm Mann, Heinrich Oster, Karl Wurster, Walter Duerrfeld, Heinrich Gattineau, Erich von der Heyde, and Hans Kugler.

The Indictment filed against the twenty-three accused made detailed allegations which were arranged under five counts, charging all or some of the accused respectively with the commission of Crimes against Peace, War Crimes, Crimes against Humanity and Membership of an Organisation declared criminal by the International Military Tribunal at Nuremberg (the S.S.). The individual counts may be summarized in the following way:

Count I

Count I consists of eighty-five paragraphs. The criminal charge is contained in paragraphs one, two and eighty-five, which read as follows:

> "(1) All of the defendants, acting through the instrumentality of Farben and otherwise, with divers other persons during a period of years preceding 8th May, 1945, participated in the planning, preparation, initiation, and waging of wars of aggression and invasions of other countries, which wars of aggression and invasions were also in violation of international laws and treaties. All of the defendants held high positions in the financial, industrial and economic life of Germany and committed these crimes against Peace, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations or groups, including Farben, which were connected with the commission of said crimes."
>
> "(2) The invasions and wars of aggression referred to in the preceding paragraph were as follows: against Austria, 1st March, 1937; against Czechoslovakia, 1st October, 1938 and 15th March, 1939; against Poland, 1st September, 1939; against the United Kingdom and France, 3rd September, 1939; against Denmark and Norway, 9th April, 1940; against Belgium, the Netherlands and

(1) For a general account of the United States Law and practice regarding war crime trials held before Military Commissions and Tribunals and Military Government Courts, see Vol. III of this series, pp. 103–120.

(2) The accused Brueggemann was by decision of the Tribunal during the arraignment severed from the case and ordered to be held subject to subsequent proceedings, upon a showing that he was physically unable to stand trial.

Luxembourg, 10th May, 1940 ; against Yugoslavia and Greece, 6th April, 1941 ; against the U.S.S.R., 22nd June, 1941, and against the United States of America, 11th December, 1941."

"(85) The acts and conduct set forth in this count were committed by the defendants unlawfully, wilfully and knowingly, and constitute violations of international laws, treaties, agreements and assurances, and of Article II of Control Council Law No. 10."

Count II

Under Count II of the Indictment all of the accused were charged with the commission of War Crimes and Crimes against Humanity. It was alleged by the Prosecution that War Crimes and Crimes against Humanity, as defined by Control Council Law No. 10, had been committed in that the accused, during the period from 12th March, 1938 to 8th May, 1945, acting through the instrumentality of Farben, participated in "the plunder of public and private property, exploitation, spoliation, and other offences against property, in countries and territories which came under the belligerent occupation of Germany in the course of its invasions and aggressive wars." The charge recites that the particulars set forth constitute "violations of the laws and customs of war," of international treaties and conventions, including Articles 46–56, inclusive, of the Hague Regulations of 1907, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

The Indictment charges that the acts were committed unlawfully, wilfully, and knowingly and that the accused were criminally responsible "in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations or groups, including Farben, which were connected with the commission of said crimes."

The Indictment further alleged : "Farben marched with the Wehrmacht and played a major rôle in Germany's programme for acquisition by conquest. It used its expert technical knowledge and resources to plunder and exploit the chemical and related industries of Europe, to enrich itself from unlawful acquisitions, to strengthen the German war machine and to assure the subjugation of the conquered countries to the German economy. To that end, it conceived, initiated and prepared detailed plans for the acquisition by it, with the aid of German military force, of the chemical industries of Austria, Czechoslovakia, Poland, Norway, France, Russia, and other countries." The particulars of the alleged acts of plunder and spoliation are then enumerated in sub-paragraphs.

Count III

Count III charges the accused, individually, collectively, and through the instrumentality of Farben, with the commission of War Crimes and Crimes against Humanity as defined by Article II of Control Council Law No. 10. It was alleged by the Prosecution that the accused participated in the enslavement and deportation to slave labour of the civilian population

of territory under the belligerent occupation or otherwise controlled by Germany; the enslavement of concentration camp inmates, including Germans; and the use of prisoners of war in war operations and work having a direct relation to war operations. It was further alleged that enslaved persons were mistreated, terrorised, tortured and murdered.

The general charge is followed by a statement of particulars, consisting of twenty-two numbered paragraphs. From these it appears that, to sustain this Count of the Indictment, the Prosecution relied upon four groups of alleged facts characterised as follows: (*a*) the rôle of Farben in the slave labour programme of the Third Reich; (*b*) the use of poison gas, supplied by Farben, in the extermination of inmates of concentration camps; (*c*) the supplying of Farben drugs for criminal medical experimentation upon enslaved persons, and (*d*) the unlawful and inhuman practices of the accused in connection with Farben's plant at Auschwitz.

These acts and conduct of the accused were alleged to have been committed unlawfully, wilfully, and knowingly and to constitute violations of international conventions, particularly of Articles 3, 4, 5, 6, 7, 14, 18, 23, 43, 46 and 52 of the Hague Regulations, 1907, and of Articles 2, 3, 4, 6, 9–15, 23, 25, 27–34, 36–48, 50, 51, 54, 56, 57, 60, 62, 63, 65–68 and 76 of the Prisoner of War Convention (Geneva, 1929), of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10.

Count IV

Count IV charges the accused Schneider, Buetefisch and von der Heyde with membership, subsequent to 1st September, 1939, in Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the "S.S."), declared to be criminal by the International Military Tribunal, and Paragraph 1 (*d*) of Article II of Control Council Law No. 10.

Count V

Count V is predicated on the acts set forth in Counts I, II and III, and charged all the accused, acting through the instrumentality of Farben and otherwise, with having together with diverse other persons, during a period of years preceding 8th May, 1945, participated as leaders, organisers, instigators and accomplices in the formulation and execution of a common plan or conspiracy to commit, or which involved the commission of Crimes against Peace (including the acts constituting War Crimes and Crimes against Humanity, which were committed as an integral part of such Crimes against Peace) as defined by Control Council Law No. 10, and were individually responsible for their own acts and for all acts committed by any persons in the execution of such common plan or conspiracy.

The acts and conduct of the accused set forth in Counts I, II and III of this Indictment were said to form a part of the common plan or conspiracy and all of the allegations made in these Counts were to be regarded as incorporated in Count V.

3. PROGRESS OF THE TRIAL

A copy of the Indictment in the German language was served upon each accused at least thirty days before the arraignment. All of the accused

entered a formal plea of not guilty in open court on the 14th August, 1947, after the arraignment.

The trial itself opened on the 27th August, 1947. Each accused was represented by an approved chief counsel and assistant counsel of his own choice, all of whom were recognised and competent members of the German Bar. In addition, the accused, as a group, had the services of a specialist of their own selection in the field of international law, several expert accountants and an administrative assistant to their chief counsel. The proceedings were conducted by simultaneous translation into the English and German languages and were electrically recorded and also stenographically reported. The trial lasted for 152 days, not including hearings before commissioners. A total of 6,384 documents, including affidavits, were submitted in evidence, of which 2,282 were submitted by the Prosecution and 4,102 by the Defence. Witnesses called, including those heard by the commissioners, numbered 189. Of these 87 were called by the Prosecution and 102 by the Defence. The official transcript of the proceedings comprised 15,638 pages, not including the Judgment.

The evidence was closed on 12th May, 1948. Between 2nd and 11th June, 1948, the Prosecution occupied one day and the Defence six and a half days in oral argument. Each of the accused was allowed to address the court in his own behalf and not on oath. Exhaustive briefs were submitted on behalf of both sides.

The Judgment was delivered and sentences passed on 29th–30th July, 1948.

4. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *The position of the Accused*

Ambros, Otto :

Professor of Chemistry. 1938–1945 member of Vorstand, Technical Committee, and Chemicals Committee ; chairman of three Farben committees in the chemical field ; plant manager of eight of the most important plants, including Buna-Auschwitz ; member of control bodies in several Farben units, including Fancolor.

Member of Nazi Party and German Labour Front ; Military Economy Leader ; special consultant to chief of Research and Development Department, Four-Year Plan ; chief of Special Committee " C " (Chemical Warfare), Main Committee on Powder and Explosives, Armament Supply Office ; chief of a number of units in the Economic Group Chemical Industry.

Buergin, Ernst :

Electro-chemist. 1938–1945 member of Vorstand ; 1937–1945 guest attendant and member of Technical Committee ; chief of Works Combine Central Germany and member of Chemicals Committee during same periods ; chief of the Bitterfeld and Wolfen plants ; member of various Farben control groups in Germany, Norway, Switzerland, and Spain.

Member of Nazi Party and German Labour Front ; Military Economy Leader ; collaborator of Krauch in the Four-Year Plan ; chairman of technical committee for certain important products, Economic Group Chemical Industry.

Buetefisch, Heinrich :

Doctor of Engineering (Physical-Chemical). 1934–1938 deputy member of Vorstand ; 1938–1945 full member of Vorstand ; 1933–1938 member of Working Committee ; 1932–1938 guest attendant in Technical Committee ; 1938–1945 member of Technical Committee ; 1938–1945 deputy chief of Sparte I (under Schneider) ; chief of the Leuna Works ; chairman or member of control groups of many Farben concerns in the fields of chemicals, explosives, mining, synthetics, etc., in Germany, Poland, Austria, Czechoslovakia, Yugoslavia, Roumania and Hungary.

Member of Himmler Circle of Friends ; member of Nazi Party and German Labour Front ; Lieutenant-Colonel of S.S. ; member of NSKK and NSFK ; member of National Socialist Bund of Technicians ; collaborator of Krauch in the Four-Year Plan ; Production Commissioner for Oil, Ministry of Armaments ; president of Technical Experts Committee, International Nitrogen Convention, etc.

Duerrfeld, Walter :

Doctor of Engineering. Not a member of the Vorstand nor of any committees ; 1932–1941 senior engineer of Leuna Works ; 1941–1944 Prokurist of Farben (a position analogous to attorney-in-fact) and chief of construction and installation at the Auschwitz plant ; 1944–1945 director of Auschwitz plant.

1937–1945 member of the Nazi Party ; 1934–1945 member of German Labour Front ; 1932–1945 member of National Socialist Flying Corps (Captain 1943–1945) ; 1944–1945 district chairman of Upper Silesia, Economic Group Chemical Industry.

Gajewski, Fritz :

Ph.D. in chemistry. 1931–1934 deputy member of Vorstand ; 1934–1945 full member of Vorstand ; 1929–1938 member of Working Committee ; 1933–1945 member of Central Committee ; 1929–1945 member of Technical Committee (first deputy chairman 1933–1945) ; 1929–1945 chief of Sparte III ; 1931–1945 chief of Works Combine Berlin ; manager of Agfa plants ; member of board in numerous other subsidiaries and affiliates.

Member of Nazi Party and German Labour Front ; member of National Socialist Bund of German Technicians ; Military Economy Leader ; member of several scientific and economic groups.

Gattineau, Heinrich :

Lawyer. Not a member of the Vorstand but member of Vorstand Working Committee 1932–1935 and of Farben's South-east Europe Committee 1938–1945 ; 1934–1938 chief of Farben's Political Economy Department ; officer or member of control groups in a dozen Farben units and subsidiaries in Germany and south-eastern Europe.

1933–1934 Colonel in the S.A. ; 1935–1945 member of Nazi Party ; member of Council for Propaganda of German Economy ; member of Committee for South-east Europe of the Economic Group Chemical Industry.

Haefliger, Paul :

A Swiss national ; acquired German citizenship in 1941 and relinquished it in 1946. 1926–1938 deputy member of Vorstand ; 1938–1945 full member of Vorstand ; 1937–1945 member of Commercial Committee ; 1938–1945 member of Chemicals Committee ; 1944–1945 vice-chairman and deputy chief for metals of Sales Combine Chemicals ; member of Farben's South-east Europe, East Asia, and East Committees ; chairman or member of Control Groups in several Farben units, including concerns in Germany, Austria, Czechoslovakia, Norway and Italy.

Was not a member of the Nazi Party.

Von der Heyde, Erich :

Doctor in agriculture. Never a member of the Vorstand or any committees ; 1939–1945 " Handlungsbevollmaechtigter " with Farben ; 1936–1940 attached to Farben's Economic Policy Department, Berlin NW 7 ; 1938–1940 counter-intelligence agent for Berlin NW 7, and for a short period deputy to Schneider as chief of Farben's Counter-Intelligence Branch, High Command of the Armed Forces.

1937–1945 member of Nazi Party ; 1934–1945 member of the Reiter (mounted) S.S. (Captain 1940–1945) ; 1942–1945 attached to the Military Economy and Armament Office, German High Command.

Hoerlein, Heinrich :

Professor of Chemistry. 1926–1931 deputy member of Vorstand ; 1931–1945 full member of Vorstand ; 1931–1938 member of Working Committee ; 1933–1945 member of Central Committee ; 1931–1945 member of Technical Committee (second deputy chairman 1933–1945) ; 1930–1945 chairman of Pharmaceutical Committee ; manager of Elberfeld plant.

Member of Nazi Party, National Socialist Bund of German Technicians, member of Reich Health Council ; officer or member of several scientific bodies.

Ilgner, Max :

Doctor of Political Science. 1934–1938 deputy member of Vorstand ; 1938–1945 full member of Vorstand ; 1933–1938 member of Working Committee ; 1937–1945 member of Commercial Committee ; 1926–1945 chief of Farben's Berlin N.W.7 office ; chairman of South-east Committee ; manager of Schkopau Buna Works, deputy manager of Ammoniakwerk Merseburg ; officer or member of central groups of fourteen concerns in seven countries, including American I.G. Chemical Corporation, New York.

1937 member of Nazi Party ; Military Economy Leader ; chairman or member of seven advisory committees to the government.

Jaehne, Friedrich :

Dipl. Engineer. 1934–1938 deputy member of Vorstand ; 1938–1945 full member of Vorstand and member of Technical Committee (guest attendant since 1926) ; 1938–1945 deputy chief of Works Combine Main Valley ; chairman of the Farben Technical Commission ; chief of

engineering department of Hoechst plant ; member of control boards of several Farben units.

Member of Nazi Party ; Military Economy Leader ; member of Greater Advisory Council, Reich Group Industry.

Von Knieriem, August :

Lawyer. 1926–1931 deputy member of Vorstand ; 1931–1945 full member of Vorstand, and occasional guest attendant at meetings of Aufsichtsrat ; 1931–1938 member of Working Committee ; 1938–1945 member of Central Committee ; 1931–1945 guest attendant at meetings of Technical Committee ; 1933–1945 chairman of Legal Committee and Patent Commission ; self-styled " principal attorney " of Farben ; member of board in several Farben units.

Member of Nazi Party, National Socialist Lawyers' Association ; member of four committees and several sub-committees of Reich Group Industry dealing with law, patents, trade marks, market regulation, etc., member of a large number of professional associations.

Krauch, Carl :

Doctor of Natural Science, Professor of Chemistry. Member of Vorstand and of its Control Committee ; member and chairman of Aufsichtsrat 1940–1945 ; chief of Sparte I 1929–1938 ; chief of Berlin Liaison Office (Vermittlungsstelle W) ; member of the board in a number of major Farben subsidiaries and affiliates, including the Ford Works at Cologne.

In April, 1936, placed in charge of the Research and Development Department for Raw Materials and Foreign Currency on Goering's staff ; October, 1936, in charge of Research and Development Department in the Office of German Raw Materials and Synthetics, under the Four-Year Plan ; July, 1938–1945, Plenipotentiary General for Special Questions of Chemical Production ; December, 1939, Commissioner for Economic Development under Four-Year Plan ; 1938–1945 Military Economy Leader ; member of Directorate, Reich Research Council.

1937 member of Nazi Party ; member of NSFK.

Kuehne, Hans :

Chemist. 1926–1945 member of Vorstand and of Working Committee until 1938. 1925–1945 member of Technical Committee ; 1933–1945 chief of Works Combine Lower Rhine ; 1926–1945 member of Chemicals Committee ; plant leader of Leverkusen plant ; officer or member of Aufsichtsrat in numerous Farben concerns within Germany and eight in five other countries.

Became a member of the Nazi Party in 1933 but was expelled shortly thereafter and not reinstated until 1937 ; member of groups in economic, commercial, and labour offices of the Reich and local Governments.

Kugler, Hans :

Doctor of Political Science. Not a member of the Vorstand ; 1928–1945 Dokurist (with title of " Director ") ; 1933–1945 member of Commercial

Committee ; 1938–1945 member of Dyestuffs Application Committee ; 1934–1945 chief of Sales Department Dyestuffs for Hungary, Roumania, Yugoslavia, Czechoslovakia, Austria, Greece, Bulgaria, Turkey, the Near East, and Africa ; 1939–1945 member of Farben's South-east Europe Committee ; 1942–1944 member of Commercial Committee of Francolor, Paris.

1939–1945 member of Nazi Party.

Lautenschlaeger, Carl :

Doctor of Medicine, Doctor of Chemical Engineering, Professor of Pharmacy, honorary senator (regent) of the University of Marburg, formerly scientific assistant at the Physiological Institute of the University of Heidelberg and at the Pharmacological Institute of the University of Freiburg in Breisgau. 1931–1938 deputy member of Vorstand ; 1938–1945 full member of Vorstand, member of Technical Committee, and chief of Works Combine Main Valley ; 1926–1945 member of Pharmaceuticals Committee.

1938–1945 member of Nazi Party ; 1942–1945 Military Economy Leader.

Mann, Wilhelm :

Commercial school graduate. 1931–1934 deputy member of Vorstand ; 1934–1945 full member of Vorstand ; 1931–1938 member of Working Committee ; 1937–1945 member of Commercial Committee ; 1931–1945 chief of Sales Combine Pharmaceuticals ; 1926–1945 member of Farben Pharmaceuticals Committee ; chairman of East Asia Committee ; official or member of numerous control groups in Farben concerns (including chairmanship in " DEGESCH ").

Member of Nazi Party ; member of S.A. with rank of lieutenant ; member of Greater Advisory Council, Reich Group Industry.

Ter Meer, Fritz :

Ph.D. in chemistry. 1926–1945 member of Vorstand ; 1926–1938 member of Working Committee ; 1933–1945 member of Central Committee ; 1925–1945 member of Technical Committee (chairman 1933–1945) ; 1929–1945 chief of Sparte II ; 1936–1945 technical representative on Dyestuffs Committee ; officer or member of control groups of numerous Farben units, subsidiaries and affiliates, including Francolor, Paris.

Member of Nazi Party ; Military Economy Leader ; member of National Socialist Bund of German Technicians ; member of Economic Group Chemical Industry, holding several official positions and titles.

Oster, Heinrich :

Doctor of Philosophy (chemistry). 1928–1931 deputy member of Vorstand ; 1931–1945 full member of Vorstand ; 1929–1938 member of Working Committee ; 1937–1945 member of Commercial Committee ; 1930–1945 manager of Nitrogen Syndicate ; chief of Farben's sales organisation for nitrogen and oil ; member of several control groups in Germany, Austria, Norway and Yugoslavia.

Member of Nazi Party ; supporting member of S.S. Reitersturm (mounted unit).

Schmitz, Hermann :

Commercial college graduate. 1925–1945 member of Vorstand ; 1930–1945 member of Central Committee ; 1935–1945 chairman of Vorstand and guest attendant at meetings of Aufsichtsrat ; 1929–1945 chairman of the board, I.G. Chemie Basel, Switzerland ; 1937–1939 chairman of the board, American I.G. Chemical Corp., New York ; chairman of Aufsichtsrat, DAG (formerly Alfred Nobel & Co.) ; member of Aufsichtsrat, Friedrich Krupp A.G., Essen ; chairman or member of control groups in several other subsidiary and affiliated Farben concerns.

1933 member of Reichstag ; chairman of the Currency Committee of the Reichsbank ; member or chairman of control groups in several financial institutions. Member of Committee of Experts on Raw Materials questions; member of Select Advisory Council, Reich Group Industry ; Military Economy Leader.

Schneider, Christian :

Chemist. 1928–1937 deputy member of Vorstand ; 1938–1945 full member of Vorstand and of Central Committee ; 1937–1938 member of Working Committee ; 1929–1938 guest attendant at meetings of Technical Committee, full member 1938–1945 ; 1938–1945 chief of Sparte I ; 1937–1945 chief of plant leaders and chief counter-intelligence agent of Vermittlungsstelle W ; chief of Farben's Central Personnel Department ; member of control bodies of several Farben units.

Member of Nazi Party ; supporting member of S.S. ; member of Advisory Council, Economic Group Chemical Industry ; member of Experts Committee, Reich Trustee of Labour.

Von Schnitzler, Georg :

Lawyer. 1926–1945 member of Vorstand ; 1926–1938 member of Working Committee ; 1930–1945 member of Central Committee ; 1929–1945 guest attendant of Technical Committee ; 1937–1945 chairman of Commercial Committee ; 1930–1945 chief of Dyestuffs Sales Combine ; various periods between 1926 and 1945 member of other Farben committees, etc.

Member of Nazi Party ; Captain of S.A. (" Sturmabteilung " of the Nazi Party) ; Military Economy Leader ; member of Greater Advisory Council, Reich Group Industry ; deputy chairman, Economic Group Chemical Industry ; chairman, Council for Propaganda of German Economy ; member of Aufsichtsrat, Francolor, Paris ; officer or member of Aufsichtsrat of other Farben affiliates.

Wurster, Karl :

Doctor of Chemistry. 1938–1945 member of Vorstand, Technical Committee, and Chemicals Committee ; 1940–1945 chief of Works Combine Upper Rhine ; member of Aufsichtsrat in several Farben concerns.

Member of Nazi Party ; Military Economy Leader ; collaborator of Krauch in the Four-Year Plan, Office for German Raw Materials and Synthetics ; acting vice-chairman of Presidium, Economic Group Chemical Industry, and chairman of its Technical Committee ; Sub-Group for Sulphur and Sulphur Compounds.

(ii) *Evidence relating to the origin, growth, and financial and administrative construction of I.G. Farbenindustrie A.G.*

The designation Farben, as used in the Indictment, has reference to Interessen-Gemeinschaft Farbenindustrie Aktiengesellschaft, which is usually abbreviated to I.G. Farbenindustrie A.G., and which may be freely translated as meaning " Community of Interests of the Dyestuffs Industries, a Stock Corporation." The corporation is generally referred to as I.G. in the German transcript of the proceedings and as Farben in the English.

Farben came into being during 1925, when the firm of Badische Anilin und Soda Fabrik of Ludwigshafen changed its name to the present designation and merged with five of the other leading German chemical concerns. From 1904, however, some of these firms had been working under community of interest agreements, and in 1916 they had formed an association council to exercise a measure of joint control over production, marketing and research and for the pooling of profits. By 1926 the merger had been effected with a capital structure of 1.1 billion Reichsmarks, which exceeded by three times the aggregate capitalisation of all the other chemical concerns of any consequence in Germany. As a consequence Farben steadily expanded its production and its economic power. In 1926 the firm had a staff of 93,742 persons and an annual turnover of 1,209 million Reichsmarks. By 1942 the staff had increased to 187,700 persons and the turnover to 2,904 million Reichsmarks. At the peak of its activities the yearly turnover of the firm exceeded three billion Reichsmarks.

Farben owned or held participating interest in 400 German firms and in about 500 firms in other countries. It also controlled some 40,000 valuable patent rights. The prosecution referred to the firm as " A State within the State."

The evidence showed that Farben's achievements were particularly outstanding in chemical research and in the practical utilisation of its discoveries. Among the many pharmaceutical products which Farben developed and sponsored may be mentioned aspirin, stabrin, the salvarsans. Two of its trademarks, the " Bayer-Cross " in the pharmaceutical field and " Agfa " in photography, are well known throughout the world. In the industrial sphere Farben was a pioneer in the development of the intricate processes by virtue of which dyestuffs, methanol, the plastics, artificial fibres, and light metals are commercially produced on a large scale. The firm played an especially important rôle in the discovery and development of the processes for making Buna rubber, nitrogen from the air, and petrol and lubricants from coal.

An enterprise of the magnitude and diversified interest of Farben required a comprehensive and intricate plan of corporate management. The controlling and managing bodies concerned were :

(a) *The Stockholders.* They numbered approximately half a million. There was an annual meeting, usually attended by financial representatives of groups of shareholders, at which reports were received and considered, capital increases and amendments to the charter were approved, and members of the Aufsichtsrat elected.

(b) *The Aufsichtsrat* comprised 55 members at the time the merger was effected, but this number was reduced to 23 in 1938 and to 21 by 1940.

This body was in the nature of a supervisory board. Under German law the Aufsichtsrat elected and removed members of the Vorstand, called special meetings of the stockholders, and had the right to examine and audit the books and accounts of the firm.

(c) *The Vorstand* was charged with the actual responsibility for the management of the corporation and represented it in dealings with others. When the Farben merger took place in 1925–1926, its Vorstand consisted of 82 members and most of its functions were delegated to a Working Committee of 26 members. In 1938 the Vorstand was reduced to less than 30 members and the Working Committee was abolished. There was also a Central Committee within the Working Committee, which survived the abolition of the latter. The Vorstand met, on the average, every six weeks and was presided over by a chairman, who, in some respects, was regarded as its executive head and in others merely as *primus inter pares*. In addition to their joint responsibilities, the members of the Vorstand were assigned to positions of leadership in specific fields of activity, roughly grouped under technical and commercial agencies, which were :

(1) *The Technical Committee (TEA)* which was composed of the technical members of the Vorstand and the leading scientists and engineers of Farben. It dealt with questions of research, development of processes, expansion and consolidation of plant facilities, and credit requests for such purposes. Beneath it were 36 sub-committees in chemistry and 5 in engineering. The Technical Committee had a central administrative office in Berlin, called the TEA-Buere, and the 5 engineering sub-committees were grouped together as a Technical Commission (TEED).

(2) *The Commercial Committee* (*KA*) which concerned itself primarily with financial, accounting, sales, purchasing, and economic political problems. The full committee consisted of about 20 members, including, in addition to Vorstand members, the heads of the Sales Combines and other administrative agencies.

(3) *Mixed Committees*. Co-ordination between the Technical and Commercial Committees was achieved through special groups that drew their personnel from both fields. The more important of these were the Chemical Committee, the Dyestuffs Committee, and the Pharmaceutical Main Conference.

The numerous Farben plants were operated on the so-called leadership principle. A major unit was usually under the personal supervision of an individual Vorstand member, though in some instances one member was responsible for more than one unit, while in others a diversion of responsibility prevailed within the plant, according to production.

Unity in policies of management was achieved by grouping the plants geographically and also in accordance with the character of production in the following way :

(1) *The Works Combines* constituted the basis for geographical co-ordination of the Farben plants. The four original combines were the Upper Rhine, the Main Valley, the Lower Rhine, and Central Germany. In 1929 a fifth, called Works Combine Berlin, was added. The works

combines co-ordinated such matters as overall administration, transportation, storage, etc., in their respective areas.

(2) *The Sparton* constituted a means of co-ordinating Farben production activities on the basis of related products. Thus Sparte I included nitrogen, synthetic fuels, lubricants and coal. Sparte II embraced dyestuffs and their intermediates, Buna, light metals, chemicals and pharmaceuticals. Sparte III embraced synthetic fibres, cellulose and cellophane, and photographic materials.

(3) *Sales Combines* were established to handle the marketing of the four principal categories of Farben products. Each combine was headed by a Vorstand member, with deputies. These were the Sales Combine Dyestuffs, the Sales Combine Chemicals, the Sales Combine Pharmaceuticals, and the Sales Combine Agfa (photographic materials, artificial fibres, etc.).

(4) *The Central Finance Administration* (*ZEFI*) was established in 1927 in connection with an office designated *Berlin NW 7*. To this was added the *Economic Research Department* (*WIPO*) in 1933. In 1933, a central office for liaison with the armed forces, called *Vermittlungsstelle W*, was added. This office dealt with such matters as mobilisation questions, military security, counter-intelligence, secret patents, and research for the armed forces. Each Sparte was represented on its staff.

(iii) *Evidence relating to Counts I and V.—Crimes against Peace and Conspiracy to Commit such Crimes.*

Counts I and V involved the same evidence.

The Prosecution spent considerable time in attempting to establish that for some time prior to the outbreak of war there existed in Germany public or *common knowledge* of Hitler's intention to wage aggressive war. It introduced in evidence excerpts from the programme of the Nazi Party. This summarisation of the programme of the NSDAP consisted of twenty-five points and was published in the *National Socialistic Year Book* in 1941. The programme itself, however, was first publicly proclaimed on 24th February, 1920, and remained unaltered down to 1941. The Prosecution also introduced in evidence excerpts from Hitler's *Mein Kampf* which were more belligerent in tone. Their basic theme was that the frontiers of the Reich should embrace all Germans. This book had a circulation throughout Germany of over six million copies.

Mein Kampf was, however, written before Hitler's party came to power and it was shown, as a matter of history, that what Hitler had said in *Mein Kampf* was consistent with statements he had made to his immediate circle of confidants and plotters, but that it was entirely inconsistent with his many speeches and the proclamations which he made as head of the Reich for public consumption.

Thus on 17th May, 1933, in addressing the German Reichstag, Hitler had stressed the futility of violence as a medium for improving the conditions of Germany and Europe and asserted that such violence would necessarily cause a collapse of the social and political order and would result in Communism. He had then said: ". . . Germany is at all times

prepared to renounce offensive weapons if the rest of the world does the same. Germany is prepared to agree to any solemn pact of non-aggression because she does not think of attacking but only of acquiring security." On the 14th October, 1933, Hitler announced the withdrawal of Germany from the League of Nations in a radio speech filled with protestations of the friendly intentions of the Reich and his government's devotion to the cause of peace. In announcing the Four-Year Plan to the German public in a speech at the Nazi Party Rally at Nuremberg on the 9th September, 1938, Hitler had justified the increase in Germany's armed forces upon the ground that this was necessary and in proportion to the increasing dangers surrounding Germany. He then said: "The German people, however, has no other wish than to live in peace and friendship with all those who want the peace and who do not interfere with us in our own country." On the 30th January, 1937, Hitler made a speech in the Kroll Opera House in Berlin, in which he again discussed the Four-Year Plan and announced a city-planning of construction for Berlin, concerning which he said: "For the execution of that plan, a period of twenty years is provided. May the Almighty grant us peace, during which the gigantic task may be completed."

The evidence also showed that even high ecclesiastical leaders and statesmen were misled as to Hitler's ultimate purpose. Thus, on 18th March, 1938, Cardinal Innitzer and the bishops of Austria had issued from Vienna a solemn declaration in which they said: "We recognise with joy that the National Socialist movement has produced outstanding achievements in the spheres of national and economic reconstruction as well as in their welfare policy for the German Reich and people, and in particular for the poorest strata of the people. We are convinced that through the activities of the National Socialist movement the danger of all-destroying Godless Bolshevism was averted."

The aggressive attitude on the part of Hitler culminated in the Munich Agreement of 29th September, 1938, in which Germany and the United Kingdom, France and Italy agreed to the occupation of the Sudeten area by German troops and the determination of its frontiers by an international commission. On the following day Hitler and the British Prime Minister, Neville Chamberlain, signed an accord in which they, among others, stated: "We regard the Agreement which was signed last evening and the German-English Naval Agreement as symbolic of the wish of our two peoples never again to wage war against each other. We are determined to treat other questions which concern our two countries also through the method of consultation and further to endeavour to remove possible causes of difference of opinion in order thus to contribute towards assuring the peace of Europe."

On the 6th December, 1938, Germany and France signed a declaration of pacific and neighbourly relations. Even in the presence of the activities carried out and the violent pressure which was brought to bear in connection with the liquidation of the remainder of Czechoslovakia, Hitler continued to emphasise his love of peace and the necessity of providing for the defence of Germany. In April, 1939, Hitler issued strict directives to the High Command to prepare for war against Poland. In spite of this he declared in a speech to the Reichstag on the 28th April, 1939, that whilst the Polish Government "under the pressure of a lying international campaign"

believed that it must call up its troops, " Germany on her part has not called up a single man and had not thought of proceedings in any way against Poland." The intention to attack on the part of Germany, he said, " was merely invented by the international press. . . ."

Later on in 1939, Hitler entered into non-aggression pacts with other European states. There followed the German-Danish non-aggression pact of 31st May, 1939 ; a non-aggression pact between the German Reich and the Republic of Estonia of 7th June, 1939 ; a similar pact with the Republic of Latvia on the same date. On 23rd August, 1939, Germany and the Union of Socialist Soviet Republics likewise entered into a non-aggression pact. These agreements were all made public and were of such a nature as to tend to conceal rather than to expose an intention on the part of Hitler and his immediate circle to start an aggressive war. The statesmen of other nations, conceding Hitler's successes by the agreements they made with him, thus affirmed their belief in his word.

It will appear from what has been stated above that the evidence failed to show the existence of a common knowledge of Hitler's plans, either with respect to a general plan to wage war, or with respect to the specific plans to attack individual countries, beginning with the invasion of Poland on 1st September, 1939.

The evidence showed that a plan or conspiracy to wage wars of aggression did exist. It was primarily the plan of Hitler and was participated in, as to both its formation and execution, by a group of men having particularly close and confidential relationship with the Dictator. It was a secret plan. At first, it was general in scope and later became more specific and detailed. It was not clear when Hitler first conceived his general plan of aggression or with whom he first discussed it. It was, however, an established fact that he made a definite disclosure at a secret meeting on 15th November, 1937. The persons present were Colonel Hossbach, Hitler's personal Adjutant ; Goering, von Neurath, Raeder, General von Blomberg and General von Fritsch. This meeting was followed by other secret meetings of special significance on 23rd May, 1939, 22nd August, 1939, and 23rd November, 1939. Thus three of the meetings had preceded the invasion of Poland. None of the accused attended these meetings.

In these circumstances the question arose whether the accused could be shown to have had *personal knowledge* of the criminal intentions of the German Government to wage aggressive wars and, if so, whether they were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war.

The Prosecution in their attempt to prove the existence of such knowledge and active participation, drew attention to the high positions held by the accused as well as to a great number of facts and circumstances from which such knowledge and participation in their view may be inferred. The evidence submitted on this point was, however, conflicting.

The Prosecution regarded Carl Krauch as the most important accused in this case because of the high positions which he held both with the government and with Farben. The accused Krauch became a member of the Vorstand in 1933 and continued in that position until 1940, when he became

a member of the Aufsichtsrat. From 1929 to 1938 he was chief of Sparte I. He had only once talked to Hitler, namely in 1944, and on that occasion he had been reprimanded by Goering, who was also present, for failure properly to plan and supervise air raid protection for plants that had been severely bombed by the Allied air forces. When, in 1934, it had been decided to create a " War Economic Central Office of Farben for all matters of military economy and questions of military policy," the accused Krauch had been instrumental in organising this agency, known as Vermittlungsstelle W. The purpose of this agency was to act as a clearing house for information concerning rearmament between the various plants and agencies of Farben and the Reich authorities in charge of the rearmament of Germany. Although it received and distributed information, it was clear from the evidence that it was not an agency for determining policy or for the giving of orders regarding a policy that had already been determined. It was a part of the programme for rearmament, but neither its organisation nor its operation gave any hint of plans for aggressive war.

In 1936, the accused Krauch joined Goering's staff for Raw Materials and Foreign Currency which had just been set up, and was put in charge of the Research and Development Department. When this staff was absorbed into the office of the Four-Year Plan, headed by Goering, the accused Krauch retained the same position in the Office for German Raw Materials and Synthetics. In 1938 when Hitler and Goering decided to step up production under the Four-Year Plan, the accused Krauch was appointed Plenipotentiary General for Special Questions of Chemical Production. Krauch, however, was not authorised to decide questions relating to current chemical production. Neither could he issue production orders or interfere with the allocation of production. His authority was limited largely to giving expert opinions on technical development, recommending plans for the expansion or erection of plants, and general technical advice in the chemical field. The evidence was clear that he did not participate in the planning of aggressive wars. Neither had he actual knowledge of the existence of such plans. The evidence also showed that the accused Krauch had no connection with the initiation of any of the specific wars of aggression or invasions in which Germany engaged. The plans were made by and within a closely guarded circle and the accused Krauch was excluded from membership in that circle.

The evidence also showed that no definite inference in this respect could be drawn by Krauch and the other accused from the gigantic expansion of the German war industry in general or of the Farben production in particular. In order to conceal Germany's growing military power, strict measures were undertaken to impose secrecy, not only on military matters, but also regarding Germany's growing industrial strength. This had served two purposes. It tended to conceal the true facts from the world and from the German public. Secondly, it tended to keep the people who were actually participating in the rearmament from learning of the progress being made outside of their specific fields of endeavour. Even people in high positions were kept in ignorance and were not permitted to disclose to each other the extent of their individual activities. Thus Keitel had objected to the accused Krauch's appointment as Plenipotentiary General for Special Questions of Chemical Production, on the ground that Krauch, as a man of

industry and not of the military, should not obtain insight into the armament field. The evidence showed that Krauch, although he was appointed over the objection of Keitel, was never fully trusted by the military. The evidence does not show that anyone told Krauch that Hitler had a plan or plans to plunge Germany into aggressive war. Neither did the positions that Krauch held with reference to the government necessarily result in the acquisition of such knowledge. After the attack on Poland, the accused, Krauch, stayed at his post and continued to function within those spheres of activity in which he was already engaged. From the evidence there seemed to be no doubt that he had contributed his efforts in much the same manner and measure as thousands of other Germans who occupied positions of importance below the level of the Nazi civil and military leaders who were tried and condemned by the International Military Tribunal.

As regards the other accused the evidence showed that all of them were further removed from the scene of Nazi governmental activity than was Krauch. The evidence did not show that they had any general or specific knowledge of the plans or conspiracy of the German State and party leaders to wage aggressive wars and invasions. Neither could such knowledge be inferred on their part from the extent to which general rearmament had been planned and progressed. The accused may have been alarmed at the accelerated pace that armament was taking, as some of them undoubtedly were. Yet, even Krauch, who participated in the Four-Year Plan within the chemical field, did not realise that, in addition to strengthening Germany, he was participating in making the nation ready for a planned attack of an aggressive nature.

(iv) *Evidence relating to Count II—The Accused's Responsibility for Participation in the Plunder and Spoliation of Public and Private Property in Countries and Territories which came under the Belligerent Occupation of Germany.*

The following general facts which were established by the International Military Tribunal at Nuremberg, in the case against Goering *et al.*, were adopted by the present Tribunal:

(1) That the Reich adopted and pursued a general policy of plunder of occupied territories in contravention of the provisions of the Hague Regulations with respect to both public and private property.

(2) That territories occupied by Germany had been exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.

(3) That in some of the occupied territories in the East and West, this exploitation had been carried out within the framework of the existing economic structure. The local industries had been put under German supervision, and the distribution of war materials had been rigidly controlled. The industries thought to be of value to the German war effort had been compelled to continue and most of the rest had been closed down altogether.

(4) That in many of the occupied countries of the East and the West, the German authorities maintained the pretence of paying for all the property which they seized. This elaborate pretence of payment, however,

merely disguised the fact that the goods sent to Germany from these occupied countries were paid for by the occupied countries themselves, either by the device of excessive occupation costs or by forced loans in return for a credit balance on a " clearing account " which was in fact only an account in name.

With reference to the particular charges in the present Indictment concerning Farben's activities in Poland, Norway, Alsace-Lorraine and France, the evidence submitted established to the Tribunal's satisfaction that the offences against property as defined in Control Council Law No. 10 had been committed by Farben,(1) and that these offences were connected with, and were an inextricable part of, the German policy for occupied countries as described above. In some instances, following confiscation by the Reich authorities, Farben had proceeded to acquire permanent title to the properties thus confiscated. In other instances involving " negotiations " with private owners, Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners. These activities had been concluded by entering territory that had been overrun and occupied by the Wehrmacht, or was under its effective control. In those property acquisitions which followed confiscation by the Reich, the course of action of Farben clearly indicated a studied design to acquire such property. In most instances the initiative was Farben's.

(a) *Evidence with particular reference to Farben's participation in the Spoliation of Public and Private Property in Poland.*

On 7th September, 1939, following the invasion of Poland, the accused von Schnitzler telegraphed to director Kreuger of Farben's Directorate in Berlin, requesting that the Reich Ministry of Economics be informed of the ownership and other facts concerning four important Polish dyestuffs factories which, it was assumed, would fall into the hands of the Germans within a few days thereafter. The plant facilities involved were those of Przemysl Chemiczny Boruta, S. A. Zigiers (Boruta), Chemiczna Fabryka Wola Krzystoporska (Wola) and Zaklady Chemiczne Winnicy (Winnica). Boruta was the property of, and controlled by, the Polish State. Wola was owned by a Jewish family by the name of Szpilogel, and Winnica was ostensibly owned by French interests, but in reality there was a secret fifty per cent. ownership in I.G. Chemie of Basel, actually controlled by Farben. Von Schnitzler pointed out that the Boruta and Wola were wholly owned by Polish interests and were members of the dyestuffs cartel and continued : " Although not wanting to take a position on further operation, we consider it of primary importance that the above-mentioned stocks be used by experts in the interests of German national economy. Only I.G. is in a position to make experts available." Shortly afterwards, on 14th September, 1939, the accused von Schnitzler and Kreuger addressed a letter to the Ministry of Economics confirming a conference of that same date and proposing that Farben be named as trustee to administer Boruta, Wola and Winnica, to continue operating them, or to close them down, to utilise their supplies, intermediate and final products. Replying to this letter, the Reich Ministry of Economics advised that it had decided to comply with Farben's suggestion

(1) I. G. Farbenindustrie A.G., however, was not indicted itself, but it was alleged by the Prosecution that the accused had acted " through the instrumentality of Farben."

and would place Boruta, Wola and Winnica, now located in Polish territory occupied by German forces, under provisional management. It agreed to name the Farben-recommended employees as provisional managers. This exhibit indicated that the action of the Reich authorities in relation to these properties was directly instigated by Farben, whose nominees took possession of the plants early in October, 1939. In June, 1940, a decision was reached whereby Farben was allowed to purchase Boruta instead of executing a 20 years lease, as originally proposed by von Schnitzler. Competition had existed for the purchase of this property and it was in April, 1941, that the accused von Schnitzler was advised that Reichsfuehrer S.S. Himmler had decided to allocate Boruta to Farben. The sales contract was signed by von Schnitzler on 27th November, 1941, and resulted in Farben acquiring the land, buildings, machinery, equipment, tools, furniture and fixtures.

The acquisition of the French interests, consisting of 1,006 shares of the stock of Winnica, was arrived at by agreement with the French. The evidence, however, did not show that the French were deprived of their ownership against their will and consent.(1)

The evidence showed that on Farben's recommendation, equipment from both Wola and Winnica had been dismantled and shipped to Farben plants in Germany.

(b) *Evidence with particular reference to the Alleged Participation by Farben in the Spoliation of Property in Norway.*

Following the aggression against and military occupation of Norway, Hitler decided that the Norwegian aluminium capacity should be reserved for the requirements of the Luftwaffe. Goering issued the appropriate orders pursuant to which Dr. Koppenberg, in his capacity as trustee for aluminium, was entrusted with special powers to expand the production of light metals in Norway.

Norsk-Hydro-Elektrisk Kvaelstoffaktieselskap (referred to as Norsk-Hydro) was one of Norway's most important plants in the chemical and related industrial fields. Its facilities were required for the German project, and certain of its plants were to be expanded and properties transferred to accomplish the German objectives. The decision to carry out this project was made at the highest governmental levels and the entire power of the military occupant was available to carry it out.

The evidence showed that Farben immediately entered into this large-scale planning and fought for as large a capital participation as possible.

The controlling stock interests in the Norsk-Hydro, amounting to approximately 64 per cent. of the capitalisation was owned by a group of French shareholders represented by the Banque de Paris et des Pays Bas (referred to as Banque de Paris). The plan finally evolved by the Reich Air Ministry, after numerous conferences in which Farben representatives participated, resulted in the creation of a new corporation, Nordisk Lettmetall, with one-third interest in the Reich Government, one-third interest in Farben and one-third interest in Norsk-Hydro. The French

(1) The Tribunal contains the following remark on this point: " The evidence on the basis of which the transfer of shares was declared invalid by the French Court has not been introduced."

owners of Norsk-Hydro did not voluntarily enter the Nordisk-Lettmetall project and the circumstances prevailing at that time left no doubt that pressure from the Nazi Government and fear of compulsory measures affecting the Norwegian holdings were the dominating considerations. In this manner Norsk-Hydro was forced to join the project and its properties were heavily damaged in subsequent Allied air raids. The evidence established that the Reich authorities deliberately planned to execute the project in such a manner as to deprive Norsk-Hydro's French shareholders of their majority interest in that company and that Farben joined in this aspect of the plan too. As a result of a shareholders' meeting on the 20th June, 1941, which the French shareholders or their representatives were deliberately barred from attending, the capital stock was increased, with the effect that the French shareholders actually became a minority group. Thus the French shareholders were deprived of their majority interest in Norsk-Hydro under compulsion.

(c) *Evidence with Particular Reference to the Alleged Participation by Farben in the Spoliation of Property in France.*

(1) *Alsace-Lorraine.*

Farben's action in occupied Alsace-Lorraine followed the pattern developed in Poland. Thus the Mulhausen plant of the Societe des Produits Chimiques et Matiers Colorantes de Mulhouse, located in Alsace, was leased by the German Chief of Civil Administration to Farben on the 8th May, 1941. Farben even went into possession of the property prior to the execution of the lease for the purpose of starting production again. It was clear from the terms of the lease agreement that temporary operation in the interest of the local economy was not contemplated and that the lease was purely transitional to permanent acquisition by Farben. Pursuant to an express provision in the agreement a formal governmental decree of seizure and confiscation, transferring the property to the German Reich, was entered on 23rd June, 1943, followed by the sale of the property to Farben on 14th July, 1943.

The evidence showed that in the case of the Strassbourg-Schiltigheim oxygen and acetylene plants, similar action was taken by Farben. After first taking a lease, Farben acquired permanent title to the plants following the governmental confiscation which was without any legal justification under international law. In none of these transactions were the rights of the owners considered.

In the case of the Diedenhofen plant, located in Lorraine, the plant was leased to Farben but permanent title was never acquired. Farben had urged its claims to purchase upon the occupying authorities, but from some reason or other, not clear from the evidence, Farben met with difficulties in this instance. The evidence did not establish that the owners of this property had been deprived of it permanently or that its use was withheld contrary to the owners' wish.

(2) *The Francolor Agreement.*

Three of the major dyestuffs firms of France, prior to the war, were Compagnie Nationale de Matieres Colorantes et Manufactures de Produits Chimique du Nord Reunies Etablissements Kuhlmann, Paris (referred to

as Kuhlmann) ; Societe Anonyme des Materieres Colorantes et Produits Chimique de Saint Denis, Paris (referred to as Saint Denis) ; and Compagnie Française de Produits Chimiques et Matieres Colorantes de Saint-Clair-du-Rhone, Paris (referred to as Saint-Clair-du-Rhone). These three firms had cartel agreements with Farben.

Immediately after the armistice of 1940 Farben used its influence with the German occupation authorities to prevent the issuance of licences and to stop the flow of raw materials which would have permitted these French factories to resume their normal pre-war production. When, as a result of this policy, their plight became sufficiently acute they were forced to request the opening of negotiations with Farben and the German authorities. A conference was held on 21st November, 1940, in Wiesbaden, at which representatives of Farben, the French industry, and the French and German governments were in attendance. The meeting was under the official auspices of the Armistice Commission. The accused, von Schnitzler, ter Meer and Kugler attended as the principal representatives of Farben. A memorandum read by von Schnitzler was presented to the French representatives, in which Farben demanded a controlling interest in the French dyestuffs industry. The German demands, set forth in the Farben memorandum, was vigorously supported by Ambassador Hammen, who pointed out the grave danger to the French dyestuffs industry if its future should be relegated to settlement by the peace treaty rather than through the medium of the " negotiations." Other meetings and negotiations of a similar kind followed. It became increasingly clear, as the negotiations progressed, that this was a matter which would be settled entirely on Farben's terms. Farben's demand was for outright control of the French dyestuffs industry by 51 per cent. participation in the stock of a new corporation, Francolor, which was to be formed to take over all of the assets of Kuhlmann, Saint-Clair and Saint-Denis. The French representatives still protested, and even had the support of the French governmental authorities. But the French industry's plight became too desperate and finally, on 10th March, 1941, the Vichy Government gave its approval to the plan for the creation of the Franco-German Dyestuffs Company, Francolor, in which Farben was to be permitted to acquire 51 per cent. stock interest. The French industry was forced to give in. The Francolor Convention was formally executed on 18th November, 1941; it was signed by the accused von Schnitzler and ter Meer on behalf of Farben. Overwhelming proof established the pressure and coercion employed to obtain the consent of the French to the Francolor agreement.

(3) *Rhone-Poulenc.*

Prior to the war the French firm Societe des Usines Chemique Rhone-Poulenc, Paris (referred to as Rhone-Poulenc), was an important producer of pharmaceuticals and related products. After the armistice Farben entered into two agreements with this firm. Under the first agreement substantial sums of money were paid to Farben during the war years on products covered by the licensing agreement and manufactured by the French firm. Under the second agreement, the so-called Theraplix Agreement, Farben eventually acquired a majority interest in a joint sales company operated in the joint interest of I.G. Bayer and Rhone-Poulenc. It appeared

from the evidence that the pressure sought to be exercised in inducing the French to enter into these agreements could not have been carried out by military seizure of the physical properties as these were located in the unoccupied zone of France.

(d) *Evidence with Particular Reference to the Alleged Participation by Farben in the Spoliation of Property in Russia.*

Farben, acting through the accused Ambros, selected and appointed experts to go to Russia to operate the Buna rubber plants expected to fall into German hands and urged its priority rights to exploit the Russian processes in the Reich. Farben also participated in plans for the organisation of the so-called Eastern corporations, which were to have an important part in reprivatising Russian industry. These plans, however, did not materialise in any completed acts of spoliation.

(e) *Evidence with Particular Reference to the Accused's Individual Responsibility under Count II.*

There was not sufficient evidence to connect any of the following accused by any personal action on their part with the acts of spoliation carried out by Farben in any of the instances enumerated above: Krauch, Gajewski, Hoerlein, von Knieriem, Schneider, Kuehne, Lautenschlaeger, Ambros, Beutefisch, Mann, Wuerzter, Duerrfeld, Gattineau, and von der Heyde. On the other hand there was overwhelming evidence to show that the accused Schmitz had played an active part in the spoliation of Norsk-Hydro and in the negotiations which brought about the Francolor agreement. The evidence did not, however, sustain the charges against him as far as the participation of Farben in the spoliation of Poland and Alsace-Lorraine is concerned. As to the accused von Schnitzler, the evidence established his personal responsibility for the participation of Farben in the spoliation of Poland and the negotiations which led to the Francolor agreement, whilst it failed to prove such responsibility in connection with the spoliation of Norsk-Hydro and in Alsace-Lorraine. As regards the accused ter Meer, the evidence showed that he also had been personally responsible for the participation of Farben in the spoliation of Poland and Alsace-Lorraine, as well as in the negotiations which resulted in the Francolor agreement. He could, however, not be connected with the spoliation of Norsk-Hydro. With regard to the accused Jaehne, the evidence established his complicity in the spoliation of Alsace-Lorraine, but it failed to prove his responsibility for the other acts of spoliation charged against him. As to the remainder of the accused, Buergin, Haefliger, Ilgner and Oster, the evidence established their co-responsibility for Farben's exploitation of Norsk-Hydro, but failed to sustain the other charges brought against them under Count II. Kugler was found to have been to some degree connected with the execution of the Francolor agreement.

(v) *Evidence relating to Count III.*

(a) *The Use of Poison Gas, supplied by Farben, in the Extermination of Inmates of Concentration Camps.*

The poison gas Zyklon-B had a wide use as an insecticide long before the war. The property rights to Zyklon-B belonged to the firm of Deutsche

Gold und Silberscheideanstalt, commonly referred to as Degussa. But actual manufacture was performed for it by two independent concerns. Degussa had for a long time sold Zyklon-B through the instrumentality of Degesch, which it dominated and controlled. Degussa, Goldschmidt and Farben entered into an arrangement with Degesch whereby it became the sales outlet for insecticides and related products for all three concerns. Farben took 42·5 per cent. interest in Degesch. The firm had an executive board of eleven members, whereof five were from the Farben Vorstand. The evidence, however, did not show that the executive board or the accused Mann, Hoerlein or Wurster, as members thereof, had any persuasive influence on the management policies of Degesch or any significant knowledge as to the uses to which its production was being put.

The proof was convincing that large quantities of Zyklon-B had been supplied by the Degesch to the S.S. and that it was actually used in the mass extermination of inmates of concentration camps, including Auschwitz. But neither the volume of production, nor the fact that large quantities were destined to concentration camps was in itself sufficient to impute criminal responsibility, as it was established by the evidence that there existed a great demand for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, were confined in congested quarters lacking adequate sanitary facilities.

The extent to which the extermination programme was kept secret was illustrated by the testimony of Dr. Peters, who was in charge of the management of Degesch. He related the details of a conference that he had had in the summer of 1943 with one Goerstein, introduced by Professor Mrugowsky, director of the Health Institute of the notorious Waffen-S.S. After swearing Dr. Peters to absolute secrecy under penalty of death, Goerstein revealed the Nazi extermination programme which he said emanated from Hitler through Himmler. Dr. Peters stated emphatically that he was thereafter extremely careful to observe the admonition to treat this conference as Top Secret and he negatived the assumption that any of the accused had had any knowledge that an improper use was being made of Zyklon-B.

(b) *The supplying of Farben Drugs for Criminal Medical Experimentation upon Concentration Camp Inmates.*

The evidence showed that healthy inmates of concentration camps were deliberately infected with typhus by the German authorities against their will and that drugs produced by Farben, which were thought to have curative value in combating this disease, were administered to such persons by way of medical experimentation, as a result of which many of them died.

Typhus first made its appearance on the Eastern front during the war, and the responsible officials of Germany were very apprehensive that it would spread to the civilian population. Desperate efforts were made, therefore, to find a remedy that would cure the disease or at least immunise against it. There was, consequently, an urgent need for finding a way of greatly expanding the production and effectiveness of vaccines. For several years previously Farben's Behring-Werke, among others, had been experimenting with a new vaccine. By this process a trained technician could in a single day produce enough vaccine to treat 15,000 persons,

whereas by the process formerly used one technician could only produce in one day enough vaccine to treat 10 persons. Farben's new vaccine lacked scientific verification and acceptance by the medical profession, however, and Farben was extremely anxious to win this recognition for its product. To that end it participated in conferences with governmental health agencies and urged that its product be tested and accepted. Samples of the vaccine were sent to recognised physicians for testing on patients afflicted with the particular disease. These physicians, in turn, submitted detailed reports covering their experiences with the drug, after which Farben scientists assembled and studied this data and concluded therefrom whether the firm would sponsor the product and place it on the market.

The Prosecution alleged that the accused Hoerlein, Lautenschlaeger and Mann supplied this drug and vaccines, well knowing that concentration camp inmates were being criminally infected with the typhus virus by S.S. doctors for the deliberate purpose of conducting experiments with these Farben products. The evidence produced in support of this charge, however, fell short of establishing the guilt of these accused in this issue. To the contrary it was shown that Farben had stopped the forwarding of drugs to these physicians as soon as their improper conduct was suspected. The inference that the accused's suspicion must have been aroused by the quantity of the drugs supplied was dispelled by the fact that there was indeed a very great demand for the drug, especially in the concentration camps.

(c) *The Alleged Participation by Farben in the Slave Labour Programme.*

The findings of the International Military Tribunal with respect to the criminal character and extent of the slave labour programme of the Third Reich were not challenged before this Tribunal. The question at issue was whether the accused through the instrumentality of Farben and otherwise, "embraced, adopted and executed the forced labour policies of the Third Reich, thereby becoming accessories to and taking a consenting part in the commission of War Crimes and Crimes against Humanity in violation of Article II of Control Council Law No. 10."

The evidence showed that during the course of the war, the main Farben plants, in common with German industry generally, suffered a serious labour depletion, on account of demands of the military for men to serve in the armed forces. Charged with the responsibility of meeting fixed production quotas, Farben yielded to the pressure of the Reich Labour Office and utilised involuntary foreign workers, prisoners of war and inmates of concentration camps in many of its plants. The following paragraphs set out the relevant evidence in greater detail.

(d) *The Employment of Forced Labour and Concentration Camp Inmates at the Farben enterprises at Auschwitz.*

The evidence showed that at a conference in the Reich Ministry of Economics on the 6th February, 1941, the planning of the expansion of Buna rubber production was discussed. The accused Ambros and ter Meer were present. Farben was instructed to choose an appropriate site in Silesia for a fourth Buna plant. It appeared that, pursuant to this instruction and upon the recommendation of the accused Ambros, the site at Auschwitz

was chosen. The evidence was conflicting as to the importance of the concentration camp there located in deciding upon the location of the plant, but it seemed clear that while the camp may not have been the determining factor in selecting the location, it was an important one, and from the beginning it was planned to use concentration camp labour to supplement the supply of workers. The three Farben officials most directly responsible for the construction at Auschwitz were Ambros, Buetefisch, and Duerrfeld. Later on Duerrfeld and Buetefisch had a conference with Wolf, the chief of Himmler's personal staff, in Berlin at which the utilisation of concentration camp workers was discussed. The parties were in general accord on the assistance to be rendered by the concentration camp. Wolf left matters of detail to be arranged by negotiations between Duerrfeld and Hoess, who was the camp commander at Auschwitz. The construction of the Auschwitz plant began in 1941. In October of that year, 1,300 concentration camp inmates were employed.

In a report from the nineteenth construction conference, held on 30th June, 1942, reference was made for the first time to the employment of forced labour other than from the concentration camp. It appeared that 680 Polish forced labourers had been employed recently. At the twentieth construction conference, on 8th September, 1942, attended by the accused Duerrfeld, Ambros and Buetefisch, Duerrfeld reported that the intended sharp increase of labour requirements would continue to strain the provisions for workers and that certain auxiliary supply sources for labour were available, among them being recruitment of Poles, which would provide 1,000 workers ; 2,000 Russian workers were to be sent to Auschwitz by order of Sauckel, but no definite promises were at hand. This statement would imply that the Auschwitz construction management was seeking these workers. The report also stated that Sauckel had promised 5,000 prisoners of war for the building sites in Upper Silesia and that 2,000 of these were intended for the Farben enterprise at Auschwitz.

As to the prisoners of war employed with Farben's enterprise at Auschwitz, the evidence showed that they had been treated better than other types of workers in every respect. The housing, the food, and the type of work they were required to perform, indicated that they were the favoured labourers of the plant site. Isolated instances of ill-treatment may have occurred, but the evidence showed that they could not be attributed to any overall policy of Farben or to acts with which any of the accused may be charged directly or indirectly.

The plight of the concentration camp inmates, however, was that of extreme hardship and suffering. With inadequate food and clothing, large numbers of them were unable to stand the heavy labour. Many of those who became too ill or weak to work were transferred by the S.S. to Birkenau and exterminated in the gas chambers. Neither was the plant site entirely without inhuman incidents. Occasionally beatings occurred by the plant police and supervisors. It was clear from the evidence that Farben did not deliberately pursue or encourage an inhuman policy with respect to the workers. In fact some steps were taken by Farben to alleviate the situation. Despite this fact, however, it was evident that the accused most closely connected with the Auschwitz project bore great responsibility with respect to the workers. They applied to the Reich Labour Office for

labour. They received and accepted concentration camp workers. They took the initiative for the unlawful employment and were aware of the sufferings and hardships to which they were exposed.

Free workers were also employed in large numbers. Foreign workers made their appearance in 1941. They consisted chiefly of Poles, Ukrainians, Italians, Slavs, French and Belgians. Forced labour was used for a period of approximately three years, from 1942 until the end of the war. Many of those who were originally employed as voluntary workers were later forced to continue.

It was clear from the evidence that Farben did not prefer either the employment of concentration camp workers or these foreign nationals who had been compelled to enter German labour service. But here again the evidence showed that Farben had accepted the situation and had actively sought the employment and utilisation of people who came to them through the services of the concentration camp Auschwitz and Sauckel's forced labour programme.

(e) *The Employment of Prisoners of War and Concentration Camp Inmates in the Fuerstengrube and Janina Coal Mines.*

Closely connected with the Auschwitz enterprise was a project for the control by Farben of the output of the Fuerstengrube coal mine. A new company, under the control of Farben, was founded for the purpose of securing, from the Fuerstengrube mine, coal supplies for the Auschwitz plant. In this new company Farben controlled 51 per cent. of the stock and was, therefore, in a position to determine the destination of the output of the mine. Later, through this same company, Farben acquired the controlling interest in another mine known as Janina.

The evidence showed that Polish labourers were used by Fuerstengrube in mining operations in 1943, long after the conquest of Poland and the impressment of the Poles into the ranks of German labour. British prisoners of war were also employed by Fuerstengrube, particularly in the Janina mine. These prisoners offered considerable resistance to their employers, with the result that they were withdrawn from the mines in the latter part of 1943. A file note disclosed that Hoess and the accused Duerrfeld inspected the Janina and Fuerstengrube mines on 16th July, 1943. It was then agreed that British prisoners of war should be replaced by concentration camp inmates. It was estimated that 300 camp inmates could be accommodated at Janina and that at Fuerstengrube it should be possible to use altogether 1,200–1,300 inmates.

The evidence established that the Auschwitz and Fuerstengrube enterprises were wholly private projects operated by Farben, with considerable freedom and opportunity for initiative on the part of Farben. There was no matter of compulsion, although the projects were favoured by the Reich authorities. On the contrary, Farben had through its officials displayed initiative in the procurement and utilisation of prisoners of war, forced labour and concentration camp inmates, fully aware of the sufferings to which they were exposed.

The accused Duerrfeld, Ambros and Buetefisch were not the only ones connected with these projects. The evidence disclosed that the accused

Krauch and ter Meer had taken an active part in the procurement of such forced labour, fully aware of the hardships and sufferings to which such labourers were exposed. As to the remainder of the accused the evidence submitted did not establish any active participation or responsibility on their behalf.

(f) *Evidence relating to the Defence of Necessity in Connection with the Alleged Participation of Farben in the Slave Labour Programme.*

Numerous decrees, orders and directives of the Reich Labour Office were submitted to the Tribunal from which it appeared that the said agency assumed dictatorial control over the commitment, allotment and supervision of all available labour within the Reich. Strict regulations prescribed almost every aspect of the relationship between employers and employees. Industries were prohibited from employing or discharging labourers without the approval of this agency. Heavy penalties, including commitment to concentration camps and even death, were set forth for violations of these regulations. The accused who were involved in the utilisation of slave labour testified that they were under such oppressive coercion and compulsion that they could not be said to have acted with that intent which is a necessary ingredient of a criminal offence. The evidence left little doubt that the defiant refusal of a Farben executive to carry out the Reich production schedule or to use slave labour to achieve that end would have been treated as treasonable sabotage and would have resulted in prompt and drastic retaliation.

On the other hand, however, the evidence showed quite clearly that the accused here involved had willingly and intentionally embraced the opportunity to take full advantage of the slave labour programme and exercised initiative in the procurement of forced labour, prisoners of war and concentration camp inmates.

(vi) *Evidence Relating to Count IV—Membership of an Organisation (the S.S.) declared Criminal by the International Military Tribunal.*

The evidence showed that of the three accused involved in this charge (Schneider, Buetefisch and von der Heyde), Schneider had only been a sponsoring member of the S.S. from 1933 until 1945. As such member his only direct contact with that organisation arose out of the payment of dues.

The membership records of the S.S. showed that the accused Buetefisch became an Ehrenfuehrer (Honorary Leader) of that organisation on 20th April, 1939. At the same time he was promoted to the rank of Hauptsturmfuehrer (Captain). On 30th January, 1941, he was made a Sturmbannfuehrer (Major). On the 5th March, 1943, he became an Obersturmbannfuehrer (Lt.-Colonel). The same records disclosed that he was assigned initially to the Upper Sector Elbe ; from 1st May to 1st November, 1941, to the Personnel Branch of the Main Office, and after the last mentioned date to the S.S. Main Office Proper.

In explanation of his connections with the S.S. the accused, Buetefisch, stated that soon after he became deputy manager of the Leuna plant of Farben in 1934 he came into contact with Kranefuss, who was the Executive

Secretary of the Himmler Circle of Friends. During the years following the renewal of their contacts, the accused made frequent use of his personal relationship with Kranefuss and the latter's good offices in connection with the protection of certain Jews and other oppressed persons in the welfare of whom the accused had become interested. Early in 1939 Kranefuss had suggested that intervention on behalf of politically oppressed persons would be much easier if the accused would affiliate himself with the S.S To this the accused had replied that on account of his professional and personal convictions he could not subscribe to the membership oath, submit to the S.S. authority of command, attend its functions or wear its uniform Much to his surprise Kranefuss advised him soon afterwards that the accused might be made an honorary member, with the reservations enumerated above. Faced with the choice of either losing the friendship of Kranefuss, which he had found most helpful in aiding the oppressed persons who were the direct objects of S.S. intolerance, or accepting honorary membership, he chose the latter course. He never took the S.S. oath and never submitted to its authority of command ; neither did he attend any of its functions or wear its uniform. As a result of a controversy later with Kranefuss concerning the wearing of uniform, the accused asked that his name be deleted from the list of S.S. rank holders. The accused stated finally that his promotions and assignments were perfunctory and automatic and without instigation on his part. The record contained corroboration of these statements by the accused and none of them was directly refuted by the Prosecution. The accused had consistently refused to procure a uniform in the face of positive demands to do so. It was also established that he had refused to attend the organisation's functions. The evidence failed to show that reciprocity in duties and privileges, obligations and responsibilities which was indispensable should he properly be characterised as a member of that organisation.

The accused von der Heyde became a member of the Reitersturm (Riding Unit) of the S.S. in Mannheim in 1933, his series number being 200,180.[1] In 1936 the accused moved to Berlin. The Prosecution contended that while he was in Berlin the accused was an active member of the Allgemeine (General) S.S. and based this charge on the following documentary proof:

(*a*) An S.S. personnel file, indicating the accused's number in that organisation as 200,180 and entries to the effect that he was promoted to Second Lieutenant on 30th January, 1938, to First Lieutenant on 10th September, 1939, and to Captain on 30th January, 1941. Opposite the entry of the accused's promotion to Second Lieutenant in 1938 was a notation to the effect that he was a fuehrer in the S.D.

(*b*) An S.S. Racial and Settlement questionnaire, filled out by the accused, likewise giving his S.S. number as 200,180, his rank as Second Lieutenant, his unit as "S.D. Main Office," and his activity as "Honorary Collaborator of S.D. Main Office."

(*c*) The accused's written application for permission to marry (required of all members of the S.S. and also of the Wehrmacht) addressed to the Reich Chief of the S.S. on 6th May, 1939. On this printed form were listed four classes of S.S. memberships (not including the Riding Unit) and that

[1] This was the group within the SS that the International Military Tribunal declared not to be criminal.

of membership of the General S.S. had been understood indicating, according to the Prosecution's conception, that the accused at that time regarded himself as a member of that group. This document also gave the accused's membership number as 200,180.

To this the accused stated that when he left Mannheim for Berlin he was placed on leave status by the S.S. Riding Unit. He emphatically denied that he had ever affiliated, either directly or indirectly, with any other S.S. group. No responsibility was assumed by the accused for the data shown on his S.S. personnel file. He ascribed these entries to an error or a false assumption on the part of the clerk who made or kept this record. The progressive promotions from Second Lieutenant to Captain were automatic and customary in all branches of the S.S., including the Riding Units. Significance should also be attached to the circumstance that in all the documents relating to the accused's S.S. affiliations his membership number was given as 200,180, which was in fact the number originally assigned to him on his first Riding Unit membership card, issued at Mannheim early in 1934. As to the application for permission to marry, he had submitted this through the Berlin office of the S.S. because he correctly assumed that this procedure would be more expedient than going through the Riding Unit office in Mannheim. As to the other data he had given in his application form, he explained that he had done so because he hoped that it would tend to expedite the approval of his marriage application.

The evidence thus failed to establish the affiliation of the accused with the Allgemeine S.S. or any branch of this organisation apart from the Riding Unit of the S.S.

5. THE JUDGMENT OF THE TRIBUNAL.

The Tribunal's Judgment contained a summary of the evidence which had been placed before it and, at relevant points, statements of legal principle and the Tribunal's findings. The last two categories of utterance are set out on the following pages.

(i) *Counts I and V (Crimes against Peace).*

The Tribunal stated that:

> "Counts I and V of the Indictment are predicated on the same facts and involve the same evidence. These two Counts will, therefore, be considered together.
>
> "Count I consists of eighty-five paragraphs. The criminal charge is contained in paragraphs one, two, and eighty-five. The other paragraphs are in the nature of a bill of particulars."

After quoting these three paragraphs from the Indictment,[1] the Tribunal continued:

"Control Council Law No. 10, as stated in its preamble, was promulgated 'In order to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal.'

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[1] See pp. 3-4.

In Article 1, the Moscow Declaration and the London Agreement are made integral parts of the law. In keeping with the purpose thus expressed, we have determined that Control Council Law No. 10 cannot be made the basis of a determination of guilt for acts or conduct that would not have been criminal under the law as it existed at the time of the rendition of the judgment by the I.M.T. in the case of United States of America *v.* Hermann Wilhelm Goering, *et al.* That well-considered Judgment is basic and persuasive precedent as to all matters determined therein. In the I.M.T. case, Count II bears a marked similarity to Count I in this case. Count I of that case is similar to our Count V. Regarding these Counts the I.M.T. said :

> ' Count I charges the common plan or conspiracy. Count II charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both counts together, as they are in substance the same.
>
> ' But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.
>
> ' It is immaterial to consider whether a single conspiracy to the extent and over the time set out in the Indictment has been conclusively proved. Continued planning, with aggressive war as the objective, has been established beyond a doubt.
>
> ' The Tribunal will therefore disregard the charges in Count I that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.'

" In passing judgment upon the several defendants with respect to the common plan or conspiracy charged by Count I and the charges of planning and waging aggressive war as charged by Count II, the I.M.T. made these observations concerning :

KALTENBRUNNER—*Indicted and found Not Guilty under Count I.*

> ' The Anschluss, although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner under Count I does not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war.'

FRANK—*Indicted and found Not Guilty under Count I.*

> ' The evidence has not satisfied the Tribunal that Frank was sufficiently connected with the common plan to wage aggressive war to allow the Tribunal to convict him on Count I.'

FRICK—*Indicted under Counts I and II. Found Not Guilty on Count I, Guilty on Count II.*

> ' Before the date of the Austrian aggression Frick was concerned only with domestic administration within the Reich. The evidence does not show that he participated in any of the conferences at which

Hitler outlined his aggressive intentions. Consequently, the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment. . . . Performing his allotted duties, Frick devised an administrative organisation in accordance with wartime standards. According to his own statement, this was actually put into operation after Germany decided to adopt a policy of war.'

STREICHER—*Indicted and found Not Guilty under Count I.*

'There is no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders. Although he was a Gauleiter, there is no evidence to prove that he had knowledge of those policies. In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this Judgment.'

FUNK—*Indicted under Counts I and II. Found Not Guilty on Count I; Guilty on Count II.*

'Funk was not one of the leading figures in originating the Nazi plans for aggressive war. His activity in the economic sphere was under the supervision of Goering as Plenipotentiary General of the Four-Year Plan. He did, however, participate in the economic preparation for certain of the aggressive wars, notably those against Poland and the Soviet Union, but his guilt can be adequately dealt with under Count II of the Indictment. In spite of the fact that he occupied important official positions, Funk was never a dominant figure in the various programmes in which he participated. This is a mitigating fact of which the Tribunal takes notice.'

SCHACHT—*Indicted and found Not Guilty under Counts I and II.*

'It is clear that Schacht was a central figure in Germany's rearmament programme, and the steps which he took, particularly in the early days of the Nazi régime, were responsible for Nazi Germany's rapid rise as a military power. But rearmament of itself is not criminal under the Charter. To be a crime against peace under Article 6 of the Charter, it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive war. Schacht was not involved in the planning of any of the specific wars of aggression charged in Count II. His participation in the occupation of Austria and the Sudetenland (neither of which is charged as aggressive war) was on such a limited basis that it does not amount to participation in the common plan charged in Count I. He was clearly not one of the inner circle around Hitler, which was most closely involved with this common plan.'

DOENITZ—*Indicted under Counts I and II. Found Not Guilty on Count I; Guilty on Count II.*

'Although Doenitz built and trained the German U-boat arm, the evidence does not show he was privy to the conspiracy to wage aggressive

wars or that he prepared and initiated such wars. He was a line officer performing strictly tactical duties. He was not present at the important conferences when plans for aggressive wars were announced, and there is no evidence he was informed about the decisions reached there. . . . In the view of the Tribunal, the evidence shows that Doenitz was active in waging aggressive war.'

VON SCHIRACH—*Indicted and found Not Guilty under Count I.*

'Despite the warlike nature of the activities of the Hitler Jugend, however, it does not appear that von Schirach was involved in the development of Hitler's plan for territorial expansion by means of aggressive war, or that he participated in the planning or preparation of any of the wars of aggression.'

SAUCKEL—*Indicted and found Not Guilty under Counts I and II.*

'The evidence has not satisfied the Tribunal that Sauckel was sufficiently connected with the common plan to wage aggressive war or sufficiently involved in the planning or waging of the aggressive wars to allow the Tribunal to convict him on Counts I or II.'

VON PAPEN—*Indicted and found Not Guilty under Counts I and II.*

'There is no evidence that he was a party to the plans under which the occupation of Austria was a step in the direction of further aggressive action, or even that he participated in plans to occupy Austria by aggressive war if necessary. But it is not established beyond a reasonable doubt that this was the purpose of his activity, and therefore the Tribunal cannot hold that he was a party to the common plan charged in Count I or participated in the planning of the aggressive wars charged under Count II.'

SPEER—*Indicted and found Not Guilty under Counts I and II.*

'The Tribunal is of the opinion that Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became the head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war ; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count I or waging aggressive war as charged under Count II.'

FRITZSCHE—*Indicted and found Not Guilty under Count I.*

'Never did he achieve sufficient stature to attend the planning conferences which led to aggressive war ; indeed, according to his own uncontradicted testimony he never even had a conversation with Hitler. Nor is there any showing that he was informed of the decisions taken at these conferences. His activities cannot be said to be those which fall within the definition of the common plan to wage aggressive war as already set forth in this Judgment. . . . It appears that Fritzsche

sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.'

BORMANN—*Indicted and found Not Guilty under Count I.*

'The evidence does not show that Bormann knew of Hitler's plans to prepare, initiate, or wage aggressive wars. He attended none of the important conferences when Hitler revealed piece by piece those plans for aggression. Nor can knowledge be conclusively inferred from the positions he held. It was only when he became head of the Party Chancellory in 1941, and later in 1943 secretary to the Fuehrer, when he attended many of Hitler's conferences, that his positions gave him the necessary access. Under the view stated elsewhere which the Tribunal has taken of the conspiracy to wage aggressive war, there in not sufficient evidence to bring Bormann within the scope of Count I.'

"From the foregoing it appears that the I.M.T. approached a finding of guilty of any defendant under the charges of participation in a common plan or conspiracy or planning and waging aggressive war with great caution. It made findings of guilty under Counts I and II only where the evidence of both knowledge and active participation was conclusive. No defendant was convicted under the charge of participating in the common plan or conspiracy unless he was, as was the defendant Hess, in such close relationship with Hitler that he must have been informed of Hitler's aggressive plans and took action to carry them out or attended at least one of the four secret meetings at which Hitler disclosed his plans for aggressive war. The I.M.T. Judgment lists these meetings as having taken place on 5th November, 1937, 23rd May, 1939, 22nd August, 1939, and 23rd November, 1939.

"It is important to note here that Hitler's public utterances differed widely from his secret disclosures made at these meetings."

The Judgment recalled that: "During the early stages of the trial the Prosecution spent considerable time in attempting to establish that for some time prior to the outbreak of war there existed in Germany public or common knowledge of Hitler's intention to wage aggressive war." After reviewing the relevant evidence[1] the Tribunal concluded that:

"While it is true that those with an insight into the evil machinations of power politics might have suspected Hitler was playing a cunning game of seething, restless Europe, the average citizen of Germany, be he professional man, farmer, or industrialist, could scarcely be charged by these events with knowledge that the rulers of the Reich were planning to plunge Germany into a war of aggression.

"During this period, Hitler's subordinates occasionally gave expression to belligerent utterances. But even these can only by remote inference, formed in retrospect, be connected with a plan for aggressive war. The

[1] See pp. 14–16.

point here is the common or general knowledge of Hitler's plans and purpose to wage aggressive war. He was the dictator. It was natural that the people of Germany listened to and read his utterances in the belief that he spoke the truth.

" It is argued that after the events in Austria and Czechoslovakia, men of reasonable minds must have known that Hitler intended to wage aggressive war, although they may not have known the country to be attacked or the time of initiation. This argument is not sound. Hitler's moves in Austria and Czechoslovakia were for the avowed purpose of reuniting the German people under one Reich. The purpose met general public approval. By a show of force but without war, Hitler had succeeded. In the eyes of his people he had scored great and just diplomatic successes without endangering the peace. This was affirmed in the common mind by the Munich Agreement and the various non-aggressive pacts and accords which followed. The statesmen of other nations, conceding Hitler's successes by the agreements they made with him affirmed their belief in his word. Can we say the common man of Germany believed less ?

" We reach the conclusion that common knowledge of Hitler's plans did not prevail in Germany, either with respect to a general plan to wage aggressive war, or with respect to specific plans to attack individual countries, beginning with the invasion of Poland on 1st September, 1939."

The Judgment then continued :

" If the defendants, or any of them, are to be held guilty under either Counts I or V or both on the ground that they participated in the planning, preparation, and initiation of wars of aggression or invasions, it must be shown that they were parties to the plan or conspiracy, or, knowing of the plan, furthered its purpose and objective by participating in the preparation for aggressive war. The solution of this problem requires a consideration of basic facts disclosed by the record. These facts include the positions, if any, held by the defendants with the State and their authority, responsibility, and activities thereunder, as well as their positions and activities with or on behalf of Farben. . . .

"The Prosecution has designated as the number one defendant in this case Carl Krauch, who held positions of importance with both the government and Farben.

" While the Farben organisation, as a corporation, is not charged under the Indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the Prosecution that the defendants individually and collectively used the Farben organisation as an instrument by and through which they committed the crimes enumerated in the Indictment. All of the members of the Vorstand or governing body of Farben who were such at the time of the collapse of Germany were indicted and brought to trial. This Tribunal found that Max Brueggemann was not in a physical condition to warrant continuing him as a defendant in the case, and by an appropriate order separated him from this trial. All of the other Vorstand members are defendants in this case. The defendants Duerrfeld, Gattineau, von der Heyde, and Kugler were not members of the Vorstand but held places of importance with Farben.

"If we emphasise the defendant Krauch in the discussion which follows, it is because the Prosecution has done so throughout the trial and has apparently regarded him as the connecting link between Farben and the Reich on account of his official connections with both. . . .

" The evidence is clear that Krauch did not participate in the planning of aggressive wars. The plans were made by and within a closely guarded circle. The meetings were secret. The information exchanged was confidential. Krauch was far beneath membership in that circle. No opportunity was afforded to him to participate in the *planning*, either in a general way or with regard to any of the specific wars charged in Count I.

" The record is also clear that Krauch had no connection with the initiation of any of the specific wars of aggression or invasions in which Germany engaged. He was informed of neither the time nor method of initiation."

In the Tribunal's opinion, " The evidence that most nearly approaches Krauch is that pertaining to the preparation for aggressive war. After World War I, Germany was totally disarmed. She was stripped of war material and the means of producing it. Immediately upon the acquisition of power by the Nazis, they proceeded to rearm Germany, secretly and inconspicuously at first. As the rearmament programme grew, so also did the boldness of Hitler with reference to rearmament. Rearmament took the course, not only of creating an army, a navy, and an air force, but also of co-ordinating and developing the industrial power of Germany so that its strength might be utilised in support of the military in event of war. The Four-Year Plan, initiated in 1936, was a plan to strengthen Germany as both a military and an economic power, although, in its introduction to the German people, the military aspect was kept in the background."

Nevertheless the Judgment concluded that:

" The evidence does not show that anyone told Krauch that Hitler had a plan or plans to plunge Germany into aggressive war. Moreover, the positions that Krauch held with reference to the government did not, necessarily, result in the acquisition by him of such knowledge.

" The I.M.T. stated that, ' Rearmament of itself is not criminal under the Charter.' It is equally obvious that participation in the rearmament of Germany was not a crime on the part of any of the defendants in this case, unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war. Thus we come to the question which is decisive of the guilt or innocence of the defendants under Counts I and V—the question of knowledge.

" We have already discussed common knowledge. There was no such common knowledge in Germany that would apprise any of the defendants of the existence of Hitler's plans or ultimate purpose.

" It is contended that the defendants must have known from events transpiring within the Reich that what they did in aid of rearmament was preparing for aggressive war. It is asserted that the magnitude of the rearmament effort was such as to convey that knowledge. Germany was rearming so rapidly and to such an extent that, when viewed in retrospect in the light of subsequent events, armament production might be said to impute knowledge that it was in excess of the requirements for defence. If we were trying

military experts, and it was shown that they had knowledge of the extent of rearmament, such a conclusion might be justified. None of the defendants, however, was a military expert. They were not military men at all. The field of their life-work had been entirely within industry and mostly within the narrower field of the chemical industry with its attendant sales branches. The evidence does not show that any of them knew the extent to which general rearmament had been planned, or how far it had progressed at any given time. There is likewise no proof of their knowledge as to the armament strength of neighbouring nations. Effective armament is relative. Its efficacy depends upon the relative strength with respect to the armament of other nations against whom it may be used either offensively or defensively."

The Tribunal found that the accused Krauch, Schmitz, von Schnitzler and ter Meer " in more or less important degrees, participated in the rearmament of Germany by contributing to her economic strength and the production of certain basic materials of great importance in the waging of war. The evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war or wars that had already been planned either generally or specifically by Adolf Hitler and his immediate circle of Nazi civil and military fanatics." The evidence against the other accused regarding aggressive war was said to be weaker than that against the accused named above.

Having thus dealt with the alleged responsibility of the accused for the *preparation* and *initiation* of wars of aggression, the Tribunal stated that: " There remains the question as to whether the evidence establishes that any of the defendants are guilty of ' waging a war of aggression ' within the meaning of Article II, 1, (*a*) of Control Council Law No. 10. This calls for an interpretation of the quoted clause. Is it an offence under international law for a citizen of a state that has launched an aggressive attack on another country to support and aid such war efforts of his government, or is liability to be limited to those who are responsible for the formulation and execution of the policies that result in the carrying on of such a war ? "

On this question the Judgment continued:

" It is to be noted in this connection that the express purpose of Control Council Law No. 10, as declared in its Preamble, was to ' give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the charter issued pursuant thereto.' The Moscow Declaration gave warning that the ' German officers and men and members of the Nazi Party ' who were responsible for ' atrocities, massacres and cold-blooded mass executions ' would be prosecuted for such offences. Nothing was said in that declaration about criminal liability for waging a war of aggression. The London Agreement is entitled an agreement ' for the prosecution and punishment of the major war criminals of the European Axis.' There is nothing in that agreement or in the attached Charter to indicate that the words ' waging a war of aggression ', as used in Article II (*a*) of the latter, were intended to apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war ; and it may be added that the persons indicted and tried before the I.M.T. may fairly be classified as ' major war criminals ' in so far as their

activities were concerned. Consistent with the express purpose of the London Agreement to reach the ' major war criminals ', the Judgment of the I.M.T. declared that ' mass punishments should be avoided.'

" To depart from the concept that only major war criminals—that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies—may be held liable for waging wars of aggression would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments.

" There is another aspect of this problem that may not be overlooked. It was urged before the I.M.T. that international law had theretofore concerned itself with the actions of sovereign states and that to apply the Charter to individuals would amount to the application of *ex post facto* law. After observing that the offences with which it was concerned had long been regarded as criminal by civilised peoples, the High Tribunal said : ' Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' The extension of punishment for crimes against peace by the I.M.T. to the leaders of the Nazi military and Government was, therefore, a logical step. The acts of a government and its military power are determined by the individuals who are in control and who fix the policies that result in those acts. To say that the government of Germany was guilty of waging aggressive war but not the men who were in fact the government and whose minds conceived the plan and perfected its execution would be an absurdity.(1) The I.M.T., having accepted the principle that the individual could be punished, then proceeded to the more difficult task of deciding which of the defendants before it were responsible in fact.

" In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their government during its period of rearmament and who continued to serve that government in the waging of war, the initiation of which has been established as an act of aggression committed against a neighbouring nation. Hitler launched his war against Poland on 1st September, 1939. The following day France and Britain declared war on Germany. The I.M.T. did not determine whether the latter were waged as aggressive wars on the part of Germany. Neither must we determine that question in this case. We seek only the answer to the ultimate question : Are the defendants guilty of crimes against peace by waging aggressive war or wars ? Of necessity, the great majority of the population of Germany supported the waging of war in some degree. They contributed to Germany's power to resist, as well as to attack. Some

(1) See also p. 47.

reasonable standard must, therefore, be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The I.M.T. fixed that standard of participation high among those who lead their country into war.

" The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result, for which there is no precedent in international law and no justification in human relations. We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland, and the defence of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge. To require this of him would be to assign to him a task of decision which the leading statesmen of the world and the learned men of international law have been unable to perform in their search for a precise definition of aggression.

" Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent. Lest it be said that the difficulty of the task alone should not deter us from its performance, if justice should so require, here let it be said that the mark has already been set by that Honourable Tribunal in the trial of the international criminals. It was set below the planners and leaders, such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick, Funk, Doenitz, Raeder, Jodl, Seyss-Inquart, and von Neurath, who were found guilty of waging aggressive war, and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions. To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations, like those of Speer, ' were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.' (I.M.T. Judgment, Vol. I, p. 330.) ".

The Tribunal concluded its treatment of Counts I and V with the following words which refer specifically to the question of conspiracy :

" We will now give brief consideration to Count V, which charges participation by the defendants in the common plan or conspiracy. We have accepted as a basic fact that a conspiracy did exist. The question here is whether the defendants or any of them became parties thereto.

" It is appropriate here to quote from the I.M.T. Judgment :

> ' The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.' (Vol. I, p. 225, I.M.T. Judgment.)

" In order to be participants in a common plan or conspiracy, it is elementary that the accused must know of the plan or conspiracy. In this connection we quote from a case cited by both the Prosecution and Defence, Direct Sales Company *v.* United States, 319 U.S. 703, 63 S. Ct. 1265. In discussing United States *v.* Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. ed. 128, the Supreme Court of the United States said :

> ' That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy ; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally.'

Further along in the opinion it is said with regard to the intent of a seller to promote and co-operate in the intended illegal use of goods by a buyer : Further along in the opinion it is said with regard to the intent of a seller to promote and co-operate in the intended illegal use of goods by a buyer :

> ' This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. (United States *v.* Falcone, *supra.*) Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. (*Ibid.*) This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes.'

" Count V charges that the acts and conduct of the defendants set forth in Count I and all of the allegations made in Count I are incorporated in Count V. Since we have already reached the conclusion that none of the defendants participated in the planning or knowingly participated in the preparation and initiation or waging of a war or wars of aggression or invasions of other countries, it follows that they are not guilty of the charge of being parties to a common plan or conspiracy to do these same things."

(ii) *The Tribunal's Findings on Counts I and V.*

The Tribunal found the defendants not guilty of the crimes set forth in Counts I and V. They were, therefore, acquitted under these Counts.

(iii) *Count II : Crimes against Property as not Falling within the Concept of Crimes against Humanity.*

During the course of the trial, the Tribunal made a ruling which it recalled in its Judgment in the following words :

" In response to a motion filed by counsel for the defendants, the Tribunal ruled that, as a matter of law, a common plan or conspiracy does not exist as to war crimes and crimes against humanity, as these offences are defined in Control Council Law No. 10.([1]) At the same time, the Tribunal held that the acts described in Sections A and B, under Count II of the Indictment, would not, as a matter of law, constitute crimes against humanity, since they related wholly to alleged offences against property ; nor would said acts constitute war crimes, since they pertained to incidents occurring in territory not under the belligerent occupation of Germany. This ruling will be further noticed under that part of the Judgment devoted to Count II of the Indictment."

In its Judgment the Tribunal, on turning its attention to Count II of the Indictment, recalled and expanded upon this ruling :

" The offences alleged in Count II are charged, not only as war crimes, but also as crimes against humanity. By a ruling entered on 22nd April, 1948, the Tribunal sustained a motion filed by the defence challenging the legal sufficiency of Count II, sub-paragraphs A and B, of the Indictment (paragraphs 90 to 96 inclusive), as applied to the charges of plunder and spoliation of properties located in Austria and in the Sudetenland of Czechoslovakia. The Tribunal ruled that the particulars referred to, even if fully established by the proof, would not constitute crimes against humanity, as the acts alleged related wholly to offences against property. The immediate ruling of the Tribunal was limited to the Skoda-Wetzler and Aussig-Falkenau acquisitions then under consideration, but the reasoning upon which this portion of the ruling was based is equally applicable to Count II of the Indictment in its entirety in so far as crimes against humanity are charged.

" The Control Council Law recognises crimes against humanity as constituting criminal acts under the following definition :

> ' (c) *Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'

" We adopt the interpretation expressed by Military Tribunal IV in its Judgment in the case of the United States of America *v.* Friedrich Flick *et al.*, concerning the scope and application of the quoted provision in relation to offences against property. That Tribunal said :

> ' . . . The " atrocities and offences " listed therein, " murder, extermination," etc., are all offences against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words " other persecutions " must be deemed to include only such as

([1]) On this point see Vol. VI of this series, pp. 5 and 104–10.

affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category. It may be added that the presence in this section of the words "against any civilian population" recently led Tribunal III to "hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority." (U.S.A. *v.* Altstoetter *et al.*, decided 4th December, 1947.) The transactions before us, if otherwise within the contemplation of Law 10 as crimes against humanity, would be excluded by this holding."

(*Transcript*, page 11013.)

"In accordance with this view, the other particulars of plunder, exploitation, and spoliation, as charged in paragraphs C, D, E, and F of Count II of the Indictment, will be considered only as charges alleging the commission of war crimes."

(iv) *Hague Regulations Regarded as Not Applying to the Occupation of Austria and the Sudetenland.*

The Judgment went on :

"It is to be also observed that this Tribunal, in the above-mentioned ruling of 22nd April, 1948, further held that the particulars set forth in Sections A and B of Count II, as to property in Austria and the Sudetenland, would not constitute war crimes, as the incidents occurred in territory not under the belligerent occupation of Germany.

"We held that, as a state of actual warfare had not been shown to exist as to Austria, incorporated into Germany by the Anschluss, or as to the Sudetenland, covered by the Munich Pact, the Hague Regulations never became applicable. In so ruling, we do not ignore the force of the argument that property situated in a weak nation which falls a victim to the aggressor because of incapacity to resist should receive a degree of protection equal to that in cases of belligerent occupation when actual warfare has existed. The Tribunal is required, however, to apply international law as we find it in the light of the jurisdiction which we have under Control Council Law No. 10. We may not reach out to assume jurisdiction. Unless the action may be said to constitute a war crime as a violation of the laws and customs of war, we are powerless to consider the charges under our interpretation of Control Council Law No. 10, regardless of how reprehensible conduct in regard to these property acquisitions may have been. The situation is not the same here in view of the limited jurisdiction of this Tribunal, as it would be if, for example, the criminal aspects of these transactions were being examined by an Austrian or other court with a broader jurisdiction.

"In harmony with this ruling, the charges remaining to be disposed under Count II involve a determination of whether or not the proof sustains the allegations of the commission of war crimes by any defendant with reference to property located in Poland, France, Alsace-Lorraine, Norway, and Russia."

(v) *The Law Applicable to Plunder and Spoliation.*

The Judgment then continued :

"The pertinent part of Control Council Law No. 10, binding upon this

Tribunal as the express law applicable to the case, is Article II, paragraph (1), sub-section (b), which reads as follows :

' Each of the following acts is recognised as a crime :

. . . . . .

' (b) *War Crimes.* Atrocities or *offences against* persons or *property constituting violations of the laws or customs of war, including but not limited to,* murder, ill treatment or deportation to slave labour or for any other purposes, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, *plunder of public or private property,* wanton destruction of cities, towns or villages, or devastation not justified by military necessity.' (*Underscoring supplied.*)

" This quoted provision corresponds to Article 6, Section (*b*) of the Charter of the I.M.T., concerning which that Tribunal held that the criminal offences so defined were recognised as war crimes under international law even prior to the I.M.T. Charter. There is consequently no violation of the legal maxim *nullum crimen sine lege* involved here. The offence of plunder of public and private property must be considered a well-recognised crime under international law. It is clear from the quoted provision of the Control Council Law that if this offence against property has been committed, or if the proof establishes beyond reasonable doubt the commission of other offences against property constituting violations of the laws and customs of war, any defendant participating therein with the degree of criminal connection specified in the Control Council Law must be held guilty under this charge of the Indictment.

" In so far as offences against property are concerned, a principal codification of the laws and customs of war is to be found in the Hague Convention of 1907 and the annex thereto, known as the Hague Regulations.

" The following provisions of the Hague Regulations are particularly pertinent to the charges being considered :

' Art. 46. Family honour and rights, individual lives and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

' Art. 47. Pillage is formally prohibited.

. . . . . .

' Art. 52. Neither requisition in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their own country.

' These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

' The requisitions in kind shall, as far as possible, be paid for in ready money ; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

' Art. 53. An army of occupation can only take possession of the

cash, funds, and property liable to requisition belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations.

'All appliances, whether on land, at sea, or in the air adapted for the transmission of news, or for the transport of persons or things, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of war material, even though belonging to companies or to private persons, are likewise material which may serve for military individuals, but they must be restored at the conclusion of peace, and indemnities paid for them.

. . . . . .

'Art. 55. The occupying State shall be regarded only as administrator and usufructuary of the public buildings, real estate, forests, and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.'

"The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles. Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.

"The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.

"These broad principles deduced from the Hague Regulations will, in general, suffice for a proper consideration of the acts charged as offences against property under Count II. But the following additional observations are also pertinent to an understanding of our application of the law to the facts established by the evidence.

"Regarding terminology, the Hague Regulations do not specifically employ the term 'spoliation,' but we do not consider this matter to be one of any legal significance. As employed in the Indictment, the term is used interchangeably with the words 'plunder' and 'exploitation.' It may therefore be properly considered that the term 'spoliation,' which has been admittedly adopted as a term of convenience by the Prosecution, applies to the widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that 'spoliation' is synonymous with the word 'plunder' as employed in Control Council Law No. 10,

and that it embraces offences against property in violation of the laws and customs of war of the general type charged in the Indictment. In that sense we will adopt and employ the term spoliation in this opinion as descriptive of the offences referred to.

" It is a matter of history of which we may take judicial notice that the action of the Axis Powers, in carrying out looting and removal of property of all types from countries under their occupation, became so widespread and so varied in form and method, ranging from deliberate plunder to its equivalent in cleverly disguised transactions having the appearance of legality, that the Allies, on 5th January, 1943, found it necessary to join in a declaration denouncing such acts. The Inter-Allied Declaration was subscribed to by seventeen governments of the United Nations and the French National Committee. It expressed the determination of the signatory nations ' to combat and defeat the plundering by the enemy powers of the territories which have been overrun or brought under enemy control.' It pointed out that ' systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression.' It recited that such spoliation :

> ' . . . has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property—from works of art to stocks of commodities, from bullion and banknotes to stocks and shares in business and financial undertakings. But the object is always the same—to seize everything of value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must enslave to enrich and strengthen their oppressors.'

" The signatory governments deemed it important, as stated in the Declaration, ' to leave no doubt whatsoever of their resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked, just as they have recently emphasised their determination to exact retribution from war criminals for their outrages against persons in the occupied territories.' The Declaration significantly concluded that the nations making the declaration reserve all their rights :

> ' . . . to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.'

" While the Inter-Allied Declaration does not constitute law and could not be given retroactive effect, even if it had attempted to include and express criminal sanctions for the acts referred to, it is illustrative of the view that offences against property of the character described in the Declaration were considered by the signatory powers to constitute action in violation of existing international law.

" In our view, the offences against property defined in the Hague Regulations are broad in their phraseology and do not admit of any

distinction between 'plunder' in the restricted sense of acquisition of physical properties, which are the subject matter of the crime, the plunder or spoliation resulting from acquisition of intangible property such as is involved in the acquisition of stock ownership, or of acquisition of ownership or control through any other means, even though apparently legal in form.

"We deem it to be of the essence of the crime of plunder or spoliation that the owner be deprived of his property involuntarily and against his will. From the provisions of the Declaration which we have quoted, it becomes apparent that the invalidity or illegality of the transaction does not attach, even for purposes of rescission in a civil action, unless the transaction can be said to be involuntary in fact. It would be anomalous to attach criminal responsibility to an act of acquisition during belligerent occupancy when the transaction could not be set aside in an action for rescission and restitution.

"It is the contention of the Prosecution, however, that the offences of plunder and spoliation alleged in the Indictment have a double aspect. It is broadly asserted that the crime of spoliation is a 'crime against the country concerned in that it disrupts the economy, alienates its industry from its inherent purpose, make it subservient to the interest of the occupying power, and interferes with the natural connection between the spoliated industry and the local economy. As far as this aspect is concerned, the consent of the owner or owners, or their representatives, even if genuine, does not affect the criminal character of the act.' In its other aspect it is asserted that the crime of spoliation is an offence 'against the rightful owner or owners by taking away their property without regard to their will, "confiscation," or by obtaining their "consent" by threats or pressure.'

"We cannot deduce from Articles 46 through 55 of the Hague Regulations any principle of the breadth of application such as is embraced in the first asserted aspect of the crime of plunder and spoliation. Under the Hague Regulations, 'Private property must be respected' (Art. 46, Para. 1), 'Pillage is formally prohibited' (Art. 47) and 'Private property cannot be confiscated' (Art. 46, Para. 2). The right of requisition is limited to 'the necessities of the army of occupation,' must not be out of proportion to the resources of the country, and may not be of such nature as to involve the inhabitants in the obligation to take part in military operations against their country. But with respect to private property, these provisions relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner. We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner is, in fact, freely given. This becomes important to the evaluation of the evidence as applied to individual action under the concept that guilt is personal and individual. If, in fact, there is no coercion present in an agreement relating to the purchase of industrial enterprises or interests equivalent thereto, even during time of military occupancy, and if, in fact, the owner's consent is voluntarily given, we do not find such action to be violation of the Hague Regulations. The contrary interpretation would make it difficult, if not impossible, for the occupying power in time of war to carry out other

aspects of its obligations under international law, including restoration of order to the local economy in the interests of the local inhabitants. (Article 43, Hague Regulations.) On the other hand, when action by the owner is not voluntary because his consent is obtained by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will, it is clearly a violation of the Hague Regulations. The mere presence of the military occupant is not the exclusive indication of the assertion of pressure. Certainly where the action of private individuals, including juristic persons, is involved, the evidence must go further and must establish that a transaction otherwise apparently legal in form was not voluntarily entered into because of the employment of pressure. Furthermore, there must be a causal connection between the illegal means employed and the result brought about by employing such intimidation.

" Under this view of the Hague Regulations, a crucial issue of fact to be determined in most of the alleged acts of spoliation charged in Count II of the Indictment is the determination of whether owners of property in occupied territory were induced to part with their property permanently under circumstances in which it can be said that consent was not voluntary. Commercial transactions entered into by private individuals which might be entirely permissible and legal in time of peace or non-belligerent occupation may assume an entirely different aspect during belligerent occupation and should be closely scrutinised where acquisitions of property are involved, to determine whether or not the rights of property, protected by the Hague Regulations, have been adhered to. Application of these principles will become important in considering the responsibility of members of the Vorstand of Farben, who are sought to be charged under the Indictment, and who did not personally participate in the negotiations or other action leading to the alleged act of spoliation except by virtue of such Vorstand membership."

(vi) *Individual Responsibility for War Crimes.*

Continuing its treatment of Count II, the Tribunal next reiterated the principle of individual responsibility for war crimes :

" It can no longer be questioned that the criminal sanctions of international law are applicable to private individuals. The Judgment of Military Tribunal IV, United States *v.* Flick (Case No. 5), held :

> ' The question of the responsibility of individuals for such breaches of international law as constitute crimes has been widely discussed and is settled in part by the Judgment of I.M.T. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals.'

" We quote further :

> ' Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender *in propria persona*. The application of international law to individuals is no novelty.'

" Similar views were expressed in the case of the United States *v.* Ohlendorf (Case No. 9), decided by Military Tribunal II."

(vii) *The Attitude Taken by the Tribunal to Certain Defence Pleas.*

The Tribunal then ruled upon a series of Defence pleas, as follows :

(a) *Plea that the Hague Convention does not apply to " annexed " territories.*

" The I.M.T., in its Judgment, found it unnecessary to decide whether, as a matter of law, the doctrine of ' subjugation ' by military conquest has application to subjugation resulting from the crime of aggressive war. The doctrine was held to be inapplicable where there are armies in the field still seeking to restore the occupied country to its rightful owners. The Hague Regulations do not become inapplicable because the German Reich ' annexed ' or ' incorporated ' parts of the occupied territory into Germany, as there were, within the field, armies attempting to restore the occupied countries to their true owners. We adopt this view. It will therefore become unnecessary, in considering the alleged acts of spoliation in Poland and Alsace-Lorraine, to consider this distinction which has been urged by the Defence."(1)

(b) *Pleas Alleging Vagueness and Obsolescence of the Law : Other Defence Arguments.*

" One of the general defences advanced is the contention that private industrialists cannot be held criminally responsible for economic measures which they carry out in occupied territories at the direction of, or with the approval of, their government. As a corollary to this line of argument it is asserted that the principles of international law in existence at the time of the commission of the acts here charged do not clearly define the limits of permissible action. It is further said that the Hague Regulations are outmoded by the concept of total warfare ; that literal application of the laws and customs of war as codified in the Hague Regulations is no longer possible ; that the necessities of economic warfare qualify and extinguish the old rules and must be held to justify the acts charged in keeping with the new concept of total warfare. These contentions are unsound. It is obvious that acceptance of these arguments would set at naught any rule of international law and would place it within the power of each nation to be the exclusive judge of the applicability of international law. It is beyond the authority of any nation to authorise its citizens to commit acts in contravention of international penal law. As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilised nations as to alter the substantive content of certain of its principles. But we are unable to find that there has been a change in the basic concept of respect for property rights during belligerent occupation of a character to give any legal protection to the widespread acts of plunder and spoliation committed by Nazi Germany during the course of World War II. It must be admitted that there exist many areas of grave uncertainty concerning the laws and customs of war, but these uncertainties have little application to the basic principles relating

(1) Concerning this plea, see also Vol. VI of these Reports, pp. 91–3.

to the law of belligerent occupation set forth in the Hague Regulations. Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare. But these uncertainties relate principally to military and naval operations proper and the manner in which they shall be conducted. We cannot read obliterating uncertainty into these provisions and phases of international law having to do with the conduct of the military occupant toward inhabitants of occupied territory in time of war, regardless of how difficult may be the legal questions of interpretation and application to particular facts. That grave uncertainties may exist as to the status of the law dealing with such problems as bombings and reprisals and the like, does not lead to the conclusion that provisions of the Hague Regulations, protecting rights of public and private property, may be ignored. As a leading authority on international law has put it:

> 'Moreover, it does not appear that the difficulties arising out of any uncertainty as to the existing law have a direct bearing upon violations of the rules of war which have provided the impetus for the almost universal insistence on the punishment of war crimes. Acts with regard to which prosecution of individuals for war crimes may appear improper owing to the disputed nature of the rules in question arise largely in connection with military, naval and air operations proper. No such reasonable degree of uncertainty exists as a rule in the matter of misdeeds committed in the course of military occupation of enemy territory. Here the unchallenged authority of a ruthless invader offers opportunities for crimes the heinousness of which is not attenuated by any possible appeal to military necessity, to the uncertainty of the law, or to the operation of reprisals.' (Lauterpacht, The Law of Nations and the Punishment of War Crimes, 1944 *British Year Book of International Law*.)

"We find sufficient definiteness and meaning in the provision of the Hague Regulations and find that the provisions which we have considered are applicable and operate as prohibitory law establishing the limits beyond which the military occupant may not go."

(viii) *The Tribunal's Findings on Count II*

The Tribunal announced the following decision as to the general allegation made in Count II:

"With reference to the charges in the present Indictment concerning Farben's activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described. In some instances, following confiscation by Reich authorities, Farben proceeded to acquire permanent title to the properties thus confiscated. In other instances involving 'negotiations' with private owners, Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners. These activities were concluded by

entering territory that had been overrun and occupied by the Wehrmacht, or was under its effective control. The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. In those property acquisitions which followed confiscation by the Reich, the course of action of Farben clearly indicates a studied design to acquire such property. In most instances the initiative was Farben's. In these instances in which Farben dealt directly with the private owners, there was the ever-present threat of forceful seizure of the property by the Reich or other similar measures, such, for example, as withholding licences, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations, or other effective means of bending the will of the owners. The power of the military occupant was the ever-present threat in these transactions, and was clearly an important, if not a decisive factor. The result was enrichment of Farben and the building of its greater chemical empire through the medium occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of the Hague Regulations. It was in violation of rights of private property, protected by the Laws and Customs of War, and in the instance involving public property, the permanent acquisition was in violation of that provision of the Hague Regulations which limits the occupying power to a more usufruct of real estate. The form of the transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage, plunder and spoliation stands out, and there can be no uncertainty as to the actual result.

"As a general defence, it has been urged on behalf of Farben that its action in acquiring a controlling interest in the plants factories and other interests in occupied territories was designed to, and did, contribute to the maintenance of the economy of these territories, and thus assisted in maintaining one of the objective aims envisaged by the Hague Regulations. In this regard it is said that the action was in conformity with the obligation of the occupying power to restore an orderly economy in the occupied territory. We are unable to accept this defence. The facts indicate that the acquisitions were not primarily for the purpose of restoring or maintaining the local economy, but were rather to enrich Farben as part of a general plan to dominate the industries involved, all as part of Farben's asserted "claim to leadership". If management had been taken over in a manner that indicated a mere temporary control or operation for the duration of the hostilities, there might be some merit to the defence. The evidence, however, shows that the interests which Farben proceeded to acquire, contrary to the wishes of the owners, were intended to be permanent. The evidence further establishes that the action of the owners was involuntary, and that the transfer was not necessary to the maintenance of the German army of occupation. As the action of Farben in proceedings to acquire permanently property interests in the manner generally outlined is in violation of the Hague Regulations, any individual who knowingly participated in any such act of plunder or spoliation with the degree of connection outlined in Article II, paragraph 2 of Central Law No. 10, is criminally responsible thereafter."

The following conclusions were announced regarding alleged acts of spoliation in specific localities:

(i) " We find that the proof establishes beyond reasonable doubt that acts of spoliation and plunder, constituting offences against property as defined in Control Council Law No. 10, were committed through Farben with respect to three properties located in Poland(1). . . . The permanent acquisition by Farben of productive facilities or interests therein, and the dismantling of plant equipment, was exploitation of territories under belligerent occupation in violation of the Hague Regulations."

(ii) " We find that offences against property within the meaning of Control Council Law No. 10 were committed in the acquisition by Farben of property interests in occupied Norway intended to be permanent and against the will and without the free consent of the owners."(2)

(iii) Of the alleged acts of plunder at the Mulhausen plant and at the Strassbourg-Schiltigheim plants in Alsace Lorraine(3): " The violation of the Hague Regulations is clear and Farben's participation therein amply proven ". Of the Diedenhofen plant(4) on the other hand: " We find the evidence insufficient upon which to predicate any criminal guilt with reference to the Diedenhofen plant."

(iv) " The defendants have contended that the Francolor Agreement(5) was the product of free negotiations and that it proved beneficial in practice to the French interests. We have already indicated that overwhelming proof establishes the pressure and coercion employed to obtain the consent of the French to the Francolor agreement. As consent was not freely given, it is of no legal significance that the agreement may have contained obligations on the part of Farben, the performance of which may have assisted in the rehabilitation of the French industries. Nor is the adequacy of consideration furnished for the French properties in the new corporation a valid defence. The essence of the offence is the use of the power resulting from the military occupation of France as the means of acquiring private property in utter disregard of the rights and wishes of the owner. We find the element of compulsion and coercion present in an aggravated degree in the Francolor transaction, and the violation of the Hague Regulations is clearly established."

(v) Of the charges of spoliation in the matter of Rhone-Poulenc(6): " This conduct of Farben's seems to have been wholly unconnected with seizure or threats of seizure, expressed or implied, and while it may be subject to condemnation from a moral point of view, it falls far short of being proof of plunder either in its ordinary concept or as set forth in the Hague Regulations, either directly or by implication."

(vi) " We are unable to say from the record before us that any individual defendant has been sufficiently connected with completed acts of plunder in Russia within the meaning of the Control Council Law.(7)

After declaring these findings and setting out the relevant evidence the

(1) See pp. 19–20.
(2) See pp. 20–21.
(3) See p. 21.
(4) See p. 21.
(5) See pp. 21–22.
(6) See pp. 22–23.
(7) See p. 23.

Tribunal then proceeded to state its findings on Count II relating to the accused individually. It prefaced its findings with the following statement:

" It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the Vorstand. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime."

The findings regarding the individual accused[1] are set out below:

(i) " Krauch is acquitted of all charges under Count II of the Indictment."

(ii) " We are not convinced beyond reasonable doubt of the guilt of the defendant Schmitz in connection with Farben's spoliative activities in Poland or Alsace-Lorraine. . . .

" Schmitz bore a responsibility for, and knew of, Farben's programme to take part in the spoliation of the French dyestuffs industry and, with this knowledge, expressly and impliedly authorized and approved it. Schmitz must be held guilty on this respect of Count II of the Indictment. . . .

" We conclude that Schmitz was fully informed of the ramifications of the Nordisk-Kettmetall plan, and that his action in expressly or impliedly approving Farben's participation connects him criminally within the meaning of Control Council Law No. 10. Schmitz is found guilty under Count II of the Indictment."

(iii) " Von Schnitzler is found guilty under Count II of the Indictment ", as a result of his activities in connection with acquisitions in Poland and with the Francolor agreement. On the other hand, " the evidence does not establish von Schnitzler's criminal complicity in the acquisition by Farben of properties in Norway, not is it sufficient to warrant conviction in connection with the charges of spoliation in Alsace-Lorraine."

(iv) Gajewski was " acquitted of the charges under this Count, as we do not consider that it is proved that he took a part in any criminal action charged in Count II ".

(v) " We cannot impute criminal guilt to the Defendant Hoerlein from his membership in the Vorstand, and he is acquitted of all of the charges under Count II of the Indictment."

(vi) " We find that the proof establishes the guilt of the Defendant Ter Meer under Count II of the Indictment beyond reasonable doubt. He

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[1] See p. 23.

was prominently connected with the activities of Farben in the acquisition of the Polish property and in the Francolor acquisition " and " was a guilty participant in Farben's acquisition of the confiscated Mulhouse plant, as he knew of and tacitly approved the acquisition."

(vii) For his participation in the spoliation in Norway, the Tribunal found the accused Buergin " guilty under Count II of the Indictment."

(viii) " For his connection with, and participation in, the Norwegian enterprise, Haefliger is guilty under Count II of the Indictment."

(ix) " The Defendant Ilgner was an active participant in the case of spoliation of Norway and must be held guilty under Count II of the Indictment. . .

" In our view the evidence establishes beyond reasonable doubt the Defendant Ilgner's criminal complicity in the spoliation of Norsk-Hydro, and the Defendant Ilgner is guilty under Count II.

" We do not find that the evidence establishes beyond reasonable doubt any connection of the Defendant Ilgner with the other particulars alleging acts of spoliation under Count II."

(x) " Jaehne was fully informed of, and took a consenting part in, Farben's acts of spoliation in the acquisition of" the confiscated Alsace-Lorraine oxygen and acetylene plants. " Jaehne's connection with this matter was such that he must be held criminally responsible under this aspect of Count II of the Indictment.

" There is not sufficient evidence to warrant his conviction under any of the other particulars set forth in Count II."

(xi) Oster was held guilty under Count II because of his connection with the Farben activities relating to Norsk-Hydro.

(xii) Of the connection of the accused Kugler with the Francolor agreement the Tribunal decided : " While he was not the dominant figure initiating the policies leading to the unlawful acquisitions, he was criminally connected with the execution of the entire enterprise and must be held guilty under Count II ".

The defendants von Knieriem, Ambros, Schneider, Kuehne, Lautenschlaeger, Beutefisch, Mann, Wurster, Duerrfeld, Gattineau, and von der Heyde were held not guilty under Count II.

(ix) *Count III ; Slave Labour*

The Tribunal did not enter into any detailed analysis of forced labour viewed as a war crime. Of the recruitment of such labour from among foreign workers, the Judgment states that : " It is enough to say here that the utilization of forced labour, unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation of that part of Article II of Control Council Law No. 10 which recognizes as war crimes and crimes against humanity the enslavement, deportation, or imprisonment of the civilian population of other countries ", and later : " The use of concentration camp labour and forced foreign workers at Auschwitz with the initiative displayed by the officials of Farben in the procurement and utilization of such labour, is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave labour programme of the Reich will not warrant the defence of necessity."

Of the employment of prisoners of war, the Tribunal said : " The use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention. Under Count III the defendants are charged with violations of this prohibition. To attempt a general statement in definition or clarification of the term ' direct relation to war operations ' would be to enter a field that the writers and students of international law have found highly controversial. We therefore limit our observations to the particular facts presented by this record," and at an earlier point : " The use of prisoners of war in coal mines in the manner and under the conditions disclosed by this record, we find to be a violation of the regulations of the Geneva Convention and, therefore, a war crime."

(x) *The Plea of Superior Orders or Necessity*

Contained in the treatment by the Tribunal of Count III is a section headed *The Defence of Necessity* which, after recalling that the defendants had pleaded this defence and after referring to the relevant evidence, makes the following remarks on the point of law involved :

" The question remains as to the availability of the defence of necessity in a case of this kind. The I.M.T. dealt with an aspect of that subject when it considered the effect of Article 8 of its Charter, which provides :

> ' The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment . . .'.

" Concerning the above provision the I.M.T. said :

> ' That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. *The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.*' (Our emphasis).

" Thus the I.M.T. recognized that while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defence where it is given under such circumstances as to afford the one receiving it of no other moral choice than to comply therewith. As applied to the facts here, we do not think there can be much uncertainty as to what the words ' moral choice ' mean. The quoted passages from the I.M.T. Judgment as to the conditions that prevailed in Germany during the Nazi era would seem to suggest a sufficient answer insofar as this case is concerned. Nor are we without persuasive precedents as to the proper application of the rule of necessity in the field of the law with which we are here concerned.

"The case of the United States *v.* Flick, *et al.* (Case 5), tried before Tribunal IV, involved the dominant figure in the German steel and coal industry and five of his business associates. They were charged, among other things, with having been active participants in the slave-labour programme of the Third Reich. The Judgment of the Tribunal reviewed the facts and concluded that four of these defendants were entitled to the benefit of the defence of necessity. We quote from that Judgment because the facts therein disclosed are strikingly similar to those developed in the trial of this case :

'The evidence with respect to this Count clearly establishes that labourers procured under Reich regulations, including voluntary and involuntary foreign civilian workers, prisoners of war and concentration camp inmates, were employed in some of the plants of the Flick Konzern. . . . It further appears that in some of the Flick enterprises prisoners of war were engaged in work bearing a direct relation to war operations.

'The evidence indicates that the defendants had no actual control of the administration of such programme even where it affected their own plants. On the contrary, the evidence shows that the programme thus created by the state was rigorously detailed and supervised by the state, its supervision even extending into prisoner of war labour camps and concentration camp inmate labour camps established and maintained near the plants to which such prisoners of war and concentration camp inmates had been allocated. Such prisoners of war camps were in charge of the Wehrmacht (Army), and the concentration camp inmates labour camps were under the control and supervision of the S.S. Foreign civilian labour camps were under camp guards appointed by the plant management subject to the approval of state police officials. The evidence shows that the managers of the plants here involved did not have free access to the prisoner of war labour camps or the concentration labour camps connected with their plants, but were allowed to visit them only at the pleasure of those in charge.'

. . . . . .

'Workers were allocated to the plants needing labour through the governmental labour offices. No plant management could effectively object to such allocation. Quotas for production were set for industry by the Reich authorities. Without labour, quotas could not be filled. Penalties were provided for those who failed to meet such quotas. Notification by the plant management to the effect that labour was needed resulted in the allocation of workers to such plant by the governmental authorities. This was the only way workers could be procured.'

. . . . . .

'Under such compulsion, despite the misgivings which it appears were entertained by some of the defendants with respect to the matter, they submitted to the programme and, as a result, foreign workers, prisoners of war, or concentration camp inmates became employed in some of the plants of the Flick Konzern and in Siemag. Such written reports and other documents as from time to time may have been signed or initialled by the defendants in connection with the employment of foreign slave labour and prisoners of war in their plants were for the most part obligatory and necessary to a compliance with the rigid and harsh Reich regulations relative to the administration of its programme.'

. . . . . .

'The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always "present", ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.'

. . . . . .

> 'In this case, in our opinion, the testimony establishes a factual situation which makes clearly applicable the defence of necessity as urged in behalf of the defendants Steinbrinck, Burkart, Kaletsch and Terberger.'

"Tribunal IV convicted two defendants (Weiss and Flick), however, under the slave-labour Count. The basis for these convictions was the active solicitation of Weiss, with the knowledge and approval of Flick, of an increase in their firm's freight-car production, beyond the requirements of the government's quota, and the initiative of Weiss in securing an allocation of Russian prisoners of war for use in the work of manufacturing such increased quotas. With respect to these activities the Tribunal concluded that Weiss and Flick had deprived themselves of the defence of necessity, saying:

> 'The war effort required all persons involved to use all facilities to bring the war production to its fullest capacity. The steps taken in this instance, however, were initiated not in governmental circles but in the plant management. They were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible.'

"We have also reviewed the Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, dated 30th June, 1948, in which Hermann Roechling was convicted of participation in the slave-labour programme. That Judgment recites that said Roechling was 'present at several secret conferences with Goering in 1936 and 1937;' that in 1940 he 'accepted the positions of plenipotentiary-general for the steel plants of the departments of the Moselle and of Meurthe-et-Moselle Sud;' that, 'stepping out of his role of industrialist, after having demanded high administrative and leading positions concerning the steel exploitation of the Reich,' he became 'dictator for iron and steel in Germany and the occupied countries;' that in 1943 said Roechling also 'lavished advice on the Nazi Government in order to utilize the inhabitants of occupied countries for the war effort of the Reich;' that he 'sent to the Nazi leaders in Berlin a memorandum requesting that he obtain the utilization of Belgian labour in order to develop German industry;' that he 'suggests in this connection that youths of 18 to 25 should be drafted to obligatory work under German command—which would mean the utilization of approximately 200,000 persons;' that he also 'requested that negotiations be started immediately in order to obtain a considerable number of Russian youths of about 16 years of age for labour in the iron industry;' that he 'requested the taking of a general census of French, Belgian and Dutch youths in order to force them to work in war plants or to draft them into the Wehrmacht together with the promulgation of a law which would make work obligatory in the occupied countries;' and that he also 'incited the Reich authorities in the most insidious manner to employ inhabitants of occupied countries and P.O.W.s in armament work, with complete disregard of human dignity and the terms of the Hague Convention.' Two defendants were acquitted and two others convicted by the French Tribunal. The latter—von Gemmingen and Rodenhauser—were found guilty as co-authors and accomplices to the above-described illegal employment of prisoners of war and deportees by Hermann Roechling, and to his encouragement of illegal

punishments meted out to said involuntary labourers. Said illegal punishments were imposed by a summary court organized, in agreement with the Gestapo, by von Gemmingen and Rodenhauser in the Roechling plant, of which they were both directors. It is thus made clear that the defence of necessity could not have been successfully invoked on behalf of either of the said named defendants. Concerning the acquitted defendants, Ernst Roechling and Albert Maier, the High Tribunal expressly said that the evidence did not establish that either of them exercised *initiative* in connection with the slave-labour programme.

" It is plain, therefore, that Hermann Roechling, von Gemmingen, and Rodenhauser, like Weiss and Flick, were not moved by a lack of moral choice but, on the contrary, embraced the opportunity to take full advantage of the slave-labour programme. Indeed, it might be said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system.

" From a consideration of the I.M.T., Flick, and Roechling Judgments, we deduce that an order of a superior officer or a law or governmental decree will not justify the defence of necessity unless, in its operation, it is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative."

(xi) *The Tribunal's Findings on Count III*

The Tribunal stated : " We are of the opinion that the evidence falls short of establishing the guilt of any of the defendants on paragraph 131 of the Indictment which charged that ' Poison gases . . . manufactured by Farben and supplied by Farben to officials of the S.S. were used throughout Europe.' "

Again, of the allegation made in paragraph 131 that " . . . various deadly pharmaceuticals manufactured by Farben and supplied by Farben to officials of the S.S. were used in experimentations upon . . . enslaved persons in concentration camps throughout Europe. Experiments on human beings (including concentration camp inmates) without their consent were conducted by Farben to determine the effect of . . . vaccines and related products," the Tribunal declared that : " Applying the rule that where from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must prevail, we must conclude that the Prosecution has failed to establish that part of the charge here under consideration."

The Tribunal found the following guilty on Count III as a whole : Krauch, Duerrfeld, Ambros, Buetefisch, and ter Meer.

The following were held not guilty on Count III : Gajewski, Hoerlein, Buergin, Jaehne, Kuehne, Lautenschlager, Schneider, Wurster, Schmitz, von Schnitzler, von Knieriem, Haefliger, Ilgner, Mann, Oster, Gattineau, von der Heyde, and Kugler.

(xii) *Count IV ; Membership of a Criminal Organisation*

The Tribunal's treatment of Count IV includes the following passage : " Article II, 1, (*d*) of Control Council Law No. 10 provides that :

" ' 1. Each of the following acts is recognized as a crime : . . .

'(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.'

" Article 10 of the Charter of the I.M.T. provides :

'In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national military or occupation courts. In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned.'

" In dealing with the S.S. the I.M.T. treated as included therein all persons who had been officially accepted as members of any of the branches of said organization, except its so-called riding units. The Tribunal declared to be criminal those groups of said organizations which were composed of members who had become or remained such with knowledge that such groups were being used for the commission of war crimes or crimes against humanity connected with the war, or who had been personally implicated as members of said organization in the commission of such crimes. Specifically excluded from the classes of members to which the Tribunal imputed criminality, however, were those persons who were drafted into membership by the State in such a way as to give them no choice in the matter and who had committed no such crimes and those persons who had ceased to belong to any of said organizations prior to 1st September, 1939.

" The I.M.T. said :

'A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the Organization. Membership alone is not enough to come within the scope of these declarations.'

" Finally, the I.M.T. made certain recommendations, from which we quote :

'Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organizations found to be criminal, the Tribunal feels it appropriate to make the following recommendations : . . .

'2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty. The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse, and Wurttemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment

fixed by the De-Nazification Law. No person should be punished under both laws.'

" For having actively engaged in the National Socialist tyranny in the S.S., the De-Nazification Law of 5th March, 1946, for Bavaria, Greater-Hesse and Wurttemberg-Baden, fixes a maximum penalty of internment in a labour camp for a period of not less than two nor more than ten years in order to perform reparations and reconstruction work, against which political internment after 8th May, 1945, may be taken into account. There are also provisions for confiscation of property and deprivation of civil rights.

" In its Preliminary Brief the Prosecution says that ' it seems totally unnecessary to anticipate any contention that intelligent Germans, and in particular persons who were S.S. members for a long period of years, did not know that the S.S. was being used for the commission of acts " amounting to war crimes and crimes against humanity . . ." ' This assumption is not, in our judgment, a sound basis for shifting the burden of proof to a defendant or for relieving the Prosecution from the obligation of establishing all of the essential ingredients of the crime. Proof of the requisite knowledge need not, of course, be direct, but may be inferred from circumstances duly established.

" Tribunal II in passing upon the question of the guilt of the Defendant Scheide on a charge of membership in the S.S. in the case of the United States *v.* Pohl, *et al* (Case No. 4), said :

> ' The defendant admits membership in the S.S., an organisation declared to be criminal by the Judgment of the International Military Tribunal, but the Prosecution has offered no evidence that the defendant had knowledge of the criminal activities of the S.S., or that he remained in the organisation after September, 1939, with such knowledge, or that he engaged in criminal activities while a member of such organisation.
>
> ' Therefore the Tribunal finds and adjudges that the defendant Rudolf Scheide is not guilty as charged in Count VI of the Indictment '."

Speaking specifically of the accused Schneider, the Tribunal continued :

" The defendant Schneider was a sponsoring member of the S.S. from 1933 until 1945. As such member his only direct contact with said organisation arose out of the payment of dues.

" After quoting from that part of the I.M.T. Judgment in which the matter of criminal responsibility for membership in the S.S. was discussed, Tribunal III in the case of the United States *v.* Alstoetter *et al.* (Case No. 3),[1] transcript page 10906, in the course of its opinion said : ' It is not believed by this Tribunal that a sponsoring membership is included in this definition '. We are not disposed to disagree with that conclusion."

Of the defendant Buetefisch, the Judgment states :

" In the appraisal of the defendant's status in the S.S., the Prosecution attaches much significance to his intimate relationship to Kranefuss and the latter's close affiliation with Himmler and his Circle of Friends. It appears that the defendant became a member of this Circle about the same time that he was made an honorary leader of the S.S. and that he was a regular attendant

(1) See Vol. VI of these Reports, pp. 1–110.

at the meetings of the Circle, including one occasion when the entire membership was the guest of Himmler at his field headquarters in East Prussia. Concerning these meetings of the Himmler Circle, Tribunal IV in Case 5 (U.S. *v.* Flick *et al.* (1) after fully considering the character and activities of that group, including the part played by Kranefuss therein, said :

> ' We do not find in the meetings themselves the sinister purposes ascribed to them by the Prosecution . . . so far we see nothing criminal or immoral in the defendant's attendance at these meetings.
>
> ' As a group (it could hardly be called an organisation) it played no part in formulating any of the policies of the Third Reich.'

" The Prosecution calls attention to the fact, however, that the Circle of Friends contributed more than a million Reichsmarks annually to the S.S. during each of the years 1941, 1942, and 1943, and that 100,000 of each of these gifts came from Farben, through the defendants Schmitz and Buetefisch. These facts, if established, would only be material to the charge here under consideration as tending to show, in connection with other facts, that Buetefisch had knowledge of the criminal purposes or acts of the S.S. at the time he became or during the period that he remained a member—if he was, in fact, a member. In other words, it is first necessary for us to determine whether the defendant was a member of the S.S. in the sense contemplated by the I.M.T. when it held such membership to be criminal. Unless and until it is first ascertained that the defendant was a member in the accepted sense, we are unconcerned with the question as to whether he had knowledge of the criminal activities of the organisation.

" The exhaustive opinion of the Supreme Spruchkammer Court of Hamm, rendered in affirming the case in which Baron von Schroeder was convicted for honorary membership in the S.S., had been cited and relied upon by the Prosecution. The factual distinction between the case with which we are presently concerned and that of von Schroeder is clearly disclosed by the opinion above referred to. In noticing the character of von Schroeder's relationship to the S.S., the Supreme Spruchkammer Court said :

> ' At the Reich Party Meeting in 1936 he (von Schroeder) was told orally by Himmler that he had been accepted as an honorary member with the rank of Standartenfuehrer by the Allgemeine (General) S.S.
>
> ' The defendant after his acceptance into the Allgemeine S.S. as an honorary member received, as is admitted by the appellant, a membership number, paid regularly his membership dues, was promoted to S.S. Oberfuehrer in 1939 and S.S. Brigadefuehrer in 1941, showed up at special occasions wearing the uniform of his rank, although he never participated in any S.S. duties and was not assigned to any definite S.S. unit, but was registered with the Staff as an assigned leader.'

" As distinguished from von Schroeder, who appeared at special occasions in the uniform of his rank, the defendant Buetefisch consistently refused to procure a uniform in the face of positive demands that he do so. This circumstance, when coupled with the other significant reservations which the defendant imposed and consistently maintained when and after he accepted honorary membership, would seem to place him in an entirely different category from that of von Schroeder.

(1) See Vol. IX of these Reports, pp. 1–59.

" We do not attach any special significance to the fact that the defendant was classified as an honorary member, but we are of the opinion that the defendant's status in the organisation must be determined by a consideration of his actual relationship to it and its relationship to him. Membership in an organisation ordinarily involves, reciprocally, rights, privileges, and benefits accruing to the member from the organisation and corresponding duties, obligations, and responsibilities flowing to the organisation from the member. One of the advantages to be gained by an organisation from having so-called honorary members is the added prestige accruing to it from having prominent personages identified with it. This point was emphasised by the Supreme Spruchkammer in dealing with von Schroeder, but even that benefit is negatived here by the showing of the refusal of Buetefisch to attend the organisation's functions and to wear its insignia.

" We are constrained to hold that the evidence does not establish beyond a reasonable doubt that the defendant Buetefisch was a member of an organisation declared to be criminal by the Judgment of the I.M.T."

The Tribunal concluded its consideration of the accused von der Heyde's responsibility under Count IV with these words:

" In dealing with the S.D., the I.M.T. included ' all local representatives and agents, honorary or otherwise, whether they were technically members of the S.S. or not ', and concluded that said organisation was criminal. In this case, however, von der Heyde is charged, specifically, with membership in the S.S., not the S.D., and the burden is on the Prosecution to establish that fact. There was no showing that membership in the S.S. was a necessary prerequisite to membership in the S.D. The Judgment of the I.M.T. indicates otherwise and treats these groups as separate, though related, organisations.

" Taking into account that the only definitely established affiliation of the defendant was with the non-culpable Riding Unit of the S.S. and that the evidence tending to show that he subsequently became a member of the General S.S. arises wholly out of the innocuous incidents connected with his efforts to obtain a marriage licence, we must conclude that the guilt of the defendant von der Heyde under Count IV has not been satisfactorily established."

(xiii) *The Tribunal's Findings on Count IV.*

It may be convenient to quote the Tribunal's words reiterating its findings on this Count:

" The defendants Schneider, Buetefisch and von der Heyde are acquitted of the charges contained in Count IV of the Indictment."

(xiv) *Judge Herbert's Statement and Opinions.*

Judge Paul M. Herbert signed the Judgment of the Tribunal subject to reservations made immediately before the pronouncement of sentences by the President of the Tribunal:

" I concur in the result reached by the majority under Counts I and V of the Indictment acquitting all of the defendants of crimes against peace, but I wish to indicate the following: The Judgment contains many statements with which I do not agree and in a number of respects is at variance with my

reasons for reaching the result of acquittal. I reserve the right, therefore, to file a separate concurring opinion on Counts I and V.(1)

" As to Count III of the Indictment, I respectfully dissent from that portion of the Judgment which recognises the defence of necessity as applicable to the facts proven in this case. It is my opinion, based on the evidence, that the defendants have not established the defence of necessity. I conclude from the record that Farben, as a matter of policy, with the approval of the T.E.A. and the members of the Vorstand, willingly co-operated in the slave-labour programme, including utilisation of forced foreign workers, prisoners of war, and concentration camp inmates, because there was no other solution to the manpower problems. As one of the defendants put it in his testimony, Farben did not object because ' we simply did not have enough workers any longer '. It was generally known by the defendants that slave labour was being used on a large scale in the Farben plants, and the policy was tacitly approved. It was known that concentration camp inmates were being used in construction at the Auschwitz Buna plant, and no objection was raised. Admittedly, Farben would have preferred German workers rather than to pursue the policy of utilisation of slave labour. Despite this fact, and despite the existence of a reign of terror in the Reich, I am, nevertheless, convinced that compulsion to the degree of depriving the defendants of moral choice did not in fact operate as the conclusive cause of the defendants' actions, because their will coincided with the governmental solution of the situation, and the labour was accepted out of desire to, and the only means of, maintaining war production.

" Having accepted large-scale participation in the programme and, in many instances, having exercised initiative in obtaining workers, Farben became inevitably connected with its operation, with all the discriminations and human misery which the system of detaining workers in a state of servitude entailed. The cruel and inhuman regulations of the system had to be enforced and applied in the working of slave labour. The system demanded it. Efforts to ameliorate the condition of the workers may properly be considered in mitigation, but I cannot accept the view that persons in the positions of power and influence of these defendants should have gone along with the slave-labour programme.

" Those who knowingly participated in and approved the utilisation of slave labour within the Farben organisation should bear a serious responsibility as being connected with and taking a consenting part in war crimes and crimes against humanity, as recognised in Control Council Law No. 10.

" I concur in the conviction of those defendants who have been found guilty under Count III, but the responsibility for the utilisation of slave labour and all incidental toleration of mistreatment of the workers should go much further and should, in my opinion, lead to the conclusion that all of the defendants in this case are guilty under Count III, with the exception of the defendants von der Heyde, Gattineau, and Kugler, who were not members of the Vorstand. I, therefore, dissent as to this aspect of Count III, and reserve the right to file a dissenting opinion with respect to that part of the Judgment devoted to Count III."(1)

(1) At the time of going to press, this opinion had not been filed.

(xv) *Sentences.*

The sentences imposed were all terms of imprisonment. Each convicted man was allowed credit for periods of time already spent in custody and this involved for Ilgner and Kugler immediate release since the sentences imposed were less than the time already spent in prison.

The sentences imposed were as follows:

Carl Krauch	Six years.
Hermann Schmitz	Four years.
Georg von Schnitzler	Five years.
Fritz ter Meer	Seven years.
Otto Ambros	Eight years.
Ernst Buergin	Two years.
Heinrich Buetefisch	Six years.
Paul Haefliger	Two years.
Max Ilgner	Three years.
Friedrich Jaehne	One and one-half years.
Heinrich Oster	Two years.
Walter Duerrfeld	Eight years.
Hans Kugler	One and one-half years.

At the time of going to press these sentences had not been confirmed by the Military Governor.

B. NOTES ON THE CASE

1. ECONOMIC OFFENCES AS WAR CRIMES

The Tribunal's general treatment of Count II of the Indictment is referred to in the notes to the *Krupp Trial*, later in this volume.(1)

2. HAGUE CONVENTION NO. IV NOT APPLICABLE TO THE OCCUPATION OF AUSTRIA AND THE SUDETENLAND

The Tribunal acting in the *I.G. Farben Trial* ruled that, whatever were the moral rights involved, it had no jurisdiction to try offences against property committed in Austria or the Sudetenland; such acts "would not constitute war crimes, as the incidents occurred in territory not under the belligerent occupation of Germany."(2)

While not stating its reasons for so deciding, the Tribunal which conducted the *Krupp Trial* held that it had no jurisdiction to try an alleged offence involved in the acquisition of the Berndorfer plant in Austria by the Krupp firm.(3) A dissenting opinion by Judge Wilkins took the opposite view on the ground that the act, if proved, would constitute a war crime; the International Military Tribunal had held that "The invasion of Austria was a premeditated aggressive step" and had found that the laws and customs of war were applicable to Bohemia and Moravia which, according to Judge Wilkins, were occupied by the Germans in a manner sufficiently similar to that used in Austria to make the same laws and customs applicable to that country.(4)

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(1) See pp. 159–166.
(2) See p. 42.
(3) See p. 140.
(4) See pp. 151–153.

The International Military Tribunal has taken the view that *crimes against humanity* were committed in Austria. For instance, of the accused von Schirach its Judgment said :

"Von Schirach is not charged with the commission of war crimes in Vienna, only with the commission of crimes against humanity. As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a ' crime within the jurisdiction of the Tribunal,' as that term is used in Article 6 (*c*) of the Charter. As a result, ' murder, extermination, enslavement, deportation and other inhuman acts ' and ' persecution on political, racial or religious grounds ' in connection with this occupation constitute a crime against humanity under that Article."(1)

The Tribunal before which the *I.G. Farben Trial* was held, however, adopted the ruling of Military Tribunal IV in its Judgment in the *Flick Trial* concerning the scope and application of Control Council Law No. 10, Article II (*c*) (*Crimes Against Humanity*), in relation to offences against property. The ruling referred to laid down in effect that offences against industrial property could not constitute crimes against humanity.(2)

3. CRIMES AGAINST PEACE

See p. 168.

4. MEMBERSHIP IN CRIMINAL ORGANISATIONS

In its Judgment, the Tribunal set out the law, as laid down by the International Military Tribunal, relating to membership in criminal organisations and proceeded to apply that law to three accused, arriving at the final finding of not guilty as to each. The Tribunal's reasoning is not analysed here, since the whole question of membership will receive treatment in Volume XIII of this series.

5. THE PLEA THAT THE INTERNATIONAL LAW APPLYING TO ECONOMIC OFFENCES IN OCCUPIED TERRITORIES IS VAGUE AND OBSOLETE

Considerable reliance was placed by the Defence in the *Flick*, *I.G. Farben* and *Krupp Trials* on the argument that the international law relating to economic offences in occupied territories is vague and largely uncodified and has been rendered obsolete by the coming of " total war," which includes a highly developed economic warfare.

Thus the Defence in the *Krupp Trial* claimed that :

" The judgment by legal standards of cases of spoliation is extraordinarily difficult, because there is not either in the Hague Rules of Land Warfare, in literature, in the judgments so far pronounced in Nuremberg, in the Indictments or in the Prosecution Trial Briefs any clear definition of the concept of spoliation either from the point of view of penal law or from that of International Law. . . .

" The provisions of the Hague Rules of Land Warfare can be interpreted only in light of the development of modern warfare.

" From this it follows that, when private property and particularly industrial works in occupied territories are concerned, the provisions of the

(1) *British Command Paper*, Cmd. 6964, p. 111.
(2) See pp. 41–42 of the present volume and pp. 48–51 of Vol. IX.

Hague Rules of Land Warfare of 1907 cannot be applied literally. Every kind of law, and thus especially International Law, depends on historical development, which might result in their relaxation or in the restriction of their scope. . . .

" It can be stated now that the case of total war and the occupation of entire countries was not provided for by the Hague Rules of Land Warfare...

" There are in total economic war not only the purely military necessities and interests of the army of occupation, but these conceptions extend also, as ' necessities of the war,' to economic necessities and interests. Economic and military necessities can no longer be separated and in total war they go hand in hand. Certainly this consequence is hard for the private property and the factories of the occupied territories. But is it not much harder, and much sadder, that through the blockade and air raids, although the Hague Regulations for Land Warfare include the civilian population, total war lets women and children hunger and die ? . . .

" If one fails to find a clear definition in the books on international law of the ' requirements of war ' which the Hague Rules on Land Warfare mentions, one should not be amazed since these books were written before we knew total war."

The Defence in the *I.G. Farben Trial* presented a somewhat similar argument. Counsel quoted the following passage from the Judgment of the International Military Tribunal :

" These orders, then, prove Doenitz is guilty of a violation of the protocol.(1)

" In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8th May, 1940, according to which all vessels should be sunk at sight in the Skaggerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare."(2)

Counsel continued :

" This sentence states nothing less than that a violation of international law cannot be punished if former enemy countries committed an analagous violation of international law, even if merely towards an ally of Germany. What is the legal significance of such a statement ? Obviously, it does not assert that the violation of international law committed by both sides proves the existence of a usage which invalidated the violated international treaty, because it is *expressis verbis* stated that international law was violated, and the opinion of the Tribunal is laid down as to how proper conduct in accordance with international law could have been observed. On the contrary, it asserts that the objection ' *tu quoque* ' is, of course, admissible. . . .

" The decision in the case of Doenitz has, moreover, a further special significance for the present trial. The acquittal of Doenitz acknowledges

(1) *I.e.*, the Naval Protocol of 1936.
(2) See *British Command Paper*, Cmd. 6964, p. 109.

that total war was carried on at sea. The same applies to the war in the air. Goering was not indicted before the International Military Tribunal because, as Generalissimo of the German Luftwaffe, he led the detachment of fighter aircraft in the German air offensive against England in 1940, although in this case too violations were committed against the Hague Regulations of Land Warfare. . . . I.e., all offences committed in the war at sea or in the air in the interests of waging total war were not included in the Indictment, because the Allies committed the same offences."

Counsel quoted, *inter alia*, the following passage from *The International Economic Law of Belligerent Occupation*, by E. H. Fielchenfeld:

"If one considers the treatment now meted out to enemy property and civilians in belligerent countries and in naval warfare, one is driven towards the conclusion that the protection of civilians in occupied regions provided by the Hague Regulations is becoming a limited survival rather than the expression of universal trends and practices."

"Thus," said counsel, "the trained observer could not but be uncertain in his legal conclusions and, in view of the practice of total war now being introduced by the nations on both sides, could not be conscious of wrong-doing if he acquiesced in the instructions and methods of the government in order to exploit the economic potential of the occupied territories."

Defence counsel wound up his argument on this point as follows:

"If the Hague Convention is applied literally, then the occupying power would have to make of the occupied territories a paradise where the individual enjoys freedom of person and property, a condition unknown either to the occupying or to the occupied state since the change over to the totalitarian system."

The attitude of the Prosecution was indicated in the following words taken from their closing speech in the *Krupp Trial*:

"It is, of course, true that the laws and customs of war can be and are, from time to time, modified in the light of the actual practices followed by civilised nations generally. But it does not follow from the fact that in this last war on both sides bombs were dropped and torpedoes fired in far greater volume than ever before in history, that Germany was entitled unilaterally to abrogate the laws of war relating to belligerent occupation. . . .

"It has also been suggested that international law is a vague and complicated thing and that private industrialists should be given the benefit of the plea of ignorance of the law. Whatever weight, if any, such a defence might have in other circumstances and with other defendants, we think it would be quite preposterous to give it any weight in this case. We are not dealing here with small businessmen, unsophisticated in the ways of the world or lacking in capable legal counsel. Krupp was one of the great international industrial institutions with numerous connections in many countries, and constantly engaged in international commercial intercourse. As was said in the Judgment in the Flick case,

> '. . . responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own state, he must be expected to ascertain and keep within the applicable law.'

"It is quite true, of course, that in the field of international law, just as in domestic law, many questions can be asked on which there is much to be said on both sides. But the facts established by the record here fall clearly within the scope of the laws and customs of war, and the language of the Hague Conventions, and we think there is no lack of charity in holding the directors of the Krupp firm to a knowledge of their clear intendment."

The United States Military Tribunal trying the *I.G. Farben Trial* has shown a willingness to admit that changing international custom may render a rule of law obsolete and so take away its obligatory nature. "As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilised nations as to alter the substantive content of certain of its principles."(1) "Technical advancement in weapons and tactics used in the actual waging of war" may have rendered obsolete or inapplicable certain rules relating to "the actual conduct of hostilities and what is considered legitimate warfare."(2) Similarly, the Judgment delivered in the *Flick Trial* stated that certain specified technical developments occurring since 1907 "make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered."(3)

Such considerations, nevertheless, did not serve to acquit Flick of guilt in connection with the Rombach plant (4) and the Tribunals acting in the *I.G. Farben Trial* and in the *Krupp Trial*, explicitly and tacitly respectively, rejected their application to the protection afforded by the Hague Convention to property rights in occupied territories.(5) The plea based on the alleged vagueness of the relevant law was also explicitly rejected by the Tribunal acting in the *I.G. Farben Trial*,(6) and an argument based on its alleged obsolete nature was rejected in the *Milch Trial*.(7)

6. JUDICIAL NOTICE IN WAR CRIME TRIALS

In the course of its Judgment, the Tribunal referred to "a matter of history of which we may take judicial notice."(8) Application was thus made of Article IX of Ordinance No. 7 (9) of the United States Military Government which binds the United States Military Tribunals:

> "*Article IX.* The Tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation

(1) See p. 48.
(2) See p. 49.
(3) See Vol. IX of these Reports, p. 23.
(4) *Ibid.*, p. 23.
(5) See pp. 48–49 and 133–134.
(6) See p. 49. For an earlier example of this type of plea, see Report of the *Peleus Trial* in Vol. I of these Reports, pp. 8, 11, 14 and 15.
(7) See Vol. VII, pp. 44–5 and 64–5.
(8) See p. 45.
(9) See Vol. III of these Reports, p. 114.

of war crimes, and the records and findings of military or other tribunals of any of the United Nations."

Specific provisions regarding judicial notice appear in certain other instruments governing war crime courts. For instance, Article 21 of the Charter of the International Military Tribunal makes the same provisions for that Tribunal as does the text quoted above for the United States Military Tribunals.

Regulation 8 (iii) made under the British Royal Warrant, Army Order No. 81 of 1945,(1) under which war crime trials by British Military Courts are held, simply states that "The Court shall take judicial notice of the laws and usages of war." It should be added, however, that Rule of Procedure 74 made under the Army Act, which according to Rule of Procedure 121 and Regulation 3 of the Regulations made under the Royal Warrant is applicable to trials under the Warrant, provides that "The Court may take judicial notice of all matters of notoriety, including all matters within their general military knowledge." It may be thought that Regulation 8 (iii) was written into the Regulations in order to remove any doubts which may have existed as to the question whether or not the laws and customs of war must be proved by expert witnesses before British war crime courts. It could be mentioned here that, even so, the Defence in the *Belsen Trial* before putting forward the suggestion (which was accepted) that Professor Smith should appear as a Defending Officer,(2) had previously requested that he be called *as an expert witness on international law.* Since the Defence abandoned this latter request the Court was not called upon to rule upon it, but it is clear that any Court will take judicial notice of the law which it applies and that the production of expert evidence on such law would not be necessary.

(1) See Vol. I, p. 105.
(2) See Vol. II of this series, p. 69.

CASE No. 58.

THE KRUPP TRIAL.

TRIAL OF ALFRIED FELIX ALWYN KRUPP VON BOHLEN UND HALBACH AND ELEVEN OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG,
17TH NOVEMBER, 1947—30TH JUNE, 1948

Liability for Crimes against Peace, War Crimes and Crimes against Humanity, Plunder and Spoliation, Crimes involving Prisoners of War and Slave Labour.

Alfried Felix Alwyn Krupp von Bohlen und Halbach and the eleven others were all officials of Fried. Krupp A.G., Essen (1903–1943) and its successor, Fried. Krupp, Essen. The original enterprise of Fried. Krupp was founded in 1812. It was transformed into a corporation (A.G.) in 1903, which was succeeded in December, 1943, by an unincorporated firm, Fried. Krupp, Essen, in accordance with a special Hitler decree. These firms in turn constituted the family enterprise of the Krupp family and, together with their subsidiaries and other interests, are hereinafter referred to as " Krupp." The managing body of the Fried. Krupp, A.G., is referred to as the " Vorstand", and that of the succeeding unincorporated firm, as the " Directorium".

It was alleged by the prosecution that the accused had committed Crimes against Peace, War Crimes and Crimes against Humanity, and participated in a common plan and conspiracy, all as defined in Control Council Law No. 10 of 20th December, 1945. These crimes were said by the prosecution to include planning, preparing, initiating and waging wars of aggression and invasions of other countries, as a result of which incalculable destruction was wrought throughout the world, millions of people were killed, and many millions more suffered and were still suffering ; deportation to slave labour of members of the civilian population of the invaded countries, the employment of prisoners of war and concentration camp inmates in armament production and the enslavement, ill-treatment, torture and murder of millions of persons, including German nationals as well as foreign nationals ; and

plunder and spoliation of public and private property in the invaded countries pursuant to deliberate plans and policies intended not only to strengthen Germany in launching its invasions and waging its aggressive wars and to secure the permanent domination by Germany of the continent of Europe, but also to expand the private empire of the Krupp firm.

All the accused were found not guilty in so far as they had been charged with Crimes against Peace and with conspiracy to commit Crimes against Peace, War Crimes and Crimes against Humanity (Counts I and IV).

Six of the accused including Alfried Krupp were found guilty under the Count charging plunder and spoliation (Count II), the six others were found not guilty under this Count.

Finally, all of the accused, except one, were found guilty of having contrary to the provisions of international law, employed prisoners of war, foreign civilians and concentration camp inmates under inhuman conditions in work connected with the conduct of war (Count III).

The accused Alfried Krupp was sentenced to imprisonment for twelve years. The other ten convicted were sentenced to imprisonment for a period of time ranging from nearly three years to twelve years.

The Tribunal in its Judgment dealt with a number of legal questions which will be outlined in the following report.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court before which this trial was held was a United States Military Tribunal (No. III of the Nuremberg Military Tribunals) set up under the authority of Law No. 10 of the Allied Control Council for Germany, and Ordinance No. 7 of the Military Government of the United States Zone of Germany.[1]

2. THE INDICTMENT

The accused whose names appeared in the Indictment were the following twelve: Alfried Felix Alwyn Krupp von Bohlen und Halbach, Ewald Oskar Ludwig Loeser, Eduard Houdremont, Erich Müller, Friedrich Wilhelm Janssen, Karl Heinrich Pfirsch, Max Otto Ihn, Max Adolph Ferdinand Eberhardt, Heinrich Leo Korschan, Friedrich von Buelov, Werner Wilhelm Heinrich Lehmann, and Hans Albert Gustav Kupke.

[1] For a general account of the United States Law and Practice regarding war crime trials held before Military Commissions and Tribunals and Military Government Courts, see Vol. III of this series, pp. 103–120.

The Indictment filed against the twelve accused made detailed allegations which were arranged under four Counts. For the sake of convenience these four Counts may be generally described as follows :

(1) Planning, preparation, initiation and waging aggressive war.
(2) Plunder and Spoliation.
(3) Crimes involving prisoners of war and slave labour.
(4) Common plan or conspiracy.

The individual Counts made the following allegations and charges :

Count I—Crimes against Peace

In the original Indictment filed all of the accused (1) were charged with having during a period of years preceding 8th May, 1945, committed Crimes against Peace as defined in Article II of Control Council Law No. 10, in that they :

(*a*) participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including, but not limited to planning, preparation, initiation, and waging wars of aggression, and wars in violation of international treaties agreements and assurances,

(*b*) through the high positions they held in the political, financial, industrial and economic life of Germany committed Crimes against Peace by having been principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations and groups, including Krupp, connected with the commission of Crimes against Peace.

" The invasions and wars referred to above and the dates of their initiation ", runs the Indictment, " were as follows : Austria, 12th March, 1938 ; Czechoslovakia, 1st October, 1938 and 15th March, 1939 ; Poland, 1st September, 1939 ; the United Kingdom and France, 3rd September, 1939 ; Denmark and Norway, 9th April, 1940 ; Belgium, the Netherlands and Luxembourg, 10th May, 1940 ; Yugoslavia and Greece, 6th April, 1941 ; the Union of Socialist Soviet Republics, 22nd June, 1941 ; and the United States of America, 11th December, 1941."

In these invasions and wars it was claimed, many millions of people were murdered, tortured, starved, enslaved and robbed ; countless numbers became diseased ; millions of homes were left in ruins ; tremendous industrial capacity capable of raising the standard of living of peoples all over the world was destroyed.

It was alleged by the Prosecution that the origins, development and background of the crimes which the accused committed, and of the criminal plans in which they participated could be traced through a period of over one hundred years of German militarism, and one hundred and thirty-three years embracing four generations of Krupp armament making. Throughout the entire period of preparation and planning for Germany's criminal invasions and wars (in the Second World War) and during the period of the actual initiation and waging of such wars, the accused supported and approved the aims

(1) During the trial the Prosecution made a motion to amend the Indictment so as to eliminate the accused Kupke, Lehmann and von Buelow from Counts I and IV.

and programme of the Third Reich and of the NSDAP and placed at their service the productive resources of Krupp, its prestige and its financial power. Thus Krupp had, as the principal German manufacturer of large calibre artillery, armour plate and other high quality armament, the largest private builder of U-boats and warships, and the second largest producer of iron and coal in Germany, contributed substantially to the ability of the Third Reich to wage its invasions and wars of aggression.

It was further alleged that the restrictions which the Versailles Treaty placed upon the armament of Germany were systematically circumvented and violated by Krupp in order to be ready to work for the German armed forces at the appointed hour without loss of time or experience. The name, prestige and financial support of Krupp had been used to bring the NSDAP into power and to put into effect its announced programme of aggression. The programme of the Nazi Party had coincided with the aspirations of the Krupp firm to re-establish a powerful Germany, with Krupp as the armament centre. The accused and other Krupp officials whose co-operation was needed for the accomplishment of the aims of the Four Year Plan had been advised as to the purposes of the plan and participated in its execution. The Krupp firm had under the direction of the accused willingly synchronized all its activities with the German Government and its plans and preparations for invasions and wars. Each of the accused, during the period of their association with Krupp, participated in its activities in support of the programme of aggression and continued the assistance and aid to the Nazi Party initiated by Gustav Krupp von Bohlen as leader of Krupp in 1933. It was alleged that the assistance Krupp rendered under the direction of the accused, through its research, foreign organisations, products and exports was indispensable to the preparation, initiation and waging of Germany's aggressive wars. To meet the demands of the German rearmament programme Krupp had altered and greatly expanded its production facilities.

It was alleged that through their foreign affiliates the Krupp firm had carried out extensive espionage activities on behalf of the German Government to whose agencies all important information was immediately passed on. Exports were regulated so as to build up the military position of friendly countries, while keeping those deemed " enemy countries " weak or dependent upon Germany. War materials were either entirely cut off from particular countries upon their selection as victims of German aggression or doled out in the minimum quantities necessary to allay suspicion.

The Prosecution maintained that the high positions held by the accused in the political, financial, industrial and economic life of Germany had facilitated the co-ordination between the activities of the Krupp firm and the German programme for rearmament. They held key positions in the economic organizations and groups which, acting in co-operation with the German High Command, prepared Germany's industrial mobilization plan. During the entire period of actual conflict Krupp was one of the principal sources of supply for German armed forces and one of the chief beneficiaries of German invasions and wars. In the wake of the invading armies the accused were said to have exploited private and public property and resources of occupied countries and to have enslaved their citizens.

The acts and conduct of the accused set forth in this Count were said by the Prosecution to have been committed unlawfully, knowingly and wilfully and to constitute violations of international laws, treaties, agreements and assurances, and of Article II of Control Council Law No. 10.

Count II—War Crimes—Plunder and Spoliation

In Count II of the Indictment all of the accused, except Lehmann and Kupke, were charged with War Crimes and Crimes against Humanity in that they from March, 1938, to May, 1945, had,

(*a*) participated in the plunder of public and private property, exploitation, spoliation, devastation and other offences against property and the civilian economies of countries and territories which came under the belligerent occupation of Germany in the course of its invasions and wars, resulting in privation and suffering to millions of the inhabitants,

(*b*) were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations and groups, including Krupp, which were connected with the commission of War Crimes and Crimes against Humanity.

It was alleged by the Prosecution that these acts of plunder and spoliation were carried out in consequence of a deliberate design and policy on behalf of the German Government. The territories occupied by Germany had been exploited in a ruthless way far beyond the needs of the army of occupation and in disregard of the needs of the local economy, and were out of all proportion to the resources of the occupied territories.

The accused were charged with having participated extensively in the formulation and execution of the foregoing plans, policies and acts of spoliation and plunder, by seeking and securing possession through duress, in derogation of the rights of the owners, of valuable properties in the territories occupied by Germany for themselves, for Krupp and for other enterprises owned, controlled and influenced by them, by exploiting properties in occupied territories, by abuse, destruction and removal of such property, by taking possession of machinery, equipment, raw materials and other property.

It was further alleged that the defendants had exercised persuasive influence and authority in the iron and steel and coal industries and exercised important functions in respect to the spoliation of occupied territories through and by means of their memberships, representation, control and influence in various economic organisations including: RVE, RVK, Kleiner Kreis and others.

It was alleged that throughout Europe the Krupp firm had been heavily engaged in spoliation and plundering activities. Through the accused and their representatives Krupp had acquired, and benefited from, numerous immovable properties, employing devices including seizure, purchase and leases influenced by force, " Trusteeships " (Treuhandschaften) and " sponsorships " (Patenschaften). Krupp had also, it was alleged, acquired and benefited similarly from acquisition of movable property seized in the occupied countries for use there or in Germany in the interest of the German war effort.

These acts of plunder and spoliation were alleged to have taken place in France, Belgium and the Netherlands, Austria, Yugoslavia, Greece and the Soviet Union.

In the subsequent paragraphs of the Indictment the Prosecution enumerates and gives the particulars of the specific acts of plunder and spoliation charged.

The Prosecution alleged that these acts had been committed unlawfully, wilfully and knowingly and constituted violations of the laws and customs of war, of international treaties and conventions, including Articles 46–56 inclusive, of the Hague Regulations of 1907, of the general principles of criminal law as derived from the criminal laws of all civilised nations, of the internal penal laws of the countries in which these crimes had been committed and of Article II of Control Council Law No. 10.

Count III—War Crimes and Crimes against Humanity—Employment of Prisoners of War, Foreign Civilians and Concentration Camp Inmates in Armament Production under Inhuman Conditions

Count III charges all of the accused with having with divers other persons, during the period from September, 1939, to May, 1945, committed War Crimes and Crimes against Humanity as defined in Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations and groups, including Krupp, which were connected with the commission of atrocities and offences against persons, including: murder, extermination, enslavement, deportations, imprisonment, torture, abuse and other inhuman acts committed against civilian populations of countries and territories under the belligerent occupation of or otherwise controlled by the Third Reich, enslavement and deportation of foreign and German nationals, including concentration camp inmates, employment of prisoners of war in war operations, and in work having direct relation to war operations, including the manufacture and transport of armament and munitions, and in dangerous occupations, persecution on political, racial and religious grounds and exploitations and ill-treatment of all categories of persons referred to above.

It was alleged that the acts, conduct, plans and enterprises charged had been carried out by the accused as a part of the slave labour plan and programme of the Third Reich. Through and by means of their offices, memberships, representation, control and influence in the RVE, RVK and other organisations and groups, the accused had victimized and committed offences against thousands of civilians and prisoners of war in the iron and steel and the mining industries alone, in Germany and in the occupied territories. It was alleged that the accused had sought out, requested and recruited foreign workers, prisoners of war and concentration camp inmates from the Third Reich and satellite government ministries and agencies, from the German military forces, the S.S., the official economic organisations and elsewhere. Krupp had maintained offices in occupied countries and recruited foreign civilians who had been forced, terrorized and mislead into employment with Krupp. Such recruitments had taken place in the Netherlands, Belgium, France, Poland and Italy. It was alleged that under the slave labour programme of the Third Reich, Krupp had employed in Krupp

enterprises over 55,000 foreign workers, over 18,000 prisoners of war and over 5,000 concentration camp inmates, not including replacements, within a period of about five years, and not including workers in Krupp plants in the occupied countries. Persecution on political, racial and religious grounds had been practised on workers brought from occupied countries and especially on concentration camp inmates, Eastern workers and Russian prisoners of war. The labour of foreign women and children had been exploited in war production and at other tasks.

Children had been separated from their parents. Foreign workers, prisoners of war and concentration camp inmates had been subjected to work which was excessive. Food, sanitary measures, medical assistance, clothing and shelter were customarily inadequate and the treatment brutal. They were exposed to air raids and deprived of protection and shelter against such raids. As a result of this treatment many had suffered and died.

It was alleged that the acts and conduct of the acoused referred to above were committed unlawfully, wilfully and knowingly and constituted violations of international conventions, particularly of Articles 3, 4, 5, 6, 7, 14, 18, 23, 43, 46 and 52 of the Hague Regulations, 1907, and of Articles 2, 3, 4, 6, 9–15, 23, 25, 27–34, 46–48, 50, 51, 54, 57, 60, 62, 63, 65–68 and 76 of the Prisoners of War Convention (Geneva, 1929) of the laws and customs of war, of the general principles of criminal law as derived from criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10.

Count IV—Common Plan or Conspiracy

Count IV charges all the accused with having together with divers other persons, during a period of years preceding 8th May, 1945, participated as leaders, organisers, instigators and accomplices in the formulation and execution of a common plan and conspiracy to commit, and which involved the commission of, Crimes against Peace (including the acts constituting War Crimes and Crimes against Humanity, which were committed as an integral part of such Crimes against Peace) as defined in Control Council Law No. 10, and that they were individually responsible for their own acts and for all acts committed by any persons in the execution of such common plan or conspiracy.

It was alleged that the acts and conduct of the accused set forth in Counts I, II and III above formed a part of the said common plan or conspiracy and that all the allegations made in these Counts therefore are incorporated in this Count.

3. PROGRESS OF THE TRIAL

The Indictment was filed with the Secretary-General of the Military Tribunals on 16th August, 1947, and the case was assigned to Tribunal No. III for trial. A copy of the Indictment in the German language was served on each of the accused on 18th August, 1947. The accused were arraigned on the 17th November, 1947. Each of the accused entered a plea of " not guilty " to all charges preferred against him. Thirty-four German counsel selected by the twelve accused were approved and represented the

respective accused. One of the accused was represented by an American attorney, selected by him, in addition to German counsel.

The presentation of evidence by the prosecution in support of the charges was commenced on 9th December, 1947, and was followed by evidence offered by the accused. The taking of evidence was concluded on 9th June, 1947. The Tribunal heard the oral testimony of 117 witnesses presented by the Prosecution and the accused, and 134 witnesses were examined before commissioners appointed under the authority of Ordinance No. 7, of Military Government for Germany (U.S.) establishing the procedure for these trials.[1] 1471 documents offered by the prosecution were marked for identification. 2829 documents offered by the accused were admitted in evidence as exhibits and 318 documents offered by the accused were marked for identification.

4. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *The Position of the Accused*

Alfried Felix Alwyn Krupp von Bohlen und Halbach was sole owner, proprietor, active and directing head of Fried. Krupp, Essen, and Fuehrer der Betriebe (Leader of the Plants), from December, 1943; successor to Gustav and Bertha Krupp von Bohlen und Halbach, directing head and owner respectively of Fried. Krupp A.G.; previously active head, Chairman of the Vorstand and head of the War Material and Raw Materials Departments of Fried. Krupp A.G., Essen; Wehrwirtschaftsfuehrer (Military Economy Leader); Deputy Chairman of the Reichsvereinigung Eisen (Reich Association Iron) and member of the Presidium of the Reichsvereinigung Kohle (Reich Association Coal) (hereinafter referred to as the "RVE" and "RVK"); member of the Verwaltungsrat of the Berg and Huettenwerksgesellschaft Ost G.m.b.H. (hereinafter referred to as the "BHO"); member of the Armament Commission (Ruestungsrat) in the Office of the Reich Minister for Armament and War Production (Reichsminister fuer Ruestung und Kriegsproduktion); member of the Nationalsozialistische Deutsche Arbeiter Partei (Nazi Party, hereinafter referred to as the "NSDAP"); sponsoring member of Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiter Partei (hereinafter referred to as the "S.S."); and Standartenfuehrer (Colonel) of the Nationalsozialistisches Flieger Korps (National Socialist Flying Corps, hereinafter referred to as the "NSFK").

Ewald Oskar Ludwig Loeser was a member of the Vorstand and head of the Administrative and Finance Departments of Fried. Krupp A.G., until March, 1943; Wehrwirtschaftsfuehrer; Krupp representative in the Kleiner Kreis (Small Circle, a group which exercised great influence over the coal, iron and steel industries); and Reich trustee for Phillips Radio, Eindhoven, Netherlands, in 1944.

Eduard Houdremont was a member of the Krupp Direktorium and deputy member of the Vorstand, head of the Metallurgical, Steel and Machine Departments; plant leader (Fuehrer des Betriebes), Gusstahlfabrik, Essen;

(1) Article V (*e*) of Ordinance No. 7 provides that: "The tribunals shall have the power . . . to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission."

Wehrwirtschaftsfuehrer ; Special Commissioner for Metal Substitutes (Sonderbeauftragter fuer Metallumstellung) in Reich Ministry for Armament and War Production and the Ministry of Economics (Reichswirtschaftsministerium) ; adviser to the administrators of the Four Year Plan ; and member of the NSDAP.

Erich Mueller was a member of Krupp Vorstand and Direktorium, head of the Artillery Designing and Machine Construction Departments and coordinator of artillery construction ; Wehrwirtschaftsfuehrer ; armaments adviser to Hitler ; adviser to the War Ministry ; head of Armament Committee (Waffenausschuss) in the office of Reich Minister for Arms and Munitions ; Chairman of the Weapons Development Committee (Entwicklungskommission der Waffen) of the Ministry for Armament and War Production ; and member of the NSDAP.

Friedrich Wilhelm Janssen was a member of Krupp Direktorium and deputy member of the Vorstand ; successor to Ewald Loeser as head of the Administrative and Finance Departments ; head of the Berlin office, 1937–43 ; Wehrwirtschaftsfuehrer ; member of the NSDAP ; sponsoring member of the S.S.

Karl Heinrich Pfirsch was a deputy member of Krupp Direktorium and Vorstand, and head of the War Material and Machine Sales Departments ; head of the Berlin office, 1943-45 ; Wehrwirtschaftsfuehrer ; and member of the NSDAP.

Max Otto Ihn was a deputy member of Krupp Direktorium and Vorstand, deputy to Ewald Loesser and Friedrich Janssen, concerned particularly with personnel and intelligence ; deputy plant leader, Gusstahlfabrik, Essen ; and member of the NSDAP.

Karl Adolf Ferdinand Eberhardt was a deputy member of Krupp Direktorium and Vorstand, and successor to Karl Pfirsch as head of the War Material and Machine Sales Departments ; and member of the NSDAP.

Heinrich Leo Korschan was a deputy member of Krupp Vorstand ; head of the Department of Steel Plants and deputy head of the Metallurgical Department ; trustee and administrator of Krupp wartime enterprises in Eastern and South-eastern Europe ; managing director of Krupp Bertha Werk, Breslau ; and member of the NSDAP.

Friedrich von Buelow was an official of Krupp, concerned particularly with confidential, intelligence, and public relations matters ; head of the Berlin office, 1932–36 ; military and political Chief of Counter-Intelligence (Hauptabwehrbeauftragter) at Krupp, Essen, and direct representative of Krupp with Nazi officials, the Gestapo and S.S. ; and chief of the Works Police (Werkschutz), Gusstahlfabrik, Essen.

Werner Wilhelm Heinrich Lehmann was an official of Krupp, deputy to Max Ihn and in charge of Arbeitseinsatz "A" (labour procurement) ; and member of the NSDAP.

Hans Albert Gustav Kupke was an official of Krupp, head of experimental firing ranges at Essen ; head of the foreign workers camps (Oberlagerfuehrer) ; previously an official of the Army Ordnance Office (Heereswaffenamt) ; and member of the NSDAP.

(ii) *Evidence Regarding the Krupp Concern*

The Krupp Concern originated with the business known as Fried. Krupp, founded in 1812. This was changed into a corporation (A.G.) in 1903. It was then known as Fried. Krupp A.G., and was a private, limited liability company. Bertha Krupp, the mother of the defendant Alfried Krupp, owned all but a very few shares of this company. The shares not owned by her were held by others for the purpose of complying with legal requirements, and were kept under careful control. In December, 1943, Fried. Krupp A.G., was dissolved and in accordance with provisions of the " Lex Krupp ", a special Hitler decree, the defendant Alfried Krupp became the proprietor. Since December, 1943, the unincorporated, privately-owned concern, owned and controlled directly, and through subsidiary holding companies, mines, steel and armament plants, two subsidiary operating companies, the Germania shipyards at Kiel, and the Grusonwerk machinery factory at Magdeburg. Many mines, collieries, development, research and other enterprises were conducted by and through many of the subsidiaries.

The Gusstahlfabrik at Essen was the most important enterprise in the higher concern. It operated open hearth and electric steel furnaces, armour-plate mills, large forge and press shops, iron and steel foundries, plate and spring shops and many machine shops. It produced semi-finished and finished iron and steel products, armaments, including armour plate, guns, tank hulls, tank turrets, shells and parts for fortifications. The Fried. Krupp Grusonwerk A.G., located in the interior of Germany, made finished guns, tanks and shells. The Germaniawerft, a shipyard located at Kiel Harbour, designed and built ships of many types including submarines. The stock of both the Grusonwerk and Germaniawerft was completely held by the Fried. Krupp A.G., and its successor Fried. Krupp, except for a few shares owned by Bertha Krupp.

In practice the control of the whole Krupp concern was vested in the Vorstand of Fried. Krupp, A.G. The Aufsichtsrat of Fried. Krupp, A.G., appears to have had the power to review the activities of the Vorstand. However, it met only once a year, and its functions were purely formal.

Gustav Krupp,[1] because of his wife's ownership of practically all of the stock of Fried. Krupp, A.G., and his position as chairman of the Aufsichtsrat, had a very great influence over the company. On March 8th, 1941, Gustav Krupp, as chairman of the Aufsichtsrat of Fried. Krupp A.G. issued a directive. It referred to the Direktorium as consisting of Goerens, and the accused Loeser and Krupp, and to six deputy members, including the accused Pfirsch, Janssen, Houdremont, Korschan, and Erich Mueller. It is also stated that Goerens and the accused Loeser and Krupp formed the Select Vorstand. It stated that next to the Chairman of the Aufsichtsrat, " the Select Vorstand is in charge of the management of the Fried. Krupp Aktiengesellschaft as well as of the Krupp Konzern. Its decisions are

[1] Gustav Krupp was originally one of the accused charged in the Indictment in the case against Goering, *et. al.*, tried before the International Military Tribunal in Nuremberg. However, he was found mentally and physically incapable of standing trial and the proceedings in that case as to him were accordingly stayed. He has never been tried. Following the finding by the IMT as to Gustav Krupp, there was a motion by the Prosecution to amend the Indictment before the IMT by naming his son, Alfried Krupp, as an accused therein. This motion was denied. Thereafter, Alfried Krupp was Indicted as one of the twelve accused in the present case.

binding for the other Direktorium members and the Vorstaende of the companies of the Konzern. It also handles the business distribution."

The directive also provided that the Select Vorstand had the leadership of the plant, and that the decisions for the Select Vorstand in technical affairs "are made by Herr Goerens, in commercial and administrative affairs by Herr Loeser and in matters pertaining to mining and armament by Herr A. von Bohlen und Halbach. These persons must keep in close contact with each other and must confer and agree especially on matters which their respective spheres of activities have in common or which are of general or special importance."

"If the necessary close co-operation is maintained the Select Vorstand should succeed in coming to a general agreement. Should there be differences of opinion nevertheless, each member of the Select Vorstand is entitled to call for the decision of the chairman of the Aufsichtsrat.

"According to the work distribution carried out by the Select Vorstand the following Dezernente are responsible for the spheres of activity assigned to them: the deputy members of the Direktorium and, inasfar as they are immediately subordinated to the Direktorium, the directors, department and workshop directors of the Fried. Krupp Aktiengesllschaft as well as the directors of the plants of the Konzern.

"In this sense the plants which have been conducted in the form of an independent body corporate as well as those which are merely considered departments of the Fried. Krupp Aktiengesellschaft are considered plants of the Konzern. The Select Vorstand decides which plants belong to these groups.

"The management of these plants which are conducted as mere departments of the Fried. Krupp sign for their spheres, as the following example shows:

"'Friedrich-Alfred-Huette der Fried. Krupp A.G.
Die Direktion (The Management).'"

"The Dezernente must manage their spheres of work in such a way as to take full responsibility for the results achieved by their departments. As heads of the spheres of activity assigned to them they must always bear in mind, that they are not conducting an individual business or plant, but part of a whole, on the rise and fall of which also their own work depends. For this reason they must observe a collegiate and mutual basis of co-operation and information with these plants and departments with whom they share common interests in their respective spheres of activity. They must inform the Select Vorstand briefly and comprehensively about the progress of work in their field, about new plans and important decisions before they are made final.

"Through the business distribution the Select Vorstand appoints the Dezernente who apart from their immediate sphere of activities will assist the Select Vorstand in its capacity as management of the Konzern. These Dezernente must keep in contact with the directors of the Konzern plants and work together with them on a collegiate basis inasmuch as the unification of the Konzern requires. The directors of the Konzern plants are under the same obligation. In the case of differences of opinion between

the directors of the Konzern plants and the Dezernente, these must jointly be submitted to the Select Vorstand for decision.

" Legal advisers to the firm and to the Konzern are at the present moment the gentlemen Ballas and Joeden. They have been entrusted, in collegiate collaboration with the Dezernente, to give legal advice.

" In order to make legal counsel effective the Dezernente are not only bound to submit to the legal advisers all legal questions which have arisen, contracts to be drawn up, etc., in good time, but also to keep in touch with the legal advisers to keep the latter informed about the various spheres of activities.

" Whatever has been said of the legal department under IV applies to the patent department accordingly."

In December, 1943, pursuant to the provisions of the " Lex Krupp ", as stated above, the Fried. Krupp Aktiengesellschaft was converted into the individually owned firm of Fried. Krupp with headquarters in Essen. On the same date, 15th December, 1943, simultaneously and on establishment of articles of incorporation of the Fried. Krupp, the Firm was vested in the sole ownership of the defendant Alfried Krupp von Bohlen und Halbach. Upon registration in the Commercial Recording Office the family enterprise had the name Fried. Krupp, and the branch enterprise Fried. Krupp, Aktiengesellschaft, Friedrich-Alfred-Huette and Krupp Stahlbau, Fried. Krupp, Aktiengesellschaft thereafter had the trade names of: Fried. Krupp, Friedrich-Alfred-Huette and Fried. Krupp Stahlbau. Thereafter, the accused Krupp had the name of Alfried Krupp von Bohlen und Halbach, whereas heretofore, his name had been Alfried von Bohlen und Halbach. After the conversion in December, 1943, the owner of the family enterprise, Alfried Krupp von Bohlen und Halbach, had the full responsibility and direction of the entire enterprise. To assist him he appointed a business management with the name " Das Direktorium ". The regular and deputy members of the former Vorstand, with the exception of the accused Loesser, who had resigned, continued to be the regular and deputy members of the Direktorium. Thereafter, they had authority to sign for the Firm in place of the owner, and without mention of " Prokura ".

The authority to sign for the individually owned firm by the others who were formerly the authorized agents of the Fried. Krupp Aktiengesellschaft was confirmed. No change was made with regard to the subsidiary companies which were continued to be managed as independent legal entities.

Control and management of the subsidiary companies was maintained in a number of ways. At least one member of the Vorstand was on the Aufsichtsrat of each of the principal subsidiary companies. The accused Krupp, Loeser, and Janssen were members of the Aufsichtsrat at the Germaniawerft, and the Grusonwerk, during various periods. The members of the Vorstand of the principal subsidiaries were required to and did submit regular reports of their activities to the parent company at Essen. Financial questions of consequence were decided by the Vorstand of the parent company, including all capital investments in excess of 5,000 Reichsmarks.

The accused Loeser entered the Krupp firm on 1st October, 1937, as a member of the Vorstand. The accused Krupp became a member of the Vorstand in 1938. The third member was Paul Goerens. In April, 1943,

the Vorstand was enlarged, and the accused Erich Mueller, Houdremont, and Janssen also became members, as did Fritz Mueller. Before that, these four had all been deputy directors, and then deputy Vorstand members. In 1937, the accused Janssen became Deputy Director. In 1938, the accused Eberhardt, Houdremont, Korschan, Ihn and Erich Mueller became Deputy Directors. In 1941, Pfirsch, who had been a deputy director since 1923, and the accused Janssen, Korschan and Mueller were made deputy Vorstand members. In 1943, the accused Eberhardt and Ihn were made deputy Vorstand members. As previously stated, the regular and deputy members of the Vorstand, with the exception of Loeser, were made regular and deputy members of the Direktorium when Fried. Krupp A.G. became the private firm Fried. Krupp in 1943.

Until 1943, various phases of activities were divided among the three members of the Vorstand. One field was Finance and Administration which had been under the direction of the accused Loesser, and was under the direction of the accused Janssen after Loeser resigned. Production in the plants was under Goerens, and the design, sale, and development of war material had been under the direction of the accused Alfried Krupp.

Although each member had his own sphere of activity, the management of the enterprise depended upon the co-ordinated efforts of the members. This has already been stated, as it was required by the Charter of Fried. Krupp, A.G. The co-ordination of three departments was required on major enterprises.

When the Vorstand was enlarged in April, 1943, Alfried Krupp became Chairman of the Vorstand, and Goerens became Deputy Chairman. Houdremont was then put in charge of metallurgy and steel plants, and also in charge of machine plants after November, 1943. From April, 1943 on, Janssen was in charge of trade, finance and administration. All of the foregoing were members of the enlarged Vorstand. These accused continued in these activities when the Vorstand members became Direktorium members in December, 1943, at the time Fried. Krupp. A.G. became a private firm. The department directors were referred to as " Dezernenten ". They had full responsibility for the results achieved by their departments, and apart from their immediate sphere of work, assisted the Vorstand in its capacity as management of the concern.

The accused Houdremont, Mueller, Janssen, Pfirsch, Ihn, Eberhardt and Korschan were all within this class at one time or another. The accused von Buelow achieved a status which for all practicable purposes was the same as that of a department director.

(iii) *Evidence Relating to Counts I and IV—Crimes against Peace ; and Conspiracy*

The evidence showed that the Krupp firm had, as the principal German manufacturer of large calibre artillery, armour plate and other high quality armament, the largest private builder of U-boats and warships and the second largest producer of iron and coal in Germany, contributed substantially to the ability of Germany to wage its aggressive wars and invasions not only during the First World War but also and particularly during the Second World War. The high positions held by the accused in the political, financial, industrial and economic life of Germany facilitated the co-operation

between the activities of the Krupp firm and the German programme for rearmament.

The evidence further showed that as early as about 1919 and onwards the restrictions which the Versailles Treaty placed upon the armament of Germany in general and on the Krupp firm in particular, had been systematically circumvented and violated by the firm and persistent attempts made to deceive the Allied Control Commissioners.

Thus the Prosecution introduced an excerpt from an article written by Gustav Krupp in 1941 and published in the firm's magazine. After speaking of himself as the " trustee of an obligatory heritage," he wrote :

" At the time (1919) the situation appeared almost hopeless. At first, it appeared even more desperate if one was not—as I was myself—firmly convinced that ' Versailles ' did not mean a final conclusion. Everything within me—as within many other Germans—revolted against the idea that the German people would remain enslaved forever. I knew German history only too well, and just out of my experiences in the rest of the world, I believed to know the German kind ; therefore, I never doubted that, although for the time being, all indications were against it—one day a change would come. How, I did not know, and also did not ask, but I believed in it. With this knowledge however—and today I may speak about these things and for the first time I am doing this extensively and publicly—as responsible head of the Krupp works, consequences of the greatest importance had to be taken. If Germany should ever be reborn, if it should shake off the chains of ' Versailles ' one day, the Krupp concern had to be prepared again. The machines were destroyed, the tools were smashed, but the men remained ; the men in the construction offices and the workshops who in happy co-operation had brought the construction of guns to its last perfection. Their skill had to be maintained by all means, also their vast funds of knowledge and experience. The decisions I had to make at that time were perhaps the most difficult ones in my life. I wanted and had to maintain Krupp, in spite of all opposition, as an armament plant—although for the distant future."

Another document introduced by the Prosecution was a report of the Krupp Direktorium for the year 1937–38 made about twenty years after it was said by the Prosecution that Gustav Krupp had formulated his alleged criminal plan referred to in the foregoing document. This report reads in part as follows :

" With the end of the business year 1937/38, twenty years have passed since the World War. Its unfortunate ending had fateful effects for us. The ' dictate ' of Versailles prohibited us to manufacture armaments and army equipment almost completely and demanded the destruction of machines and installations necessary for their manufacture. Under the supervision of the inter-allied control commission, approximately 10,000 machines, presses, furnaces, cranes and assembly shafts, work tools, as well as the installations of the firing ranges in Essen and Meppen were destroyed. Our firm had to decide whether it wanted to renounce, for all time, the production of war material and continue the enterprise on the basis of the coal mines, the refined steel works in Essen and the foundry in Rheinhausen, while discharging all superfluous workers and employees, or whether it would

continue employing its personnel with a new production programme and keep the shops operating with the production of peace-time products.

"In spite of numerous doubts and contrary to the advice of outside experts, it (Krupp) decided, as trustee of a historical inheritance, to safeguard the valuable experiences, irreplaceable for the armed strength (Wehrkraft) of our nation, and through constant close ties with the works members to keep up the shops and personnel in readiness if the occasion should arise, for armament orders later on. With this view in mind, we chose objects for the new programme of manufacture on which the personnel could obtain and improve their experience in the processing and refining of material, even though the manufacture and sale of these products partly entailed big losses. The changeover was made more difficult by the occupation of the Ruhr and its effects. But, after the inflation, the reserves built up by the very cautious evaluation of the property in the Goldmark balance, the proceeds from the coal mines, the Essen steel works and the foundry in Rheinhausen, as well as the renunciation of the payment of dividends, made it possible to overcome the difficulties of this period of time so full of losses. . . .

"'When, in 1933, we were again called upon to manufacture war material in large quantities, we were immediately ready to do so, and in addition, we were able to let other firms profit from our experiences, safeguarded and newly acquired by the use of our capital. Workshops which had not been in operation for years or had only been operating on an insufficient scale were again put into operation, and after a short preliminary stage, were working at capacity. Recognitions for holding out and rapidly going to work fill us with pride. They prove that the sacrifices of the past safeguarded great values for our people.

'After having again abandoned the production of all objects which were only meant to keep our personnel and our plants occupied, our production programme today is a carefully balanced whole in which peace and war production are organically united.'"

The Prosecution introduced as a witness the British General and lawyer, J. H. Morgan, K.C., the sole surviving member of the Allied Commission set up to supervise compliance by Germany with the disarmament provisions of the Versailles Treaty. There was also put in as evidence General Morgan's book *Assize of Arms*, which gives an account of the efforts of the Commission and how they were thwarted.

In the final report of that Commission made in February, 1927, after it had been ordered withdrawn following the signing of the Treaty of Locarno and the admission of Germany to the League of Nations, it was said among other things:

> "'The resistance of the Krupp firm to the efforts of the Commission to enforce disarmament provisions of the Treaty was great and always encouraged by the German government.' Particularly pertinent is the further statement made in this report that, 'initially the firm (Krupp) anticipated that they would eventually be permitted to manufacture every type of war material and that many special tools, jigs and gauges which gave the best results in the war, although ordered by the Commission for destruction, were withheld under various pretexts which pretexts were upheld by the government.'"

It was clear from the evidence that Gustav Krupp embraced Nazism shortly prior to the seizure of power by the Nazi Party and continued his allegiance thereafter. He played an important part in bringing to Hitler's support other leading industrialists and through the medium of the Krupp firm, the " two-legged stockholder's meeting "—as the Prosecution called him—from time to time made large scale contributions to the Party Treasury.

In order to show that the decision made by Gustav Krupp in 1919 (referred to above), was made with a criminal intent and amounted to a plan to accomplish an illegal objective, and further to show that the accused participated in this plan with knowledge of its criminal character and with like intent, the Prosecution introduced and placed much stress on the following two sentences from an article written for the Krupp firm in July, 1940, by one Schroeder who was the head of the firm's accounting department and submitted to the High Command of the German Armed Forces :

" Without government order, and merely out of the conviction that one day Germany must again fight to rise, the Krupp firm have, from the year 1918 to 1933, maintained employees and workshops and preserved their experience in the manufacture of war materials at their own cost, although great damage was done to their workshops through the Versailles Treaty, and employees and machines had in part to be compulsorily dispersed. The conversion of the workshops to peace-time production involved losses, and as at the same time, the basic plan of a reconversion to war production was retained, a heterogeneous programme as a result, the economic outcome of which was necessarily of little value ; but only this procedure made it possible at the beginning of the rearmament period to produce straight away heavy artillery, armour plates, tanks and such like in large quantities."

The evidence showed that after the Nazi seizure of power the activities of the accused consisted primarily in the performance of their duties as the salaried executives and employees of a private enterprise engaged in the large scale production of both armament and peace time products. The armament was ordered by and sold to the German Government as a part of the rearmament programme and also to other governments from whom orders were solicited and obtained in the normal course of such a business. In its field of activities the Krupp firm was one of the most valuable single contributors to the German war effort.

At the time when the so-called " Krupp conspiracy " was alleged to have been formed, in 1919, only three of the accused were connected with the firm, and it was conceded by the Prosecution that none of these occupied a sufficiently important position to justify charging them with responsibility for decisions taken at the end of 1920. The other accused became connected with the firm at various times over the period 1926–1937.

The evidence did not show, neither was it contended by the Prosecution that the alleged " Krupp conspiracy " involved a concrete plan to wage aggressive war clearly outlined in its criminal purpose.

Neither did the Prosecution succeed in proving that the accused had taken actual part in or conspired with the German Government or the Nazi Party in their planning, initiating and waging of aggressive wars and invasions or had had actual knowledge of these particular plans.

Thus it was clear from the evidence that the accused had not attended or been informed about the decisions taken by Hitler during the four secret meetings which took place on the 5th November, 1937, 23rd May, 1939, 22nd August, 1939 and 23rd November, 1939, where important declarations were made by Hitler as to his purposes.

With the exception of von Buelow and Loeser, all of the accused were members of the Nazi Party, but so far as it appeared from the evidence they made no substantial contribution to that organisation and their connection with it was confined in the main to the fact of membership.

None of the accused held, either before or during the war, any position of authority within the party or within the public life comparable in importance to that of either Speer or Sauckel.

(iv) *Evidence relating to Count II—War Crimes—Plunder and Spoliation*

The general attitude of the accused Alfried Krupp during the period of Germany's aggressions here under treatment, was indicated by the evidence given by the German witness Ruemann who appeared before the Tribunal. Ruemann described how on the 18th May, 1940, the accused Alfried Krupp and three others were gathered around a table intently studying a map while listening to a broadcast of German war news over the radio. The four men learned of the great advance of the German Wehrmacht through Belgium and evidently concluded from what they heard that the situation in Holland had been so consolidated that there was a possibility that outstanding members of the economy now would be able to go there. At the conclusion of the broadcast the four men talked excitedly and with great intensity. One, according to Ruemann, said: " This one is yours—that one is yours—that one we will have arrested—he has two factories." They resembled, as the witness put it, " vultures gathered around their booty." One of the men (Lipps) had telephoned his office to contact the competent military authority to obtain passports to Holland for two of them on the following day.

(a) *Evidence relating to the Austin Plant at Liancourt, and the Property* 141 *Boulevard Hausmann, Paris*

The Austin factory located at Liancourt, France, was founded in 1919. In 1939 the firm was purchased by Robert Rothschild, who was a citizen of Yugoslavia and of Jewish extraction. The peace-time business of the firm was the production of agricultural tractors. Only during the months of May and June, 1940, did the factory, upon special instructions from the French Army Headquarters during the German offensive against France, devote 90 per cent of its capacity to the production of war materials.

The owner, Robert Rothschild, was forced to flee from Liancourt with the general exodus upon the advance of the German army. He went to live south of Lyon and because of his Jewish extraction he was unable to return to German-occupied France, but he sent his non-Jewish brother-in-law, Milos Colap, to take charge of the plant.

The Austin plant was taken over by the German Army immediately upon the occupation in June, 1940. The German commander refused to turn over the plant to Colap because it was Jewish owned, but upon the German commander's advice Rothschild assigned his stock to Colap, whereupon the property was released to Colap on the 19th October, 1940. Colap

remained in charge of the property until 28th December, 1940, at which time he was dismissed under the provisions of the anti-Jewish Decree issued by the Chief of German Military Government for France, on 18th October, 1940.

After Colap's dismissal, a provisional administrator was appointed to operate the plant. The owner, Rothschild, opposed the appointment of the administrators and all the time took the view that such appointments were illegal.

In June, 1942, an offer was made by the Krupp firm to Maurice Erhard, then administrator of the property, for the purchase of the Austin plant for five million francs. Within a month after the offer was made by the Krupp firm, a subordinate in the office of the accused Loeser reported that Erhard had been delaying negotiations. As a result thereof the German military authorities, after consulting with the Krupp firm, directed Erhard to give the Krupp firm a three years' lease if he could not make up his mind to sell the property, and stated that failure on the part of Erhard to make the lease would result in his dismissal.

The accused Loeser's subordinate recommended that the lease should be signed purely as an opening wedge for the later acquisition of the plant through a Krupp-owned French corporation.

At the time the lease was signed the Krupp firm purchased all but thirty of the machines at a ridiculously low price according to Colap.

The lease agreement was signed by Maurice Erhard as provisional administrator pursuant to the German decree for the sequestration of Jewish properties for a three year period, with the right of renewal for an additional three years.

After the Krupp firm took possession of the Austin factory they manufactured parts for other Krupp factories in France and Germany, which were used for war purposes. Only about 2·1–2·2 per cent of the production was devoted to the manufacture of spare parts for agricultural tractors.

The Krupp firm continued its efforts to acquire the plant by purchase but the change in the military situation prevented the Krupp firm from finally obtaining title to the property.

Moreover, the Krupp firm selected a valuable property located in the heart of Paris, 141 Boulevard Hausmann, which was to become their central office in France. This was accomplished by profiting from the anti-Jewish policy of the Nazi Regime. The property was owned by Société Bacri Frères, a Jewish firm, and had been sequestered by the commissioner for Jewish affairs. The Krupp firm's representative in Paris, Walter Stein, obtained a lease of the property for the firm with the right to purchase it within six months after the date of the lease, 1st January, 1943, for 2,000,000 francs—not from the rightful owners but from the provisional administrator of the Société Bacri Frères by virtue of a decision of a commissariat for Jewish questions. There had been nothing to prevent the firm from leasing or buying a building from a non-Jewish owner in Paris.

The Krupp workers evacuated the Austin plant a few days before the entry of the American troops. Eighteen machines which they had collected in France were dismantled and taken to Germany. Among these were two machines originally obtained from the Austin plant.

The evidence showed that the accused Krupp, Loeser, Houdremont, Mueller, Jansen and Eberhardt voluntarily and without duress had participated in the purchasing and removal of the machinery and in the leasing of the Austin plant and in the obtaining of the lease of the Paris property.

(b) *Evidence relating to the Seizure of the Elmag Plant at Mulhouse and the Removal of Machinery to Germany*

For more than one hundred and twenty-five years a French company known as S.A.C.M. (Alsatian Corporation for Mechanical Construction) had its principal place of business at Mulhouse, Alsace. The company owned eight plants, four of which were located in France, outside of Alsace, but the principal works of the four located in Alsace were at Mulhouse. At the outbreak of the war the principal product of the Mulhouse plant was textile machinery, and a portion of the plant was devoted to the manufacture of combustion engines, machine tools and machinery for the fuel industry.

Upon the German occupation of Alsace in June, 1940, a "Chief of Civilian Administration" was appointed by the Germans, and German law was introduced. A German administrator was appointed to take charge of the S.A.C.M. properties hereinafter referred to as ELMAG, an abbreviation of the German translation of the name of the firm. The reason for this seizure seems to have been that the majority of the stock of the company was owned by Frenchmen, living outside of Alsace. The company was referred to as "an Alsatian enterprise in which enemy interests predominate." The action was protested against by the president and those of the directors who had remained with the company after the occupation.

In August, 1940, when the German administrator took over the plant, Elmag still used about one-half of the working hours for producing textile machinery but this figure rapidly decreased later in favour of direct and indirect production for the German Armed Forces.

As a result of damaging air raids on the Gusstahlfabrik-Essen plant in March, 1943, it was decided to move the Krupp-Krawa factory (automotive works) to the Elmag plant. On 27th March, 1943, a meeting for that purpose was held in the Reich Armament Ministry in Berlin, there being present the accused Janssen and Eberhardt as well as other Krupp officials, representatives of the Armament Ministry, of the German Civil Administration for Alsace, and of Elmag.

Minutes of the meeting were recorded by the accused Eberhardt and distributed to the accused Krupp, Mueller, and Pfirsch.

Strenuous opposition was raised by the administrators for Alsace and the Elmag representatives to the taking over of the plants by the Krupp firm, but transfer of the automotive factory from Essen to the Elmag plant had been decided upon and nothing could be done to alter the decision. The Krupp representatives obtained a statement by the Armament Ministry, to the effect that "the entire plant at Mulhouse, Masmuenster and Jungholz will be for the credit and debit of Krupp. . . ."

Under the terms of the lease, which was signed for the Krupp firm by the accused Eberhardt, the management of the three plants was turned over to the Krupp firm for the duration of the war. The machinery and fixed installations were to remain the property of Elmag.

The programme of war production was greatly increased when the Krupp firm took over the plants.

The evidence left little doubt that the Krupp firm desired ultimately to acquire the Elmag plant as their property. The fortunes of war, however, forced the Krupp firm to evacuate the Elmag plants because of the advance of the Allied armies. In view of this situation, the exploitation of the Elmag plants was substituted by outright physical looting.

The evacuation of the Krawa plant from Alsace was decided by Reich Minister Speer in early September, 1944, and the plant was hurriedly evacuated and re-established in Bavaria. Machinery which was the property of the Elmag plant, including machinery which was in the plant when it was seized by the German authorities as well as machines acquired from other sources were evacuated along with Krupp's own machinery. A total of 55 machines belonging to the Elmag plant were taken to Germany.

In October, 1944, a Krupp employee of Elmag inspected among others the Peugeot Works in Sochaux, France, in order to select machinery and equipment that would be usable in Krupp's plants. The evidence showed that a great number of machines and other equipment had been removed from this plant by Krupp.

The evidence showed that the accused Janssen and Eberhardt had attended the conference in Berlin where the decision to take over the Elmag plant had been made. The latter had been in charge of the negotiations and signed the contracts. The accused Krupp had participated in the discussions with Janssen and Eberhardt as to the methods to be employed to acquire the plant. The accused Mueller and Pfirsch had been advised of these discussions. The correspondence regarding the acquisition had been conducted by the accused Krupp, who had in turn brought the matters to the attention of the accused Eberhardt and Mueller. The accused Eberhardt had participated in the removal of the machinery and the plant to Germany and the accused Krupp, Houdremont, Mueller and Janssen had been kept informed concerning the evacuation of machines and equipment from other industrial firms in France for Elmag. The accused Mueller had participated in directing the production progress at Elmag. The management of the Elmag plant was responsible to the Krupp-Essen Vorstand which prior to April, 1943, consisted of the accused Krupp, Loeser and Goerens, and thereafter of the accused Krupp, Houdremont, Mueller and Janssen and Fritz Mueller, since deceased.

(c) *Evidence relating to the Removal of Machines from the Alsthom Factory at Belfort*

In the early part of 1941 the German High Command instituted a new submarine building programme, which was participated in by the Krupp subsidiary the Krupp Stahlbau in Reinhausen. One of the managers of this plant was sent to France in the company of a naval officer of the Armament Inspectorate of the Navy High Command in order to find bending roll machines of greater dimensions than were available at the Krupp plants. They proceeded to the Alsthom plant where they located two bending roll machines of greater dimensions than were available at the Krupp plants. They immediately placed " seized " signs upon the machines. The director of the Alsthom plant objected to the confiscation on the ground

that the machines were the only ones on which the construction of boiler drums and high pressure tubes were based. These machines were very heavy, one weighing 380 tons and the other 50–60 tons. Neither had been used for military purposes.

The objections raised to the seizure were of no avail and shortly afterwards the machines were dismantled by Krupp workmen and carried off to Germany. They were installed in the Krupp Stahlbau plant and were used in the submarine building programme until the end of the war when they were found and finally brought back to the Alsthom plant.

Repeated attempts were made by the Krupp firm to obtain title to the machines but the director of the Alsthom plant pursued delaying tactics which in the end and, because of the eventual outcome of the war, proved successful.

The evidence showed that the matter had received the attention of the Vorstand at various times from the acquisition of the machines until the liberation of Paris in June, 1944, and that the accused Krupp, Loeser, Houdremont, Mueller and Janssen were responsible for this confiscation and the detention of the machines.

(d) *Evidence relating to the Illegal Acquisition of Machines from other French Plants and of other goods Requisitioned by various Government or Army Offices as War Booty or Purchased through the Black Market by these Official Agencies*

The evidence showed that the Krupp firm not only took over certain French industrial enterprises, but also considered occupied France as a hunting ground for additional equipment which was either shipped to the French enterprises operated by the Krupp firm or directly sent to Krupp establishments in Germany. The Krupp firm obtained this machinery from the local French economy, partly through their own efforts and partly through those of various government offices. Some French machines were obtained from booty depots. Some were directly requisitioned from French firms with payment offered to the owners after the confiscation. Some were purchased by Krupp through its representatives in Paris, and some could only be obtained after negotiations conducted by Krupp officials had been adequately backed up through the intervention of German authorities.

In December, 1940, the Raw Materials Trading Co., which had been referred to as Roges, was founded at the request of the German Army High Command, the Economic and Armaments Office and the Reich Ministry of Economics, " whose desire it was to utilise the raw materials in the occupied countries of western Europe and to accelerate their use in German war economy.")

Goods were obtained by Roges in co-operation with the German military and economic agencies which goods could be placed in two categories, namely: (1) captured goods, referred to as " Booty Goods " and (2) purchased goods (those secured through the black market by German official agencies).

Under a special Goering decree, the Office of Plenipotentiary for Special Tasks was created, which supervised and directed the procuring of goods in occupied countries through the black market. These goods and booty

goods obtained in occupied countries by the German Army Command were turned over to Roges. These goods, as a rule, were gathered together in depots from which they were distributed to German firms under directions from the Central Planning Commission. Both the booty and the black market goods consisted of wares of all kinds, such as household goods, raw materials, textiles, machines, tools, shoes, scrap metal and other materials and were obtained in all the countries occupied by Germany. There were many machines and machine tools included in the booty goods.

The booty goods were not paid for and cost Roges only the cost of transportation from the occupied territories to Germany. These, as a rule, were confiscated by the German military agencies and turned over to the branch offices of Roges for shipment to Germany. The black market goods were procured by buyers, acting under orders of the German Economic Ministry and the Armaments Ministry. All purchases had to be approved by the competent military commander in the occupied area. Prices were fixed by the buyers and the owners were paid by Roges in currency of the particular occupied country, which foreign currency was furnished by the Reich, but came out of occupation costs.

A great portion of these booty and black market goods was distributed at the request of the Reich Association Iron (RVE), of which defendant Alfried Krupp was vice-chairman, to its member firms. In many instances the goods were shipped by Roges direct from the occupied country to the firms in Germany when those firms had placed their order for certain goods in advance. In other cases the booty goods were sent by Roges to a special booty centre where they were then allocated by the Reich agencies and sent to the respective business firms. As a rule the prices paid for these items were the prevailing domestic prices and lower than Roges paid for the black market goods. As Roges paid nothing for the booty goods, the surplus resulting was credited to the supreme command of the Armed Forces.

During the war, campaigns for the collection of scrap metal were conducted and Major Schuh carried on these drives in the occupied territories. These accumulations of scrap metal from the occupied countries were placed by Roges at the disposal of German industry. The Krupp firm regularly obtained large quantities of this scrap metal from Roges.

During the period of the war, the Krupp firm received goods of all kinds from Roges, of a total valuation of 14,243,000 RM. This amount comprised 3,458,000 RM for " booty " goods and 10,785,000 RM for goods purchased on the black market. It may be concluded from the evidence presented that the Krupp firm knew the source of these goods purchased from Roges and that certain of these items such as machines and materials were confiscated in the occupied territories and were so-called booty goods.

The evidence submitted indicated that in particular the accused Krupp, Loeser, Pfirsch, Eberhardt and Korschan were aware of the circumstances under which these war booty and black market goods were acquired.

(e) *Evidence relating to the Removal of Machines from Holland, etc.*

By 1942 the so-called Lager-Aktion programme was under way in the Netherlands under which the products of the various Dutch firms were seized by the German authorities and held for shipment to Germany. This

covered in the main the period from 1942 to September, 1944, which may be referred to as the first phase of organised spoliation in the Netherlands. For several years prior to the outbreak of war the Krupp firm owned a number of subsidiary Dutch companies located in various parts of the country. The Branch office at Rotterdam of Krupp Eisenhandel had sold Krupp products for many years in Holland and knew where many of these materials were located. The evidence showed that the Krupp firm had informed the German authorities which thereupon seized these products which included goods owned by the Board of Works, the Municipal Gas Works of Dutch municipalities and several private firms. These municipal and private enterprises were forced to deliver these confiscated materials to various depots in Holland from where they were transported by the Krupp Dutch subsidiary, Krupp's Shipping and Transport Company, and shipped to Germany. The evidence showed that during this phase of spoliation the Krupp firm had shipped to Germany about 16,000 tons of such confiscated materials. The prices for these materials had been arbitrarily fixed by the German authorities without the consent or approval of the Dutch owners. A considerable portion of these materials had reached the Krupp firms.

The second phase of the above mentioned spoliation programme covered the period of September and October, 1944, when it was thought that the Allied troops would soon liberate the Netherlands and that therefore not sufficient time would be available for the complete removal of industrial machinery and materials. Hence, only valuable machines and first-class materials were taken.

The third phase lasted from November, 1944, until May, 1945, during which time the Allied armies were held by the German Army after only a small portion of the Netherlands had been liberated. During this period a systematic plunder of public and private property was carried out.

By the fall of 1944 the Ruhr district had suffered heavy damage by bombing from the air. Thus in October, 1944, the Gustahlfabrik in Essen had been badly damaged by air raids. Reichsminister Speer went to Essen to inspect the damage and during a meeting which was attended by members of the Krupp Vorstand and other officials, Speer proposed that German firms should seize machines and materials from the Dutch to rehabilitate the factories of the Ruhr (the so-called Ruhr Aid Project).

As a result of this proposal two employees of Krupp's Technical Department were appointed by Rosenbaum, the accused Houdremont's direct subordinate, to proceed to Holland for the purpose of selecting machines and materials suitable for the Krupp industries in Germany. At the Hague the two were joined by Rosenbaum and Johannes Schroeder, the accused Janssen's chief assistant. Through the local German government offices they obtained the names of shipyards and manufacturing enterprises in Rotterdam, Lipps factory in Hilversum, de Vries Robbe & Co. of the N.V. Nederlandsche Seintossellen Fabrik in Hilversum, which was a subsidiary of the Phillips firm in Eindhoven, of the firm of Rademakers, the scale factory of Berkel, as well as idle shipyards at various places. More detailed evidence was submitted by the Prosecution relating to the looting of the following three specific factories : Metaalbedrijf Rademakers N.V., located

at Rotterdam, de Vries-Robbe & Co., N.V., located at Gorinchem and Lips Brandkaster-Dlotenfabrieken N.V., located at Dordrecht.

The evidence showed that the Krupp firm had through the Commissioner for the Netherlands of the Reich Ministry for Armaments and War Production secured the sponsorship for these factories which gave the firm the strict supervision over orders and deliveries.

It was further shown by the evidence that practically all the machinery, goods and equipment from these factories had been confiscated and shipped to Germany on government orders by which the Krupp firm had availed itself, and with the participation of the Krupp firm. Practically all the machines, goods and equipment had been sent to the Krupp factories in the Ruhr.

A comment reported to have been made by two representatives of the Field Economic Office had referred to the Krupp men concerned as the " Robbers ".

Energetic protests by the managers of these Dutch firms had been of no avail. Active resistance was impossible and out of the question. Obstruction on the part of the Dutch owners was met with the threat of calling in the Wehrmacht.

The evidence showed that all the various Dutch industries referred to above had been exploited and plundered for the benefit of the German war effort and for the Krupp firm itself in the most ruthless way.

The evidence submitted by the Prosecution in support of the charges referred to above under headings (a)–(f) disclosed active participation in the acquisition of machines from France by the accused Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt, and from Holland by the same accused with the exception of the accused Eberhardt. The accused Loeser, however, did not participate in the acquisition of machinery and materials subsequent to April, 1943. In the acquisition of machines and property in France, the accused Eberhardt was, as the evidence showed, the most active in the field of all the accused.

It was further shown by the evidence that the initiative for the acquisition of properties, machines and materials in the occupied countries referred to above, was that of the Krupp firm and that it had utilised the Reich government and Reich agencies whenever necessary to accomplish its purposes.

(v) *Evidence relating to Count III—War Crimes and Crimes against Humanity —Employment of Prisoners of War, Foreign Civilians and Concentration Camp Inmates in Armament Production under inhuman conditions* [1]

The fact that large numbers of civilians had been brought under compulsion from occupied territories, and had been used in the German armament industry together with concentration camp inmates and prisoners of war on a vast scale, was not denied by the Defence. Likewise, the undisputed evidence showed that the firm of Krupp had participated extensively in this

[1] In summarising the evidence relating to Count III, the Tribunal said: " All the acts relied upon as constituting Crimes Against Humanity in this case occurred during and in connection with the war."

labour programme. According to an analysis, introduced by the prosecution, of relevant documentary evidence the whole Krupp enterprise consisting of about 81 separate plants within greater Germany, had employed, between 1940 and 1945, a total of 69,898 foreign civilian workers and 4,978 concentration camp inmates, the great majority of whom were forcibly brought to Germany and detained under compulsion throughout the period of their services, as well as 23,076 prisoners of war. For instance, the evidence showed—and it was admitted by the defence—that out of a total number of 70,000–76,000 workers employed in August, 1943, at the Krupp Gustahlfabrik (Cast steel Factory) located in Essen, 2,412 were prisoners of war and 11,557 were foreign civilian workers.

(a) *Evidence relating to the Illegal Employment of Prisoners of War*

As to the employment of prisoners of war the evidence showed that during the last world war Germany did not even pretend to adhere to the provisions of the Geneva Convention. Both by the Defence's own evidence as well as that of the Prosecution it was conclusively shown that throughout German industry in general and the firm of Krupp and its subsidiaries in particular, prisoners of war of several nations, including French, Belgians, Dutch, Poles, Yugoslavs, Russians and Italian military internees were employed in armament production in violation of the laws and customs of war. It was also shown that in many instances, including employment in the Krupp coal mines, prisoners of war were assigned to tasks without regard to their previous training, in work for which they were physically unfit and which was dangerous and unhealthy. This practice began as early as in 1940. At that time 185 Belgian and Dutch prisoners of war were employed at the Gustahlfabrik in Essen. French prisoners of war were employed in armament production as early as 1941, and Russian prisoners of war in March, 1942. Polish prisoners of war were employed at the Elmag Plant in 1944 and during the heavy air raids in the fall of that year more than 3,000 prisoners of war were employed in Essen. In the various subsidiaries the practice was likewise pursued. These included the Friedrich Alfried Huette, the Bergwerke, Essen, the Grusonwerke, the Bertawerke and the Elmag Plant. In the various enterprises 22,000 prisoners of war were employed in June, 1944.

The evidence also seemed to show that the accused were or must have been aware of the illegality according to international law of the employment of prisoners of war in or in connection with the armament production and that the treatment and other conditions under which they worked, were contrary to the provisions of international law.

Prior to the attack on Russia the Nazi policy-makers had decided not to observe international law in their treatment of Russian prisoners of war. The regulations to this effect were issued on 8th September, 1941.

As to prisoners of war from other countries it was commonly known that they were employed in the armament industry in violation of the laws and customs of war. The evidence showed that in the early stages of the war, the Krupp firm had sought to evade the provisions of Article 31 of the Geneva Convention and the corresponding provisions of the Hague Regulations as well as the German law by an interpretation alleged to have been given by the Commandant of the prisoner-of-war camp or some other

military authority. This appeared from a memorandum of a Krupp representative to his superiors in which he stated :

" According to international agreement Prisoners of War may not be employed in the manufacture and transportation of arms and war material. But if any material cannot be clearly recognised as being part of a weapon, it is permissible to get them to work on it. Responsible for this decision is not the Intelligence branch (Abwehrstelle) but the Commandant of the Prisoner-of-War Camp."

The Prosecution introduced an affidavit of Schroeder who was also examined before the Tribunal. Schroeder was the commercial management member of the Vorstand of the Germaniawerft, a shipbuilding subsidiary of the Krupp firm, located at Kiel. The accused Krupp, Loeser and Janssen were members of the Aufsichtsrat of the Germaniawerft at the time in question. Schroeder testified that he had been promised prisoners of war or other foreign workers as replacements for German workers drafted for war services. As the Germaniawerft was engaged in the building of war ships, Schroeder had some scruples about using prisoners of war in that work. This was in 1941 and at that time the prisoners of war available were largely French, Belgian and Dutch. Schroeder decided to go to Essen in order to discuss the matter with the top officials there. He explained his difficulties to the accused Loeser and Krupp. Instead of giving him a direct answer to his question, the accused Krupp put him in charge of a plant manager who showed Schroeder around the factories in Essen with a view to demonstrating how the matter was handled there. Schroeder further stated that the accused Krupp and Loeser had told him that " the legitimacy of employing foreign workers on war work was not to be discussed " and that " we'll show how to do it and then you can draw your own conclusions of how to arrange matters in Kiel where conditions are different." Schroeder testified that out of a total of 11,000 workers employed at the Germaniawerft in 1943, there were 1,500 prisoners of war. At that time Speer had already forbidden all peace-time production at the Germaniawerft.

In another affidavit introduced by the Defence the witness Hans Jauch who, from the beginning of June, 1942, was the Commander of Stalag VI-F which had jurisdiction over the employment of prisoners of war in the Essen area, stated :

" At Krupp's the assignment of workers to jobs was governed by principles of expediency, that is they were put wherever they were needed. A clear separation of production for war purposes and peace purposes was in a firm like Krupp's presumably impossible under the sign of total war. I am of the opinion that if one had wanted to adhere strictly to the letter of the Geneva Convention in this respect the OKW probably ought not to have assigned any POW's at all to a firm like Krupp and all similar firms."

1. *Evidence with Particular Reference to the Employment of Russian Prisoners of War and Italian Military Internees*

The fact that during a substantial part of the war years, Russian prisoners of war and Italian military internees were required to work in a semi-starved condition was conclusively shown by documentary evidence taken from the Krupp files.

Russian prisoners of war began to arrive at the Krupp works early in 1942. The utter inadequacy of the food supplied to them was conclusively shown by protests made by managers of several of the plants.

Thus, for instance, on 26th March, 1942, Thiele, in charge of the boiler construction shop of the Locomotive Works at Esssen, reported to the Krupp official Hupe that :

" The Russian Prisoners of War employed here are in a generally weak physical condition and can only partly be employed, on light fitting jobs, electric welding and auxiliary jobs. 10 to 12 of the 32 Russians here are absent daily on account of illness. In March, for instance, 7 appeared for work only for a few days, 14 are nearly always ill, or come here in such a condition that they are not capable of even the slightest work. Therefore only 18 of the 32 remained who could be used only for the slightest jobs. The reason why the Russians are not capable of production is in my opinion, that the food which they are given will never give them the strength for working which you hope for. The food one day, for instance, consisted of a watery soup with cabbage and a few pieces of turnip."

Other reports went to show the same. That nevertheless these conditions continued was indicated by a report of 19th November, 1942, from the Instrument Shop No. 11 to the Labour Allocation Office in which it was stated that the prisoners who lived on this diet again and again broke down at work after a short time and sometimes died.

That the conditions described in these reports and documents were general and known by every agency of the Krupp firm employing Russian prisoners of war, was shown by other documents introduced in evidence by the Defence as well as by the Prosecution.

In his report of 30th October, 1942, to the accused Lehmann, Eickmeier, an employee of the Labour Allocation drew attention to the fact that the state of health and nutrition in all Russian prisoner of war camps was very unfavourable and obvious to everyone who had an opportunity to observe these things due to malnutrition and other bad conditions. The report then goes on :

" Army medical inspectors have also made remarks in the camps along these lines and stated that they had never met with such a bad general state of affairs in the case of the Russians as in the Krupp camps. In fact the prisoners returning from work make a complete worn out and limp impression. Some prisoners just simply totter back into camp."

Conditions at the Krupp prisoner-of-war camps at the time under consideration were so bad that they came to the attention of the Army High Command, who made complaints to the Krupp firm.

The evidence showed that the Krupp firm was not required by governmental directives to work prisoners of war, who, in many instances, were bordering on starvation. Tó the contrary the evidence showed that the allocation of prisoners of war and their supervision was made by the military authorities and that requests by a firm for prisoners of war were only granted on condition that those physically unfit would not be put to work until they had been made fit by proper feeding or whatever measures were found necessary.

It was conceded by the Defence that the prisoners of war were required to work in highly dangerous areas, exposed to increasingly heavy air raids. Their camps were located within or close to the danger area. The lack of sanitary and medical care was most deplorable and the protection against air raids quite insufficient.

The evidence showed that the Italian prisoners of war were first accorded the status of prisoners of war, but were later forced to accept the status of foreign workers. They had been forcibly brought to Germany and were under compulsion kept in a state of servitude while employed in the armament industry in connection with a war against their own country. The food and billeting conditions, as well as sanitary and medical care, had been deplorable. In a report dated February, 1944, by the Friedrich Alfried Huette at Rheinhausen, it was stated that the sickness rate among the Italian workers was 11 per cent including 70 cases of oedema and 100 loss of weight. It was also stated that of the 765 camp inmates, 35 per cent were unfit or only partly fit for work and that the number of undernourished persons and cases of stomach and bowel trouble showed the food unsuitable for most of the Italian military internees.

2. *Evidence with Particular Reference to the Illegal Use of French Prisoners of War in the German Armament Industry*

There was no evidence which could sustain the Defence's contention that an agreement had been reached at between the German and the Vichy Governments whereby the use of French prisoners of war in the German armament industry had been authorised. Even though some of the witnesses had stated that they were under the impression that such an agreement had been reached at with Laval, there was no evidence to show that any of the accused had actually acted upon the strength of any such agreement or even personally were aware of the existence of such an agreement.

(b) *Evidence relating to the Illegal Use of Civilian Foreign Workers and Concentration Camp Inmates in the Krupp Works*

During the war, Dutch, Belgian and French workers employed in Germany were referred to as Western workers. The Czechs in many ways were treated by the Krupp firm like Western workers, although the evidence showed that on some occasions they were subjected to the same mistreatment as the so-called Eastern workers. Among the Western workers, a distinction was made between " free " labour and " convict " labour. The " free " workers were treated better than all of the other classes of labour with whom this case is concerned. They had better rations and more liberty. They were, however, not free to leave their work and were also otherwise deprived of many basic rights. The evidence showed that an ever-increasing majority of these " free " workers were compelled by the Krupp firm to sign contracts, and if they refused to do so, they were liable to be sent to penal camps. At the end of their contractual period of employment, the " contract " was unilaterally considered renewed. If one of them failed to report for work, he was treated as " slacking," and also deprived of the small and insufficient food rations. Often they were reported to the Gestapo. Those who left their employment with the Krupp firm, were charged with " breach of contract " and were frequently sent to a punishment

camp maintained by the Gestapo. In the punishment camps they were treated very badly. Their rations were the same as those given to the Eastern workers. They were confined behind barbed wire ; their movements were severely restricted ; they were frequently beaten. They were also, as shown by the evidence, mistreated in many other respects, such as being denied packages and letters, forbidden to attend religious services and given no pay.

About the spring of 1942, Sauckel's Labour Mobilisation Programme became effective, and compulsory labour laws were enacted in the various occupied countries.

The evidence showed that wholesale manhunts were conducted and able-bodied men were shipped to Germany as " convicts " without having been charged or convicted of any offence. Many were confined in a penal camp for three months during which time they were required to work for industrial plants. If their conduct met with approval they were graduated to the status of so-called " free " labour.

The Western slave labourers employed by the Krupp firm were produced in various ways. Some had signed contracts under compulsion ; some because of their special skill had been ordered to go to Germany, and others had been taken because they belonged to a particular group. Some of those who had endeavoured to evade compulsory service referred to as " convicts," with others picked up in manhunts, were required to go to Germany and work for the Krupp firm. The evidence showed that subordinates of the accused Lehmann had been sent to occupied countries to secure workers. The accused Lehmann himself went to Paris in 1942 in order to take part in the negotiations concerning group recruitments. In October, 1942, an employee of the Krupp firm, Hennig, was sent to France to assist in the selection of the drafted individuals for the Krupp firm. The number of French workers employed by the Krupp firm in the Cast Steel Factory at Essen rose from 293 in October, 1942, to 5,811 in March, 1943.

The accused Lehmann had a Krupp representative go to Holland in October, 1942, who remained there for two years in order to assist in securing Dutch workers for the firm. The number of Dutch workers employed by the Krupp firm in Essen rose from 33 in June, 1942, to about 1,700 in March, 1943. Likewise, a Krupp representative was sent to Belgium. He stayed at Liege from where Belgian workers were sent to the Krupp firm. Many of them were treated as " convicts." After the usual period of three months of punishment they became so-called " free workers."

Dutch workers who attempted to escape from compulsory service in the Krupp firm, were arrested, confined in the penal camp, and returned to the Krupp firm.

Czech workers who were sent to Essen for training for work in the Berthawerke, were required to sign contracts. If they escaped and were recaptured they were first sent to a labour education camp, and while confined there they were required to work for the Krupp firm.

Penal camps were maintained by the Krupp firm at Grusonwerke, at

Friedrich Alfried Huette and at Essen. Those at Essen were known as Dechenschule and Neerfeldschule.

In 1943 it became apparent that slave labourers reported to the Gestapo for punishment, were not always sent back to the Krupp firm after the expiration of their sentences. In October of that year the accused von Buelow made plans and laid down the conditions for the operation of a penal camp of its own by the Krupp firm at the Gusstahlfabrik. In January, 1944, construction of the camp was under way. The accused von Buelow, took it upon himself to make sure that iron bars were installed in the windows and that locks were put on the doors, and that an air raid shelter was provided for the guards. About 90 per cent of the inmates of this penal camp were Belgians, the remainder being French, Italian, Polish, Yugoslavian, Bulgarian, Chinese and Algerian.

The Dechenschule penal camp, referred to above, was surrounded by barbed wire and patrolled by a guard. The inmates were guarded at all times, even while at work in the Krupp plants. Upon their arrival they were told that they were prisoners, and their heads were shaved. They were issued convict clothing. They could not leave the camp without such suits.

The inmates were deliberately assigned to heavy and dirty work in plants of the Krupp firm. The food, consisting of liquid and little else at night was quite inadequate for men performing the labour required by the inmates. Because of the improper nourishment at least 15 died on account of illness and malnutrition. Mistreatment and beatings were a daily occurrence in the camp. The beaten and sick men were denied medical assistance. They were also denied religious consolation. As an air raid shelter they were allowed to use only a trench, although adequate air raid protection was available nearby. As a result 61 of them lost their lives when the trench was hit in an air raid. After the destruction of Dechenschule, the penal camp was transferred to Nerrfeldschule, where the conditions were even worse. According to a witness, the inmates had actually to fight for a dry spot on which to sleep at night. Those who lost were forced to stand on their feet all night.

Both the Dechenschule and the Nerrfeldschule camps belonged to and were managed by the Krupp firm. The inadequate facilities that existed there were provided for by the firm's officials. The firm was responsible for supplying adequate air raid shelters. The food was provided for by the firm. The guards were members of the Krupp Werkschutz. The inmates worked in the Krupp plants to which they were assigned by officials of the firm. Medical treatment was also the responsibility of the firm. The prisoners were beaten by the guards in the firm's employ.

The evidence showed that the responsibility for these two penal camps was not limited to the accused von Buelow. Each of the other accused, except Loeser, Pfirsch and Korschan, participated in the establishment and maintenance of the camps.

Civilians from Poland and Russia were first brought to Essen in large numbers in 1942. In January, 1942, the Gusstahlfabrik employed five Russians and 67 Poles. In April, 1942, 319 Russians and 462 Poles were employed. By the end of the year, the Gusstahlfabrik employed 5,787

Russians and 1,046 Poles. In October, 1944, 3,535 Russians and 1,210 Polish workers were employed. The decline in the number of Eastern workers from 1943 until the end of the war was caused particularly by the evacuation of sections of the Gusstahlfabrik, and the workers were taken to other plants of the Krupp firm. Eastern workers were also employed in the Krupp plants Elmag, Suedwerke, Berthawerke, the Friedrich Alfried Huette and at the Germaniawerke.

The Eastern workers, like the Russian prisoners of war, were treated worse than all other classes of foreign workers, with the exception of concentration camp victims and the inmates of "labour education camps." The evidence showed that upon their arrival, they were put under guard behind barbed wire in very bad camps; they were brought back and forth to work under guard. They were compelled to wear distinguishing badges. The food was of very poor quality and not sufficient in amount. They were required to work very hard and received very little compensation. Their treatment was most inhuman. The status of Eastern workers was declared to be that of prisoners. In a memorandum to the work managers, dated 13th March, 1942, the accused Ihn stated: "The Russian civilian workers are to be treated in the same way as prisoners of war. Any sympathy is false pity, which the courts will not accept as an excuse." The accused von Buelow voluntarily aided in the restrictions placed upon these people. In spite of government orders to the contrary the accused von Buelow continued to oppose the removal of the barbed wire fences round the camps.

The camps in which the Eastern workers were confined were overcrowded, very dirty and inadequate in many ways. Long before the damage caused by the Allied air raids on Essen, the housing of the slave labourers by the Krupp firm was totally inadequate. The sanitary and medical facilities were appalling. In addition their lives were constantly in jeopardy due to the location of the camp in the very centre of the danger area and the lack of protection against air raids. As a result many of the Eastern workers lost their lives.

The food furnished to the Eastern workers employed by the Krupp firm was deplorable. Hassel, a subordinate of the accused von Buelow said when Krupp employees protested on behalf of the Russian civilians that "one was dealing with Bolsheviks and they ought to have beatings substituted for food." As shown by a survey made on 7th May, 1943, four-fifths of the Eastern workers who had died at a Krupp hospital died of tuberculosis and malnutrition.

Russian workers were compelled at all times to wear a badge "Ost" (East) and the Polish workers were compelled to wear a badge "P" in order that they might be distinguished. It was the rule that escaping Russians must be shot. These workers included old men and women and children and pregnant women. In 1943 some of the Eastern children employed by the Krupp firm were from twelve to seventeen years old. In 1944 children as young as six years of age were assigned for work. Eastern workers were beaten as part of their daily routine. The evidence showed that these beatings took place in the Krupp plants as well as in the camps. Several Russians were beaten to death on various occasions. No action was taken against the culprits. The number of atrocities committed against

the Eastern workers in the Krupp plants was such that it was a matter of common knowledge there.

The utilisation of concentration camp labour for the armament programme was at first restricted to employment in armament plants by the S.S. itself within its camps. The first change in this system was inaugurated on 16th March, 1942, on the basis of conferences at Hitler's headquarters, when it was announced that concentration camp inmates were to be used to a greater extent but only within the concentration camps themselves. Shortly thereafter the accused Erich Mueller, made a proposal to Hitler for the setting up of a plant to produce automatic AA-guns in a concentration camp. The Krupp Auschwitz project was a part of this programme. The evidence showed that the Krupp firm was desirous of obtaining skilled labour through the concentration camps for the achievement of their industrial ends and that this method of recruiting slave labourers was no matter of necessity. The accused Erich Mueller discussed the employment of concentration camp inmates with Hitler. The evidence showed that the accused Alfried Krupp, Houdremont, Loeser, Eberhardt, Korschan, Ihn, Lehmann and Pfirsch were also actively involved in these efforts.

On the 11th March, 1943, a special conference was held between the accused Houdremont, Korschan, Mueller, Eberhardt and several of their subordinates from the technical office in order to discuss the extent of the damage done to the Fuse Plant at Essen by bombing. It was decided to submit a proposal to the government authorities for the evacuation of the remaining machinery from the fuse factory in Essen and to resume production in large scale at a factory at Auschwitz. The plan was approved. In June, 1943, the Krupp firm started to employ concentration camp inmates in Auschwitz. By the end of the month approximately 160 persons were actually working for the firm there. By the middle of July, 50 persons were engaged in the manufacturing of equipment and tools and another 150 on repairs and installation machinery. In September, 270 persons were employed, and it was contemplated that by the end of the year 600–650 people could be used. Before full-scale production could be had, however, the offensive of the Russian Army forced the Krupp firm to give up the plant at Auschwitz.

These concentration camp inmates were of many nationalities, including Poles, Frenchmen, Czechs and Dutchmen. The majority were of Jewish religion. Many were in very poor physical condition. They were beaten and otherwise punished by S.S. guards. The food furnished to them was meagre, insufficient in both volume and nutrition value.

The facts connected with the Berthawerke lead to the same conclusions. Here again, it was shown by the evidence, that it was not only known by the Krupp firm that concentration camp labour would necessarily be required to fulfill the programme, but that the fact of availability of such labour was used as a means for expansion. The labour used for the construction of the Krupp owned Berthawerke consisted almost entirely of imprisoned Jewish labour. About 4,000 of them were assigned to the construction of the plant by July, 1943.

In their application to the Reich Association Iron for the approval of a plan for the starting of construction on a steel works at Markstaedt, the

Direktorium of Fried. Krupp in Essen, stated with reference to the sources of manpower that "before long, 3,300 Jews who are working on the spot as building workers, can be released for the above-mentioned work." Again in the monthly report of the Berthawerke for July, 1944, reference was made to the negotiations which took place with the armament command concerning the use of 500 Jews for track-laying on the firing range. In April, 1944, 1,668 concentration camp inmates were employed at Berthawerke. By July of that year, the number had increased to 2,610, and in October of that year Bernhard Weiss of the Flick firm had estimated on his visit to Berthawerke that approximately one-half of the total labour force of 12,000 consisted of concentration camp inmates. These concentration camp workers were interned in nearby camps. They were in a bad state of health, and some of them could not walk at all without aid. They were badly clothed. The inmates worked without any morning meal and for twelve hours with only one bowl of soup. Their food was so poor that they sought for food remains, and begged for scraps of food. A doctor employed by the Krupp firm who observed the poor appearance of the concentration camp inmates employed, reported that: "In spite of all efforts we could not change in detail the system of the work to be done by the concentration camp detainees, which was really responsible for the bad state of the detainees."

The evidence also showed that the concentration camp inmates had been beaten because they did not properly perform the work to which they were assigned, as a result of not knowing how to work the machines. The beatings administered to them by the supervisors was with a whip made of iron with rubber. Conferences were had between the competent plant managers and the members of the S.S. during which the matter of punishing the concentration camp inmates was discussed. The housing furnished to the concentration camp inmates was most inadequate, and the lives of the inmates were in danger as the plant was not furnished with proper air raid shelters for the workers. During air raids, the concentration camp inmates had to remain in the plant while other employees were permitted to leave it.

The evidence showed that the Krupp firm had desirously employed concentration camp inmates in various other plants as well. Thus approximately 200 female concentration camp workers had been assigned to the fuse plant erected by Krupp at Wuestegiersdorf in Silesia in 1944. All of them were Jewish and of Hungarian and Yugoslavian nationality. They were procured as a result of negotiations between the Krupp firm and the S.S. Concentration camp workers consisting of Hungarian and Polish women of the Jewish faith were employed at the Krupp Geisenheim plant on the Rhine until March, 1945. Concentration camp inmates had also been employed by the Krupp firm at the Elmag plant. After the Krupp Krawa plant had been evacuated from Alsace to Germany and re-established in Nuremberg and Kulmbach as the Suedwerke, the Direktorium sent the accused Lehmann to the S.S. Main Economic Administration at Oranienburg, to arrange for the allocation of concentration camp inmates. Lehmann reported that at Oranienburg he was informed that concentration camp Buchenwald was the camp to which they should apply. The accused Ihn and Lehmann then started negotiations with the commander of the Buchenwald concentration camp, with the result that 2,000 female concentration camp inmates were allocated to the Krupp firm. An effort was also

made by the Krupp firm to obtain 2,000 male concentration camp workers, but in vain. Five hundred and twenty of these were later selected by Krupp officials and sent to the Krupp plants at Essen. These female concentration camp inmates ranged in age from 15 to 25 years. They belonged to the Jewish faith and had because of their religion been forcibly removed from their homes in Czechoslovakia, Rumania and Hungary in May, 1944, and transported to Germany. The camp at Humboldstrasse in Essen, maintained by the Krupp firm and used for the housing of these 520 female concentration camp inmates, was in every respect deplorable. The housing, sanitary and medical facilities were extremely bad, the protection against air raids consisting only of open trenches. After the barracks had been burned down in an air raid in October, 1944, all the inmates were crowded into the patched kitchen building. During another air raid in December, 1944, this building was also hit and thereafter the entire population lived in the cellar of this bombed-out building. The food was very bad, and only one meal was served each day. They did not have two blankets each as prescribed by the S.S. The Krupp firm furnished them with only one blanket. The mistreatment of these girls was a matter of common knowledge. Although these conditions were known to all responsible parties, no efforts were made to improve things.

In February, 1945, a subordinate of the accused Lehmann learned that the S.S. did not plan to permit the concentration camp inmates to remain alive and thus be liberated by the advancing American troops. He advised Lehmann of this plan and also the members of the Direktorium. After a discussion of this matter by the Direktorium, the accused Janssen advised the accused Ihn and Lehmann of the decision of the Direktorium to have these concentration camp prisoners removed from Essen. On 17th March, 1945, the girls were marched to Bochum. There a train was made up for them together with 1,500 male concentration camp inmates. They were shipped eastwards under S.S. guards. With the exception of a few girls who had succeeded in escaping shortly before, nothing further has been discovered about the fate of these Jewish girls employed by the Krupp firm.

The evidence showed that the accused Krupp, Loeser, Houdremont, Mueller, Janssen, Ihn, Eberhardt, Korschan, von Buelow, Lehmann and Kupke had actively participated in the endeavours of the Krupp firm to employ not only prisoners of war but also concentration camp inmates in the armament production and to a greater or lesser extent were responsible for the deplorable and inhuman conditions accorded to them.

(vi) *Evidence relating to Count IV—Conspiracy to Commit Crimes against Peace, War Crimes and Crimes against Humanity*

The evidence relied upon in support of this Count is the same as that submitted by the Prosecution and the Defence under and in connection with the foregoing three Counts to which reference therefore may be made.

3. THE OPINION OF THE TRIBUNAL ON COUNTS I AND IV (CRIMES AGAINST PEACE) OF 11TH JUNE, 1948

On 12th March, 1948, after the Prosecution had rested its case in chief, the defendants filed a motion entitled, " Motion of the Defence for Acquittal on the Charge of Crimes against the Peace."

In the motion, the defendants moved that the Tribunal " should decide. . . that the defendants are not guilty in this respect," referring to Counts I and IV of the Indictment.

In connection therewith, briefs were filed, the memorandum of the prosecution being dated 20th March, 1948.

During the session of 5th April, 1948, the Tribunal, through the President, states as follows: " Before you proceed with the other witness, Doctor, we desire to dispose of a motion that has been made. On 12th March last, the defendants filed a joint motion for an acquittal on the charges of crimes against the peace. We construe this to be a motion for a judgment of not guilty on Counts I and IV of the Indictment on the ground that the evidence is insufficient as a matter of law to warrant a judgment against them on those Counts.

" After a careful consideration of this motion, the Prosecution's reply thereto, and the briefs and the evidence, we have come to the conclusion that the competent and relevant evidence in the case fails to show beyond a reasonable doubt that any of the defendants is guilty of the offences charged in Counts I and IV. The motion accordingly is granted and for the reasons stated the defendants are acquitted and adjudged not guilty on Counts I and IV of the Indictment. An opinion, stating in more details the reasons of our conclusion, will be filed at a later date."

(i) *The Opinion of the Tribunal as a whole*

The above-mentioned opinion which was subsequently prepared and was filed on 11th June, 1948, after recalling the events set out above, proceeded as follows:

In Count I of the Indictment, all of the defendants (1) are charged with Crimes against Peace. This Count is frequently referred to as the " aggressive war Count ". In the fourth Count, all of the defendants (1) are charged with having participated in the formulation of, and execution of a common plan and conspiracy to commit, and which is alleged to have involved the commission of Crimes against Peace. This latter count is often referred to as the " conspiracy Count ".

" As stated in the judgment of the International Military Tribunal, the charge in the Indictment ' that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

> ' To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'

" Judgment of the International Military Tribunal, Volume I, page 186 of Official Documents, Trial of the Major War Criminals.

" It is difficult to think of more serious charges which might be made against any individual than those contained in the two Counts in question.

(1) During the Trial, however, the Prosecution made a motion to amend the Indictment so as to eliminate the accused Kupke, Lehmann and von Buelow from Count I and Count IV.

Realizing this and the attending responsibility upon us, we have carefully weighed the evidence offered in view of what was said in the judgment of the International Military Tribunal.

" Article II of the Control Council Law No. 10 provides in part as follows :

" 1. Each of the following acts is recognized as a crime :

' (*a*) Crimes against Peace. Initiation of invasion of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. . . . '

' 2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.'

" The following articles appear in ' Military Government—Germany, Ordinance No. 7, Organization and Powers of Certain Military Tribunals ' :

" ARTICLE IX

' The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

" ARTICLE X

' The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasion, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.'

" In the judgment of the International Military Tribunal, the conspiracy and aggressive war Counts were discussed together, and the guilt or innocence of each accused upon the counts upon which he was indicted were also covered.

" A detailed review in this opinion of all of the evidence offered by the prosecution upon these two counts is not deemed essential. Assuming that all of the evidence so presented is considered as creditable, it was upon 5th April, 1948, and is now, our considered opinion that the requirements for a finding of the defendants guilty upon these two Counts have not been met. We do not hold that industrialists as such, could not under any circumstances be found guilty upon such charges. Herein we state what we construe to be the necessary elements of proof for conviction upon these two Counts, and have concluded that evidence of the same has not been submitted. This conclusion having been reached upon 5th April, 1948, it then appeared to us that it was our duty to state it immediately, and not require the defendants to offer further evidence upon these two Counts. The obvious result of not having taken this course, would have been to put the defendants, who otherwise would not know the views of the tribunal, in the position of exposing themselves to a situation which we do not deem consistent with the rights of every defendant, namely, the right to have a fair trial. One of the requirements is that the Prosecution shall sustain the burden of proving each defendant guilty beyond a reasonable doubt. The tribunal, having determined that the Prosecution had failed to prove each defendant guilty beyond a reasonable doubt upon the two Counts in question, entertained the thought that the only possible effect of having the defendants present evidence upon these two Counts would be, that in doing so, proof of facts required for conviction might then possibly be produced to the advantage of the prosecution. It is our opinion that such a course would not be in keeping with our ideas of justice. It was because of this that we announced our conclusion in the manner in which we did in open court upon 5th April, 1948."

The opinion recalled that :

" In paragraph 1 of Count I of the Indictment, it is alleged that all of the defendants, ' with divers other persons, including Gustav Krupp von Bohlen und Halbach, Paul Goerens and Fritz Mueller, during a period of years preceding 8th May, 1945, committed Crimes against Peace as defined in Article II of Control Council Law No. 10, in that they participated in the initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation, and waging wars of aggression, and wars in violation of international treaties, agreements, and assurances.'

" In paragraph 2 of Count I, it is stated that the defendants ' held high positions in the political, financial, industrial and economic life of Germany and committed Crimes against Peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups, including KRUPP, connected with the commission of Crimes against Peace.'

" In paragraph 3 of the first Count, it is said that the ' invasions and wars referred to and the dates of their initiation were as follows : Austria, 12th March, 1938 ; Czechoslovakia, 1st October, 1938, and 15th March, 1939 ; Poland, 1st September, 1939 ; Denmark and Norway, 9th April, 1940 ; Belgium, the Netherlands and Luxembourg, 10th May, 1940 ; Yugoslavia and Greece, 6th April, 1941 ; the USSR, 22nd June, 1941 ; and the United States of America, 11th December, 1941.' "

The Tribunal then continued :

" It is now clear that the wars which the defendants are alleged to have participated in the initiation of were wars of aggression. However, can it be said that the defendants, in doing whatever they did do, prior to 1st September, 1939, did so knowing that they were participating in, taking a consenting part in, aiding and abetting the invasions and wars set out in paragraph 3 ?

" The International Military Tribunal required proof that each defendant had actual knowledge of the plans for at least one of the invasions or wars of aggression, in order to find him guilty. It was stated that, ' Evidence from captured documents has revealed that Hitler held four secret meetings to which the Tribunal proposes to make special reference because of the light they shed upon the question of the common plan and aggressive war.'

" Continuing on, it was stated, ' These meetings took place on the 5th of November, 1937, the 23rd of May, 1939, and the 22nd of August, 1939 and the 23rd of November, 1939.'

" Then the tribunal said, ' At these meetings important declarations were made by Hitler as to his purposes, which are quite unmistakable in their terms.'

" In finding Hess guilty on the aggressive war Count and on the conspiracy Count, the International Military Tribunal clearly indicated that in its opinion a defendant could be found guilty even if he had not attended one of the four meetings referred to above. Likewise, we do not hold that a defendant cannot be found guilty unless he attended one of the meetings.

" Schacht was indicted under Counts I, conspiracy and II, waging aggressive war, and he was found not guilty by the International Military Tribunal.

> ' But rearmament of itself is not criminal under the charter. To be a Crime against Peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars.'

" As it was necessary in the case of Schacht, it is necessary, with respect to these defendants, that it be shown that they carried out rearmament ' as part of the Nazi plans to wage aggressive wars.'

" Speer was indicted on all four Counts. He joined the Nazi Party in 1932. In 1934 he was made Hitler's architect and became a close personal confidant. Shortly thereafter he was made a department head in the German Labour Front and the official in charge of capital construction on the staff of the deputy to the Fuehrer, positions which he held through 1941. On 15th February, 1942, after the death of Fritz Todt, Speer was appointed chief of the Organization Todt, and Reich Minister for Armaments and Munitions (after 2nd September, 1943 for armaments and war production). The positions were supplemented by his appointments in March and April, 1942 as General Plenipotentiary for Armaments and as a member of the Central Planning Board, both within the four-year plan. He was a member of the Reichstag from 1941 until the end of the war.

" The tribunal stated that it was of the opinion that ' Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or

of conspiring to that end. He became the head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war, but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count I or waging aggressive war as charged under Count II."

"If Speer's activities were found not to constitute 'waging aggressive war' we most certainly cannot find these defendants guilty of it.

"In the Charter of the International Military Tribunal under II, Jurisdiction and General Principles, we find the following:

'Article 6. The Tribunal established by the agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

'The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

'(*a*) Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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

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

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

"The prosecution contends that to be guilty of participation in the preparation and waging of aggressive war, under Count II of the Indictment in the case before the International Military Tribunal, it was not necessary that the individual be one of the small circle of conspirators around Hitler, nor be informed of the decisions taken in that circle. Participation in the preparation and waging of aggressive war, it is claimed, was obviously considered a crime different from participation in the common plan to wage aggressive war.

" The prosecution claims that the conclusion follows that participation in the preparation of or waging of aggressive war is a crime different from the crime of participation in the common plan conceived by Hitler to wage aggressive war ; that is, to be guilty of such participation, it is not necessary to have attended the conferences at which aggressive war was planned, or to be advised as to what took place at them, and that such participation may take place even in advance of the crystallization of a conspiracy to wage aggressive war.

" The Prosecution further says that Control Council Law No. 10 makes not only the preparing of or waging of aggressive war criminal, but also makes criminal participation in a common plan or conspiracy, having as its objective, such preparing or waging of aggressive war. It is claimed that it follows that participation in a plan or conspiracy for the accomplishment of acts of the character adjudged by the International Military Tribunal to constitute preparing or waging aggressive war under Count II of the Indictment filed before that tribunal, is criminal, even though neither the conspiracy nor the acts form part of the ' Nazi Conspiracy ' charged under Count I. It is also contended that both law and logic support this conclusion and that if an individual can be guilty of preparing for, or waging aggressive war, even though he did not participate in the conspiracy around Hitler, there would appear to be no reason why a group of individuals should not be held responsible for collectively conspiring toward the same end. It is claimed that this is what the defendants did in this case. The claim is made that acting together, but not as part of the ' Nazi Conspiracy ', they took action that had as its object, first to prepare, and them to wage aggressive war and that everything that these defendants did they did in concert with one another, and that the end achieved, either legal or illegal, was accomplished through their collective action.

" We cannot conclude that there were two or more separate conspiracies to accomplish the same end, one the ' Nazi Conspiracy ' and the other the ' Krupp Conspiracy '. It must be remembered at all times that in Count I, it is alleged that the defendants participated in crimes against peace, the initiation of invasions of other countries and wars of aggression and, in Count IV that they participated in a conspiracy to commit the crimes against peace, and that the invasions and wars referred to, and the dates of their initiation were as follows: Austria, 12th March, 1938 ; Czechoslovakia, 1st October, 1938 and 15th March, 1939 ; Poland, 1st September, 1939 ; Denmark and Norway, 9th April, 1940 ; Belgium, the Netherlands and Luxembourg, 10th May, 1940 ; [Yugoslavia and Greece, 6th April, 1941, the U.S.S.R., 22nd June, 1941][1] ; and the United States of America, 11th December, 1941.

" As the invasions and aggressive wars listed above are those set out in paragraph three of the first Count of the Indictment, the prosecution has the burden of proving that these specific invasions and wars of aggression were the ones in connection with which the defendants either conspired, as alleged in the fourth Count of the Indictment, or in which they participated, as asserted in the first Count of the Indictment. All of the allegations of

[1] The words in brackets did not appear in the actual text of the Judgment but appear in Count I of the Indictment, summarised on pages 71–3.

Count I are ' incorporated in ' Count IV. Consequently, the above allegation as to invasions and wars of aggression and their dates is part of Count IV.

" For the above reasons we concluded that the prosecution failed to prove any of the defendants guilty by the requisite degree of proof on either Count I or Count IV and that accordingly none of the defendants is guilty on Counts I and IV."

(ii) *The Concurring Opinion of Presiding Judge H. C. Anderson*

Judge Anderson agreed with the opinion set out, but filed a concurring opinion, his " approach to some of the questions involved in Counts I and IV of the Indictment being somewhat different."

After having recalled and quoted the relevant parts of Counts I and IV of the Indictment, the pertaining provisions of Control Council Law No. 10 on which they are based and surveyed in brief the origin, growth and importance of the Krupp firm, Judge Anderson turned to certain matters of general application in the following words :([1])

" There are certain matters of general application which must be stated in the outset of this investigation. They must be borne in mind throughout the discussion. The first is that this Tribunal was created to administer the law. It is not a manifestation of the political power of the victorious belligerents which is quite a different thing. The second is that the fact that the defendants are alien enemies is to be resolutely kept out of mind. The third is that considerations of policy are not to influence a disposition of the questions presented. Of these there are but two : (*a*) what was the law at the time in question and, (*b*) does the evidence show *prima facie* that the defendants or any of them violated it. The fourth is that the defendants throughout are presumed to be innocent and before they can be put to their defence, the prosecution must make out a *prima facie* case of guilt by competent and relevant evidence. It is true that the procedural ordinance of the Military Government for Germany (US) provides that ' they (the Tribunals) shall adopt and apply to the greatest possible extent . . . non-technical procedure.' But neither the members of this Tribunal nor the people of the nation prosecuting this case regard the presumption of innocence as nothing more than a technical rule of procedure. Nor do they, or we, think it a mere rhetorical abstraction to which lip service will suffice. Upon the contrary, in addition to its procedural consequences, it is a substantive right which stands as a witness for every defendant from the beginning to the end of his trial. The fifth is that Gustav Krupp von Bohlen is not on trial in this case. He is alleged to have been a conspirator with the defendants but his declarations, acts, and conduct are not binding on the defendants unless and until the existence of the criminal conspiracy charged in the Indictment has been *prima facie* proven *aliunde* and then only insofar as they can be regarded as having been in furtherance of the alleged criminal purpose. The sixth is that it is a fundamental principle of criminal justice that criminal statutes are to be interpreted restrictively ; that criminal

([1]) This statement of principles was quoted in the Judgment in the *High Command Trial* (Trial of Von Leeb and Others), " omitting only such portions as had particular application to that case [*The Krupp Trial*], as a statement of the principles that we deem controlling in the approach to the instant case."

responsibility is an individual matter ; that criminal guilt must be personal. The seventh is that the application of *ex post facto* laws in criminal cases constitutes a denial of justice under international law.(1) Hence, if it be conceded that Control Council Law No. 10 is binding on the Tribunal, it nevertheless must be construed and applied to the facts in a way which will not conflict with this view."

Judge Anderson continued :—

" This is also the position of the Prosecution, for General Telford Taylor, Chief of Counsel for War Crimes, in his recent report to the Secretary of the Army on Nurnberg Trials, among other things, said this :

> ' No one has been indicted before the Nurnberg Military Tribunals unless, in my judgment, there appeared to be substantial evidence of criminal conduct under accepted principles of international penal law.'

" The trial before the I.M.T. involved the construction and application of the London Charter in respect, among other things, of Crimes against the Peace as therein defined, in their relation to existing international law.

" It is quite obvious from the brief that the Prosecution relies mainly upon the conspiracy Count. The reason is not difficult to find and quite understandable. It is, that only upon this theory can the particular defendants be charged with the acts and declarations of Gustav Krupp. The Prosecution was allowed wide latitude in its effort to establish a prima facie case of conspiracy as the basis for the use against the defendants of Gustav Krupp's statements and activities. A great mass of evidence was provisionally admitted upon the assumption that a prima facie case would be made. When this failed, such evidence was incompetent as against the defendants.

" The emphasis upon the conspiracy charge makes it appropriate to consider that Count first. Control Council Law No. 10 does not define conspiracy, nor does the London Charter. But in construing the latter document, the I.M.T. did so in the following paragraph :

> ' The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.'

" Applying this rule, the I.M.T. held proof of actual knowledge of the concrete plans of the Nazi government to wage aggressive war to be essential to a conviction under the conspiracy Count.

" Upon the other hand the Prosecution bases its case under both counts upon the asserted legal propositions :

(1) " Quincy Wright : ' The Law of the Nurnberg Trial,' *American Journal of International Law*, Vol. 41, January, 1947, p. 53."

> ' Crimes against Peace comprehend at least that any person, without regard to nationality or the capacity in which he acts, commits a Crime against Peace if he knowingly participates in developing, furthering, or executing a national policy of aggrandisement on the part of a country to use force in order (*a*) to take from peoples of other countries their land, their property or their personal freedoms, or (*b*) to violate international treaties, agreements or assurances ; or if he knowingly participates in a common plan or conspiracy to accomplish the foregoing.'

" As a corollary it is insisted that the requisite criminal intent can be shown by proof ' that the defendants intended, without regard to and without exact knowledge of Hitler's plans, that military power be used for the aggrandisement of Germany or be used in violation of treaties.' "

" In a truly outstanding brief there is a valiant effort on the part of the Prosecution to justify the departure from the definition of conspiracy given by the I.M.T., for it was doubtless realized, and properly, that to do so was vital to the case against the defendants. This is the crux of the case. The contention is in substance, that whereas in the Indictment before the I.M.T. the conspiracy charged was that originated by Hitler and his intimates, for convenience called the ' Nazi conspiracy ', the conspiracy here is a separate and independent one originated in 1919 by Gustav Krupp and the then officials of the Krupp concern, long before the Nazi seizure of power.

" In an effort to make the statement of its theory conform in part at least to the language of Control Council Law No. 10, the alleged ' Krupp conspiracy ' is tersely described in the brief in general terms as follows : " Acting together, but not as a part of the " Nazi conspiracy ", they (the defendants) took action that had as its object first, to prepare and then to wage aggressive war. As will presently appear, this considered alone does not accurately represent what I conceive to be the theory of the Prosecution and although manifestly not intended to be so, is somewhat misleading and confusing.

" The idea that independently of governmental authority the owner or controller of a private enterprise, together with his employees, in this day and time, could formulate and execute a criminal combination to commit crimes against the peace as defined in Control Council Law No. 10 is so unique and far-reaching in its implications that the mere statement of it at once gives rise to the question of whether the prosecution's contention has not been misunderstood."

Judge Anderson found it advisable to remove any doubts on this score by quoting the relevant parts from the brief and opening statements of the Prosecution. He drew special attention to the following conclusions made by the Prosecution :

" *The conclusion follows from all this (preceding discussion) that participation in the preparation or waging of aggressive war is a crime different from the crime of participation in the common plan conceived by Hitler to wage aggressive war* ; that to be guilty of such participation it is not necessary to attend the conferences at which aggressive war was planned, or to be advised as to what took place at them ; *and that such participation may take place even in advance of the crystallization of a conspiracy to wage aggressive war.* (Emphasis added.)

" Since Control Council Law No. 10 makes not only the *preparing or waging* of aggressive war criminal but also participation in a common plan or conspiracy *having as its objective such preparing or waging*, it follows that participation in a plan or conspiracy for the accomplishment of acts of the character adjudged by the International Military Tribunal to constitute *preparing or waging* under Count II of the Indictment filed before that Tribunal is criminal even though neither the conspiracy nor the acts form part of the 'Nazi Conspiracy' charged under Count I.' (Emphasis added) . . .

" The activities of these defendants were economic and political in character. That is, they contributed to the preparation and waging of war not by direct military action but *by supporting a policy of national aggrandizement*. Primarily, these defendants assisted in marshalling the resources first of Germany and then of the conquered countries to increase the military power of Germany. (Emphasis added).

Judge Anderson then went on :

" Having in mind the definition of conspiracy under the London Charter laid down by the I.M.T. and herein-above quoted, the conspiracy of which eight of the defendants before that Tribunal were found guilty was the concrete plans to wage aggressive war which were formulated by Hitler as early as 1937 and disclosed by him to a few of his top leaders in four secret key conferences held on 5th November, 1937, 23rd May, 1939, 22nd August, 1939 and 23rd November, 1939. This Tribunal is bound by this finding with respect to the existence of a common plan or plans to wage aggressive wars and no other such plans are shown by the evidence in the present case. Indeed, in earnestly pressing the conspiracy charge contained in Count IV, the Prosecution does not contend at all that the defendants participated in these plans but as indicated in a wholly different plan which it is insisted amounted to a Crime against the Peace. This is not easy to follow but it must be understood if the Prosecution's contention is comprehended. Just how radical is the departure from the conspiracy as it was found to be by the I.M.T. is indicated by the following further quotation from the brief:

" 'The activities of the Krupp firm in preparation for war long antedated its alliance with Hitler. When Gustav Krupp entered into an agreement with the then heads of the German state in 1920 to preserve Germany's rearmament potential for a future struggle, Hitler was the leader of an obscure political movement. *It would be clearly absurd to say that the intention with which this, and other activities of the Krupp firm in implementation of that decision, were formed, is to be determined by proof of the presence or absence of knowledge of decisions taken by Hitler fifteen years later.* The continued activity of the Krupp firm in support of Hitler, after it became evident to all that he stood for aggrandisement of Germany at the expense of its neighbours, reinforces the conclusion that its activities at all times had this as its purpose, but it is not, and could not be, the only proof of such intention.' (Emphasis added.)

" It is further contended that in order to convict these defendants under the conspiracy charge it was not necessary as held by the I.M.T. with respect to the conspiracy there involved that the Prosecution show knowledge on their part of Hitler's plans to wage aggressive war as they were found to be by that Tribunal. Upon the contrary, it is insisted that it was sufficient to

show merely ' that the defendants intended without regard to and without exact knowledge of Hitler's plans that military power be used for the aggrandisement of Germany or be used in violation of treaties.'

" As further indicating how radically the prosecution has departed from the rationale of the opinion of the I.M.T. and the construction it gave the London Charter, the following additional passage from the brief is equally illuminating :

> ' To be guilty of participating in the preparation . . . of criminal war it is not necessary to show that the defendants believed or intended that employment of Germany's military power would result in actual armed conflict. Whether or not a war actually occurred would depend on the attitude taken by the victim nations to the threat of force. If the military power of Germany was so overwhelming as to make resistance futile, there would be no war, yet the aggrandisement of Germany would as surely have been accomplished through the employment of military power as though a successful war had been concluded.'

" By way of contrast to the foregoing theory it will be observed from the quotation herein-above, the I.M.T. stated the question before it to be ' whether a concrete plan *to wage war* existed, . . . ', which obviously is quite a different thing from the prosecution's contention. This alone, it seems to me, would be a sufficient answer to the conspiracy count. To further consider the matter, however, it becomes necessary to determine whether the contention outlined by these passages from the brief has any sound legal basis either in Control Council Law No. 10, the London Charter or international customary law.

" The ' Krupp conspiracy ' is alleged to have been formed in 1919 by Gustav Krupp in conjunction with the then officials of the Krupp concern. Only three of the defendants in this case were connected with the firm at that time and it is conceded that ' none of them occupied a sufficiently important position to justify charging them with the responsibility for decisions taken at the end of 1920.' But it is sought, nevertheless, to hold them liable for those decisions upon the theory that they participated in the execution of the alleged conspiracy. The other defendants, became connected with the firm at various times over the period from 1926 to 1937 and it is sought to hold them retroactively responsible for the original agreement between Gustav Krupp and his then associates ; for that agreement and not its execution, is the gist of the offence of conspiracy which is complete from the moment the combination or confederacy is formed.

" It is also conceded that ultimate authority to settle the problems which faced the Krupp firm in 1919 as a result of the Versailles Treaty, and out of which the alleged conspiracy arose, rested in Bertha Krupp and her husband, Gustav Krupp, who actually exercised the proprietary management.

" Whether it be called the ' Nazi conspiracy ', the ' Krupp conspiracy', or by some other name, to be a crime under Control Council Law No. 10 or the London Charter, a conspiracy must meet at least three requirements : (1) There must be a concrete plan participated in by two or more persons ; (2) the plan must not only have a criminal purpose but that purpose must be clearly outlined ; and (3) the plan must not be too far removed from the time of decision and of action.

" It is conceded, of course, that it must be shown that the conspiracy had a criminal purpose. In an effort to bring this essential element of the offence within the language of Control Council Law No. 10 and the London Charter, the alleged criminal purpose is, as already said, stated in general terms as being ' first to prepare and then to wage aggressive war.' But as also indicated this is unintentionally misleading. When considered in the light of the evidence there is no contention that the alleged ' Krupp conspiracy ' involved a concrete plan to wage aggressive war clearly outlined in its criminal purpose. Upon the contrary, when converted from the abstract to the concrete and reduced to its essentials, the real contention in this case is that in violation of the terms of the Treaty of Versailles, Gustav Krupp and his then associates entered into an agreement in 1919 whereby the armament potential of the Krupp firm was to be secretly preserved with a view to utilizing it in aiding the rearmament of Germany *if and when some future government embarked upon a rearmament programme in support of a national policy of aggrandisement.*"

Judge Anderson then surveyed the evidence submitted by the Prosecution in support of its above-mentioned contention and concluded:

" The foregoing evidence is sufficient to show that, notwithstanding the prohibition in the Versailles Treaty, Gustav Krupp, in 1919, decided to maintain the firm's armament potential consisting of a nucleus of its skilled employees, to the end that if and when the German government was again in the market for war material, the firm would be in a position to re-enter that field of activity."

He then drew attention to the fact that the Prosecution expressly disclaimed an intention to level an attack against the business of making arms as such and went on to say that the Prosecution " concedes, and properly so, that the ' armourer's trade is no more inherently unlawful than that of the soldier or diplomat; all of these professions revolve around war and statecraft, but that does not make them criminal *per se.*' This is a realisation that even under its theory of the law, in order to make the Krupp organization amount to a criminal conspiracy, it was necessary to show that the decision made by Gustav Krupp in 1919 was made with a criminal intent and amounted to a plan to accomplish an illegal objective; and further that the defendants participated therein with knowledge of its criminal character and with like intent. To show these essential facts the prosecution places much stress upon two sentences plucked from an article written for the Krupp firm in July, 1940, by one Schroeder who was the head of the firm's accounting department and submitted to the High Command of the German Armed Forces.

" These sentences are as follows: ' Without government order, and merely out of the conviction that one day Germany must again fight to rise, the Krupp firm have, from the year 1918 to 1933, maintained employees and workshops and preserved their experience in the manufacture of war materials at their own cost, although great damage was done to their workshops through the Versailles Treaty, and employees and machines had in part to be compulsorily dispersed. The conversion of the workshops to peace-time production involved losses, and as at the same time, the basic plan of a reconversion to war production was retained, a heterogeneous programme

as the result, the economic outcome of which was necessarily of little value ; but only this procedure made it possible at the beginning of the rearmament period to produce straight away heavy artillery, armour plates, tanks and such like in large quantities.'

" The emphasis of course is upon the rather dramatic and ambiguous phrase ' fight to rise '. We are not enlightened as to just what it means.

" The foregoing sentences in which the phrase appears are from a lengthy document described by the Prosecution when it was introduced in evidence as a key document. The circumstances under which it and a companion document were prepared demonstrate, I think, that the phrase ' fight to rise ', whatever was meant by it, cannot be utilized to give a criminal character to the activities of these defendants in pursuing their duties as employees of the Krupp firm.

" It seems hardly necessary to argue that, in the foregoing circumstances, the phrase ' fight to rise again ', used by Schroeder nearly twenty years after the conspiracy is alleged to have originated with Gustav Krupp ; and after the period of preparation was over and the war well under way, cannot be utilized to give a criminal character to the activities of the defendants. Apart from all other considerations, it not only was not made in connection with or furtherance of any criminal conspiracy or plan to prepare or wage war but, it shows, as already said, that it was in furtherance of the legitimate interests of the firm from a strictly private business standpoint and this while the war was at its height.

" Considered objectively and in the proper context, it is at least plausible that Gustav Krupp's decision made in 1919 was a calculated business risk. Here was a man faced with the loss of a large part of what doubtless was a profitable business that had been built up over a long period of years. He concluded there was a strong possibility that the obstacles then preventing him from engaging in that field of activity would sooner or later be removed by the repudiation of the Versailles Treaty or otherwise, and that the German Government would then be again in the market for armament. In this situation he decided to be prepared to, at that time, immediately re-engage in that business. When, in 1933, his calculation proved to be correct, the Krupp firm was ready to begin the production of arms at once thus no doubt gaining a considerable advantage over its competitors. It is true that the result was a contribution to the rearmament of Germany but it is not contended that in reaching his decision and formulating his plan Gustav Krupp had any idea of aiding in that project except for a profit. Upon the contrary, as is said, the Prosecution concedes that his decision was not made for purely patriotic reasons and it is shown conclusively that when the firm did begin the production and sale of armaments the prices were fixed at a figure which enabled it to recoup the losses sustained in preserving the firm's armament potential during the period from 1919 to 1933 when the production of armament was prohibited. In this connection it cannot be reasonably said that in making his decision Gustav Krupp was influenced by the desire to make armament for Germany alone or that such was his intention. Upon the contrary, the only reasonable view is that his decision was made with the intention of re-engaging in the armament business generally when the opportunity denied him by the Versailles Treaty came. This is

conclusively shown by what happened. In 1933 or shortly thereafter, the Krupp firm did exactly that. It not only manufactured armament for the German government but diligently sought the more profitable business of other governments apparently without discrimination. Hence, under the evidence in this case, it is not an altogether unreasonable view that Gustav Krupp would not have made the same decision unless he had believed that it was to the firm's financial interest. The continued insistence even during the war on profits and the efforts to recoup prior losses through high prices charged his government negatives the idea that he would have incurred the hazard for what he later claimed to have been patriotic reasons. But this view may be laid aside.

" The Prosecution's position would be unassailable from a factual standpoint if the charge were that Gustav Krupp formulated and, in conjunction with the then officials of the firm, executed a plan to violate the disarmament provisions of the Versailles Treaty. Indeed when it is considered in the light of the evidence offered to support it, this necessarily seems to be the primary basis for the conspiracy charge.

" It is shown beyond doubt that Gustav Krupp did as claimed and also that in many respects he practised a gross deception upon the Inter-allied Control Commission which was set up to supervise the compliance with the disarmament provisions of the Treaty. This conduct on the part of Gustav Krupp was indefensible from a moral point of view. But however reprehensible from that standpoint, it was in my opinion no crime *per se* either under the London Charter or Control Council Law No. 10.

" Under the construction given the former by the I.M.T. the conspiracy to commit crimes against the peace involving violations of a treaty is confined to a concrete plan to initiate and wage war and preparations in connection with such plan. Control Council Law No. 10 is to be likewise construed. Independently of the government, the firm of Krupp could not wage war within the meaning of Control Council Law No. 10 or the London Charter, nor was it apparently possible that it could do so.

" In this connection it is interesting to note that the I.M.T. pointedly refrained from a finding on the specification in the indictment that the Defendants there had violated the disarmament clauses of the Versailles Treaty, or basing a conclusion thereon. Yet we have that specification repeated here as a primary basis."

Judge Anderson then pointed out that the Prosecution's theory of an independent " Krupp Conspiracy ", considered in the light of the evidence presented a serious question of jurisdiction. He drew attention to the fact that conspiracy to commit a crime and the commission of that crime are separate and distinct offences, and then went on :

" It is not contended that the particular defendants were parties to the alleged criminal agreement at the time it was first formed. Upon the contrary it is sought to hold them retroactively responsible under the Anglo-Saxon common law rule that those who join a previously formed conspiracy are equally liable with the others for the original agreement. It is not necessary to stop to inquire whether, under the construction given the London Charter, the Prosecution can invoke this rule of the Anglo-Saxon common

law. The decision as to several of the defendants in that case, for instance as to Speer and Doenitz, makes it extremely doubtful.

" However this may be, it is obvious that under the Prosecution's theory of an independent ' Krupp conspiracy ' it is sought to hold the defendants guilty of an offence which was complete in 1919 and it is this that poses the jurisdictional question.

" This is an *ad hoc* Tribunal. It was created as an instrumentality to administer the provisions of Control Council Law No. 10 and for no other purpose. Control Council Law No. 10 was enacted for the express purpose of giving effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto. Both the Moscow Declaration and the London Agreement which are made integral parts of Control Council Law No. 10 refer exclusively to war criminals whose crimes were committed in connection with the series of wars initiated by the Nazi Government on 1st September, 1939. So here we have a Tribunal drawing its jurisdiction exclusively from the fact of a series of particular wars called upon to take cognizance of an alleged offence which was admittedly unconnected with any of the plans to wage the particular wars upon which the jurisdiction of the Tribunal depends and which was committed in the time of peace twenty years before the outbreak of any war and at a time when the defendants were not ' alien enemies ' within the meaning of the laws of war.

" To sustain this view of the case would be a radical departure from the laws and customs of war.(1) It was, I venture to think, to avoid such an anomaly that in the case before it the I.M.T. restricted the scope of the conspiracy denounced as a crime by the London Charter to a concrete plan which led to the initiation of war and which, from a standpoint of time and causation, was not so remote from that action as to preclude it being considered an essential part of the fact from which the Tribunal drew its jurisdiction, namely, the particular wars themselves. . . .

" Apart from any question of whether the requisite participation on the part of the particular defendants was shown, a determinative inquiry is whether the agreement made in 1919 by Gustav Krupp with the then officials of the Krupp firm constitutes a common plan or conspiracy to commit a crime against the peace as defined by Control Council Law No. 10 and the London Charter.

" As already said the Prosecution occasionally use the alternative expression, ' to prepare or to wage war,' in stating the alleged criminal purpose of the ' Krupp conspiracy.' But it is obvious that there is no serious contention that it embodied a concrete plan to wage war. To repeat, the firm of Krupp could not wage war or aid in doing so independently of the German government and it was not apparently possible that it could do so. Upon the contrary, in order to make the theory conform to the language of Control Council Law No. 10 and the London Charter it is necessary to regard the alleged criminal purpose of the plan to have been to prepare to aid in the preparation for war through the manufacture and sale of armament, if and when such a programme should be adopted by

"(1) Cf. Gen. J. H. Morgan, K.C. Nurnberg and After, *The Quarterly Review*, October, 1947, London."

some future German government. The question then is whether such a plan was a crime against the peace.

" It is worth pointing out that whatever was true from 1928 onward, it is a debatable question as to whether aggressive war or a conspiracy to that end was a crime under international customary law as it stood in 1919 when the alleged confederacy was formed by Gustav Krupp and the then officials of the Krupp firm.

" To give an affirmative answer to the Prosecution's contention, I venture to think, would be to extend the concept of conspiracy even beyond the limit fixed by domestic common law of the Anglo-Saxon nations to say nothing of international law as laid down by the I.M.T."

After having associated himself with and quoted the doctrines on preparation for crime in relation to a conspiracy and its limitations, expounded by Francis B. Sayre, in an article in the February, 1922, issue of the *Harvard Law Review* and by Wharton in his book, *On Criminal Law*, Volume II, Section 1605, pp. 1863–1864, Judge Anderson stated :

" Under this doctrine it seems clear that if the manufacture and sale of armaments for profit can be regarded as preparation for war in a criminal sense it can only be so if done in complicity with the plans of some agency capable of planning, initiating and waging war and which in fact does so, or as the result of a special statute : otherwise, there is no crime in any event for, as Mr. Wharton points out, the preparation must be regarded as a mere condition and not a juridical cause of the offence which was actually committed. In the present case, conceding the most that can be reasonably said by the Prosecution of Gustav Krupp's decision in 1919, it is obvious that the crime of aggressive wars beginning in September, 1939, from which this Tribunal draws its jurisdiction, as well as the preparation therefore, resulted not from that decision but from the collateral intervention of Hitler as the head of the Nazi Government and his collaborators.

" In connection with the contention that mere preparation for war alone is a crime, F. B. Schick, of the University of California, writing in the *University of Toronto Law Journal*, Volume VII, pages 27, 40, makes this highly pertinent comment :

> ' Interesting among the delicts declared to be " Crimes against Peace " is the provision according to which the planning or preparation of an illegal war constitutes an international delict. It would seem that this legal innovation, if it were to be accepted as a precedent for possible prosecutions of future war criminals, could render criminally responsible, at any time, every individual, everywhere. As a rule it is impossible to know in advance whether the planning or preparation of certain acts is to promote an illegal war. Nor is it possible to ascertain whether services rendered in times of peace in order to strengthen the military and economic war potential of a state, and—by doing so—to guarantee national as well as international security, will be construed at some later date as contributions to the planning and the preparation of an illegal war ; or, would anyone doubt that the present search for new, and more effective, weapons carried on so successfully by scientists, industry, and top-ranking officers of the victorious armies and navies under the leadership of the three most powerful of all peace-loving nations is being intensified for any but security reasons ? '

" The article in which the foregoing passage appears was obviously written after the indictment was returned but before the judgment of the I.M.T. was rendered. As will be seen the Tribunal was apparently equally aware of the danger pointed out by the author and avoided it by the construction it gave the language of the Charter defining crimes against the peace.

" In demonstrating this it will also become apparent that within the exception mentioned by Mr. Wharton, neither the Control Council Law No. 10 nor the London Charter can be regarded as a special statute making indictable preparations for the crime of aggressive war apart from the plans of those by whom that crime was committed or capable of being committed. It seems to me that this was pointedly and decisively shown by the I.M.T.

" There is, I think," Judge Anderson continued, " no justification for the view that the I.M.T. considered mere preparation apart from planning and initiation to be a separate and distinct offence, and, hence, that a conspiracy to prepare for war in the absence of and apart from the concrete plan to initiate and wage aggressive war was a crime against the peace."

Further on Judge Anderson states that in his opinion it seems obvious " that the theory of a ' Krupp conspiracy ' to prepare for war, carried to its logical conclusion, would necessarily mean that, granted the required criminal intent on the part of the participants, they would be guilty of a crime even though no German government ever planned, initiated or waged an aggressive war and even if the armament purchased of Krupp had been used exclusively for legitimate purposes.

" I am not pursuaded that there is anything in Control Council Law No. 10 or the London Charter that justifies that anomalous conclusion.

" In my opinion, ' planning, preparation and initiation ' as these words are used in the London Charter and Control Council Law No. 10 are in practical effect the same as a conspiracy to wage war. They are merely descriptive of the activities prerequisite to the crime of aggressive war and, to be of determinative significance, must be connected with a concrete plan of some agency capable of waging war clearly outlined in its criminal purpose and, moreover, must not be too far removed from the time of action and decision . . ."

After having summarised and commented upon the evidence given by the British General and lawyer, J. H. Morgan, K.C., who appeared as a witness before the Tribunal, the results of the Nye Investigations in the Senate of the United States and the Diary of Mr. Dodd, U.S. Ambassador to Berlin during the rearmament period, which all went to show that the allied nations were fully aware of the rearmament which took place in Germany, Judge Anderson stated :

" This, of course, would not justify criminal conduct, if any, on the part of the defendants. It is pertinent only as bearing upon the question of whether the defendants had reason to believe that the particular activities in which they were engaged would be considered indictable under international customary law. Needless to say, however, for such evidence to be of any significance a lack of knowledge of the Nazi plans for aggressive war is to be presupposed.

" It is, of course, a somewhat different case where usage and custom has culminated in a concrete expression of the law as, for instance, in the Hague rules of Land Warfare and the Geneva Convention. In such a case the enactment gives the required notice just as is true in the case of statutory municipal law or judicial precedent at common law. . . ."

" That it was essential to the Prosecution's case to escape the definition of conspiracy given by the I.M.T. has already been adverted to. The view that this definition was due solely to the fact that the charge in the Indictment before the I.M.T. was the broad ' Nazi conspiracy ' involves, I think, a misconception. The Tribunal spoke not solely with reference to the particular case. It was construing the language of the Charter and pronouncing a rule to be applied in all cases of conspiracy based upon that enactment. It cannot, I think, be seriously contended that under the same law the rule defining a conspiracy could be one thing in one case and another thing in another case. Such a view would rob the law of all predicability. It would make the law depend upon the allegations of the Indictment rather than to require the sufficiency of the charge to be tested by the rule of law.

" Contrary to the Prosecution's contention, in my opinion, the *restricted scope given the concept of conspiracy by the I.M.T. was* superinduced by the commendable desire to avoid a violation of the principle embodied in the maxim, *nullum crimen sine lege, nulla poena sine lege.* This was accomplished by making the definition conform to the continental concept of the offence of complicity."

This seemed, in Judge Anderson's opinion to correspond with the view expressed by Professor Donnedieu de Vabre, the French member of the I.M.T., in his article entitled: " The Judgment of Nuremberg and the Principle of Legality of Offences and Penalties", published in Brussels in the *Review of Penal Law and Criminology* for July, 1947.

Judge Anderson then turned to the contention made by the Prosecution, that according to its interpretation of the pertaining provisions of Control Council Law No. 10 and the principles of International Law, it was not even necessary to prove that the accused believed or intended that the employment of Germany's military power would result in actual armed conflict. He commented upon this contention in the following words:

" I must confess that I am unable to find any basis in the language of either the Control Council Law No. 10 or the London Charter for the legal proposition stated by the Prosecution as the major premise of its case. In taking it as the basis for its case, it seems to me to be clear the Prosecution has reverted to the conception of a ' broad Nazi conspiracy ' exemplified by the openly and widely proclaimed programme of the Nazi Party and Government upon which the Prosecution based its case before the I.M.T. and which Tribunal pointedly and decisively declined to adopt. The Prosecution before the I.M.T. described the Nazi Party as the ' instrument of cohesion among the defendants and their co-conspirators and an instrument for carrying out the purpose of their conspiracy ', whereas the Prosecution in this case says, ' in 1933, it (the Krupp firm) entered into an alliance with that party for the realisation of their common objective '."

Judge Anderson then pointed out that there were many passages in the

Prosecution's brief which went to show that the alleged criminal purpose of the so-called "Krupp conspiracy" was in reality identical with the open conspiracy of the Nazi Party even though it may have originated beforehand. Judge Anderson commented on this allegation in the following words:

"It is sufficient to say here that throughout the brief there runs the idea that the plan in which the defendants participated or came to participate was not a concrete plan to wage war clearly outlined in its criminal purpose, as held to be essential by the I.M.T., but the national plan of the Nazis for aggrandisement of Germany at the expense of other nations, which is nothing more or less than to state the Nazi Party programme without mentioning it by name.

"That in restricting the concept of conspiracy to a concrete plan to wage aggressive war the I. M. T. decisively rejected this idea is too clear for argument. The grounds on which this was done cannot, I think, be circumvented simply by changing the name from a 'Nazi conspiracy' to a 'Krupp conspiracy'. Hence, it is clear to my mind that to adopt the Prosecution's position as to the law would be to expand the concept of conspiracy under Control Council Law No. 10 beyond that contained in the London Charter as construed by the I.M.T. The latter Tribunal, I think, went to the limit fixed by the principle forbidding *ex post facto* laws and beyond that I am unwilling to go.

"In concluding the response to the contention that the conspiracy among private citizens to 'prepare for war' independently of and apart from the concrete plans of the Nazi Government to wage war, I cannot do better than to repeat in part the quotation from the article by Professor Schick in the *Toronto Journal*, which is hereinabove cited:

> 'It would seem that this legal innovation, if it were to be accepted as a precedent for possible prosecutions of future war criminals, could render criminally responsible, at any time, every individual, everywhere. As a rule it is impossible to know in advance whether the planning or preparation of certain acts is to promote an illegal war. Nor is it possible to ascertain whether services rendered in times of peace in order to strengthen the military and economic war potential of a state, and—by doing so—to guarantee national as well as international security, will be construed at some later date as contributions to the planning and the preparation of an illegal war.'

"As applied to the facts of the present case, it is no answer, I think, to say that in the case of a conspiracy exclusively among private citizens such as that here alleged, the question of criminal intent is the determinative factor. An evil intention is not a crime. To be of significance it must be coupled with the real or apparent possibility of doing the act contemplated."

Judge Anderson concluded:

"From what has been said it follows that, in my opinion, there is no basis for the Prosecution's theory of an independent 'Krupp conspiracy'. Therefore, from a criminal standpoint the activities of the defendants in the production of armament can only be considered in connection with the criminal plans of the Nazi Government.

"This theory is covered by the contention that the 'Krupp conspiracy' fused with the 'Nazi conspiracy' upon the seizure of power by the Nazi

Party. This presents a question of a different type. The idea of a 'Krupp conspiracy' independent and apart from the war plans of the Nazi Government has disappeared. The question is no longer whether there was a criminal plan or plans for that essential element has been established by the judgment of the I.M.T. The inquiry, therefore, is whether the evidence was sufficient to show that the defendants participated in such plans under circumstances that made them guilty under the conspiracy Count."

Judge Anderson pointed out that it was true that Gustav Krupp had embraced Nazism shortly prior to the seizure of power by the Nazi Party and had continued his allegiance thereafter. He had also played an important part in bringing to Hitler's support other leading industrialists and had, through the medium of the Krupp firm, from time to time made large scale contributions to the Party treasury. "But," Judge Anderson continued, "under the facts of this case this conduct on the part of Gustav Krupp cannot be charged against the defendants". Likewise it was true, Judge Anderson pointed out, that with the exception of von Buelow and Loeser, all of the accused had been members of the Nazi Party, but their connection with it "was confined in the main to the fact of membership, as was true of several millions other Germans". Finally, Judge Anderson drew attention to the fact that "after the seizure of power the activities of the defendants consisted primarily in the performance of their duties as salaried employees of a private enterprise engaged in the large scale production of both armament and peace-time products". But, although as a matter of course, rearmament is a part of the preparation for war, "rearmament itself," Judge Anderson continued, "is not criminal".

Judge Anderson held that before the accused's activities could be said to constitute crimes against peace it must be shown that they were parties to the plans of the Nazi Government to wage aggressive war. He then turned to the inquiry whether the evidence was sufficient to show that the accused participated in such plans under circumstances which would make them guilty under the conspiracy Count in the following words:

"It is essential therefore to determine whether the proof was sufficient to show that the defendants manufactured and sold armament to the government with the knowledge that the product was going to be used in some invasion or war of aggression against another nation as these terms are defined in Control Council Law No. 10 and the London Charter, and with the intent to aid in the accomplishment of the criminal purpose of those initiating and waging such conflict.

"This question is not to be determined by objective standards. Actual knowledge is required. The rule applicable in cases of ordinary negligence and similar actions has no place in criminal law.

"I agree with the Prosecution, however, that it was not necessary to show that the defendants participated in the four key conferences at which Hitler disclosed to a few top leaders his plans for an aggressive war. Nor do I think the I.M.T. held this to be essential. In stressing the attendance or non attendance at these meetings the Tribunal was merely pointing out the necessity for actual knowledge of the criminal purpose and the sufficiency or insufficiency of the evidence on that question and not announcing an exclusive standard by which this essential fact was to be determined. That

this is true is shown by the conviction upon the charge of conspiracy of both Hess and Ribbentrop, neither of whom was shown to have attended any of the conferences.

" The requisite knowledge, I think, can be shown either by direct or circumstantial evidence but in any case it must be knowledge of facts and circumstances which would enable the particular individual to determine not only that there was a concrete plan to initiate and wage war, but that the contemplated conflict would be a war of aggression and hence criminal. Such knowledge being shown, it must be further established that the accused participated in the plan with the felonious intent to aid in the accomplishment of the criminal objective. In the individual crime of aggressive war or conspiracy to that end as contra-distinguished to the international delinquency of a state in resorting to hostilities, the individual intention is of major importance.(1)

" Except by a few of the top leaders of the regime, the truth about the concrete plans of the Nazis to wage war never became known until after the war was launched and all the facts and circumstances necessary to a determination that it was an aggressive war probably were not known to the general public in Germany until a considerable time thereafter. Indeed, the whole truth was likely not generally known until it was brought to light in the trial before the I.M.T.

" As indicated by the judgment in that case, it is doubtful if Hitler himself had fully determined upon a concrete plan for a war of aggression much prior to 1937. Certainly prior to that time his top leaders and most intimate associates did not have the knowledge which the I.M.T. held necessary to make their activities constitute participation in a criminal conspiracy. To these the information, as already said, was disclosed in four secret conferences held on 5th November, 1937, 23rd May, 1939, 22nd August, 1939 and 23rd November, 1939.

" But at the same time the general public was being told quite a different story. The Nazi propaganda machine was going full blast throughout the rearmament period. It was intended to cloak the concrete plans of the Nazi leaders to wage war and did do so notwithstanding that the Nazi foreign policy was known everywhere. The nature and extent of this propaganda is a matter of common knowledge. It is reviewed in part in the judgment of the I.M.T. and need not be repeated here. But a reference to the findings there made and a resort to what is now common knowledge will show that until the very outbreak of war with Poland, Hitler was proclaiming his peaceful intentions and signing non-aggression pacts with some of the nations subsequently attacked.

" In the present connection it is important to remember two things. First, the strict censorship which prevailed over all news sources. The German people were permitted to know only what Hitler wanted them to. The second is that the propaganda emanated from the head of the government of the nation which, regardless of its decidedly objectionable characteristics, was apparently a legitimate one. It is an historical fact that for Germans this was a consideration of importance. It of course

" (1) Quincy Wright, ' The Law of the Nurnberg Trial,' *American Journal of International Law*, January 1947, p. 38."

cannot be utilized to excuse crime and from the viewpoint of peace-loving nations is highly regrettable. But it is nevertheless true and to ignore it in the connection presently under consideration would be to abandon an objective approach to the question.

"Throughout the rearmament years, the period which the prosecution contends these defendants had the knowledge necessary to make their activities criminal, Hitler's propaganda apparently deceived the highest officials of foreign governments who were vitally interested and who presumably had in hand all the information obtained through elaborate intelligence service as well as statesmen experienced in judging foreign affairs. These facts are not only common knowledge but a part of the record in the trial before the I.M.T. of which the Prosecution claims this Tribunal must take judicial notice."

"It seems to be contended," Judge Anderson went on, "that the requisite guilty knowledge on the part of the defendants of the plans for aggressive war can be inferred from the inherent nature and extent of the Krupp firm's activities in the rearmament field, together with the fact that they or some of them occupied high positions in the economic life of Germany which necessarily brought them in contact with high government officials. No such inference is permissible. There is no evidence that any government official or anyone else informed any of the defendants that the government orders executed by the Krupp firm were in connection with concrete plans for aggressive war. Rearmament must look the same whether for aggression or defence. The fact that the defendants were engaged in the manufacture of weapons ordinarily employed in offensive warfare is not of determinative significance. Offensive warfare and aggressive war is not the same thing. Offensive weapons may be, and frequently are, employed by a nation in conducting a justifiable war.

"Whether such knowledge can be inferred from the nature of the accused's activities plus the fact that he held a high political or civil or military position, or a high position in the financial, industrial or economic life of Germany is clearly and conclusively indicated by the judgment of the I.M.T. as to several of the defendants before it; notably, von Papen, Schacht, Doenitz, Frick and Streicher, all of whom were acquitted of the charge of conspiracy on the ground that they lacked the requisite knowledge of the Nazi plans to wage aggressive war. A full discussion showing the activities of these high ranking government officials is set forth in the opinion of the I.M.T. and need not be repeated here. It is sufficient to say that in view of their exoneration with respect to the essential element of the offence now being considered, to say that private businessmen such as these defendants had the requisite guilty knowledge derived alone from the extent and nature of their activities in connection with the manufacture and sale of armament in private enterprise and the high positions some of them held in the economic life of the nation, would not only be an anomaly, it would be an inconsistency which would cast a doubt upon the objectivity of the trial and the purpose of this Tribunal to administer justice under the law . . ."

Judge Anderson then drew attention among others to the following passage in the Prosecution's brief:

"In short, then until May, 1939, no-one in Germany could have had knowledge of when and against whom Germany would wage her wars of aggression. Before that date, a few leaders of Germany had been advised as early as November, 1937, that Germany was prepared to resort to the sword, if necessary, to gain her own ends. After that date, the military leaders knew of Germany's intention to invade Poland; *the rest of the German people learned of it with the invasion of Poland three months later. Only for the short space of three months can anyone be deemed to have had any special information as to Hitler's plans. These were the men who were Hitler's co-conspirators.* The period of preparation, however, for Germany's wars of aggression stretched back over a far longer period of time. During this period of time the defendants in this case rendered important services to the Nazi Government. Their participation in Nazi preparations took place long before the plans to wage aggressive war were crystallized.

"The foregoing," Judge Anderson continued, "is equivalent to an admission . . . that the evidence was insufficient to show guilty knowledge on the part of the defendants under the rule adopted by the I.M.T. and shows that the real contention in this case is that no more was required than knowledge of the national programme of the Nazi Party and Government. That the I.M.T. rejected this view is beyond dispute."

Judge Anderson then dealt with the final question, namely whether the accused were guilty under Count I charging the planning, preparation, initiation and waging of the twelve specific wars and invasions referred to in this Count, in the following words:

"As already pointed out, the I.M.T. seems to have regarded the 'planning, preparation, initiation and waging' of aggressive wars as constituting two separate offences, one consisting of the acts of 'planning, preparation and initiation,' and the other of 'waging' aggressive war. To repeat, the offence of planning, preparation and initiation of aggressive wars is, in practical effect, the same as the conspiracy. Here the determinative question is whether with the requisite guilty knowledge the evidence was sufficient to show that the defendants were guilty of participating in the planning, preparation and initiation of the particular wars charged in the indictment. What has already been said in connection with the conspiracy charge is a sufficient answer to this question.

"This leaves for consideration the charge of waging aggressive war. Little space is devoted in the brief to this question.

"The activities of the defendants insofar as they related to the waging of war continued at all times to be confined to the performance of their duties as employees of the firm engaged in the manufacture and sale of armament upon government orders and the participation by some of them as members of the economic associations existing in Germany at the time.

"The I.M.T. refrained, wisely perhaps, from undertaking to formulate a specific rule by which to determine what activities would constitute waging aggressive war, but by its decision with respect to several of the defendants it conclusively demonstrated its opinion as to what activities would not constitute that offence. A reference to the verdict as to Sauckel and Speer will suffice to show this."

Judge Anderson made reference to the following passage of the Judgment of the I.M.T. as regards Speer :

" The Tribunal is of the opinion that Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became head of the armament industry well *after all the wars had been commenced and were under way*. His activities in charge of German armament production were in aid of the war effort in the same way as other productive enterprises aid in the waging of a war ; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count I or waging aggressive war as charged under Count II.

" The Prosecution had contended," Judge Anderson went on, " that the acquittal of Speer on the charge of waging war was predicated, not on the character of his activities but, upon the time of their commencement."

In dealing with this contention Judge Anderson said :

" The view of the Prosecution as to the rationale of the decision is unsound in my opinion, for the following reasons :

" First : If the ground for the acquittal of Speer of *all* charges under Counts I and II had been the fact that he did not become head of the industry until well after all the wars were under way it would have been an easy matter for the Tribunal to have said so and stopped there. If the contention of the Prosecution is valid, then the statement contained in the third sentence as to the relation of productive enterprise to the offence charged was not only irrelevant to the issue decided and mere surplusage but was absolutely meaningless.

" Second : It will be observed that as was true in the case of Doenitz, as well as others, the Tribunal in Speer's case expressed two separate conclusions, one with respect to the offence of *initiating, planning, and preparing* wars of aggression or conspiring to that end, and the other with respect to engaging in a common plan to wage war as charged in Count I or waging aggressive war as charged in Count II. . . .

" Third : The facts with respect to Speer's activities render the conclusion embodied in the Prosecution's contention unreasonable when viewed in the light of their importance to the war effort. It is pertinent to note that Speer was appointed Reich Minister for Armament and Munitions about seven months before the German Armed Forces reached Stalingrad and about eleven months before their disastrous defeat in that decisive battle. His activities extended over a period of more than three years, or about one-half of the entire war period. To say that merely because they did not cover a longer period of time, they did not amount to sufficient participation is to deny the importance of armament production to the waging of war. It is to say, in effect, that the war could have been waged as well during the last three years without the centralised and organised control of armament production by Speer during that period. This does not meet the test of reason.

" If it be conceded that the duration of a particular activity is proper to be considered in determining whether the contribution to waging war was a substantial one, it is submitted that there can be no doubt about the fact that a period of three years meets the requirement in that respect. If this

is true, the only explanation for the acquittal of Speer under Counts I and II is that the Tribunal felt that, conceding the requisite duration, the nature of his activities did not constitute waging war within the meaning of the language of the Charter and that, it is submitted, is exactly what the Tribunal made plain when, in disposing of this case, they said in effect that mere productive enterprise in aid of war effort does not constitute waging war.

"In its relation to the defendants in the present case the acquittal of Speer of the offence of waging war is peculiarly significant, for he was the government representative who exercised direct supervision over their activities as he did over those of all industrialists engaged in the war effort. He was the official head of the whole industrial programme for the production of armaments. It would be unprecedented to hold that the activities of private citizens in the production of armament constituted waging of war when those of the official supervising those activities did not constitute that offence. So far as I am able to perceive, there is no reasonable basis for making such a distinction. . . .

"As already emphasised, the defendants were private citizens and non-combatants. None of them held, either before or during the war, any position of authority comparable in importance to that of either Speer or Sauckel; nor in any permissible view of the evidence can it fairly be said that they collaborated with those conducting the war to the extent that Sauckel and Speer did. None of them had any voice in the policies which led their nation into aggressive war; nor were any of them privies to that policy. None had any control over the conduct of the war or over any of the armed forces; nor were any of them parties to the plans pursuant to which the wars were waged and so far as appears, none of them had any knowledge of such plans. To repeat, their activities in connection with the war consisted primarily in the performance of their duties as employees of a private enterprise engaged for profit in the manufacture and sale of armament, together with membership by some of them in the economic and industrial associations organised to aid in the war effort.

"To hold that such activities, constitute waging war, I venture to think, would be a violation of the principle forbidding *ex post facto* law.

"The I.M.T. held that independent of the London Charter the waging of aggressive war was a crime under international law. This holding was based on treaties and usages and customs of nations culminating in the Briand-Kellogg Pact. Accepting this instrument 'as expressing and defining for more accurate reference the principles of law already existing' as the I.M.T. said was the case, in determining what activities were intended to constitute waging war, the language must be interpreted in the light of the existing state of international thought upon the subject and the objects sought to be accomplished thereby. Whatever may be the view of experts in the field of criminology, in the eyes of law-makers and laymen the object of punishment is to deter others from crime. In this particular instance, I apprehend, the object sought to be accomplished by making aggressive war a crime was to deter those capable of initiating that type of war from doing so. The language used in the Pact is to the effect that the signatories renounced war *as a matter of national policy*. Considered in the light of the complexity of the whole problem, the usage and custom which led to the Treaty and the object sought to be accomplished, it seems to me to be a

reasonable view that the language used necessarily implies that only those responsible for a policy leading to initiation and waging of aggressive war and those privy to such a policy together with those who, with a criminal intent actively conduct the hostilities or collaborate therein, are criminally liable in the event of war in violation of the Pact: for, if the threat of punishment deters these, there will be no war and the object of the law will have been accomplished. Upon the other hand, if the threat to the policy-makers, leaders and their collaborators proves of no avail, is it reasonable to conclude that the law contemplates that the threat of post-war punishment by a court exercising criminal jurisdiction held out to the mass of the people will prove effective? To answer this in the affirmative, it seems to me, would be to ignore everyday experience and indulge in purely theoretical rather than practical thought.

"Moreover, to extend criminal liability beyond the leaders and policy-makers and their privies to private citizens called upon to aid the war effort necessarily embodies the concept of mass punishment. To say that private citizens who participate to a substantial degree in the war effort after the policy-makers and leaders have plunged the nation into war are subject to indictment in a criminal court, notwithstanding they had no voice or control in the conduct of the war or its initiation is to say that there is no practical limit to the number who can be held responsible where the conflict is what is known as total war. This concept of mass punishment, in my opinion, is so inherently obnoxious, both from a legal and moral standpoint, that it would be an unreasonable construction to say that it was contemplated by any system of law founded upon justice. To enforce it would be an execution of power rather than an exercise of judicial authority. It would be to announce a rule which provides no practicable standard for the guidance of those bound by it. This would be of no service to the cause of justice under the law. Where would the line of demarcation be? Every private citizen called upon to contribute to the war effort would be obliged to determine in advance and at his peril whether he could do so without involving himself in criminal liability; whether the war in which he is called upon to aid his country is an aggressive war or lawful war? If he must determine this question, what standard is he to use in determining when and to what extent he can safely participate? Has that standard been so far fixed by international law that those not privy to a policy leading to aggressive war or the plans under which it is being conducted can reach the necessary decision with reasonable certainty?"

(iii) *The concurring opinion of Judge Wilkins*

Judge William J. Wilkins concurred in "everything that has been said in the above opinion" (i.e., the opinion of the Tribunal as a whole on Counts I and IV), but reserved the right to file a special concurring opinion at the time of the filing of the final judgment.

Judge Wilkins availed himself of this right at the time stated. The opinion, besides containing a summary of the relevant evidence, set out the following legal arguments:

"The principles of criminal liability applicable with respect to the Crime against Peace are the same elementary and basic principles applicable generally with respect to other crimes. The basic principle is that criminal

guilt requires two essential elements, namely, action constituting participation in the crime, and criminal intent. To establish the requisite participation there must be not merely nominal but substantial participation in and responsibility for activities vital to building up the power of a country to wage war. To establish the requisite criminal intent, it seems necessary to show knowledge that the military power would be used in a manner which, in the words of the Kellogg Pact, includes war as an ' instrument of policy '.

" In view of the factual situation, the Prosecution necessarily, in presenting its case, submitted evidence dealing with activities of Gustav Krupp and the Krupp firm, in an effort to connect up the defendants with substantial participation with these activities in such a manner that guilty knowledge could also be imputed to them.

" Gustav Krupp is not on trial in the present case nor has he had his day in court. Neither is the Krupp firm on trial except as it may appear as the *alter ego* of the defendant Alfried Krupp after he became the sole owner of the Krupp family enterprise by virtue of Hitler's Lex Krupp in December, 1943. Yet as said before, in view of the circumstances of the present case, evidence concerning Gustav Krupp and the Krupp firm was admitted by the Tribunal ; and the voluminous amount of credible evidence presented by the Prosecution, the major part of which comes from the files of the Krupp firm, is so convincing and so compelling that I must state that the Prosecution built up a strong *prima facie* case, as far as the implication of Gustav Krupp and the Krupp firm is concerned.

" I have also no hesitancy in stating that in my opinion the vast amount of credible evidence justifies the conclusion that the growth and expansion of the Krupp firm at the expense of industrial plants in foreign countries were uppermost in the minds of these defendants throughout the war years. This huge octopus, the Krupp firm, with its body at Essen, swiftly unfolded one of its tentacles behind each new aggressive push of the Wehrmacht and sucked back into Germany much that could be of value to Germany's war effort and to the Krupp firm in particular.

" It is abundantly clear from the credible evidence that those directing the Krupp firm during the war years were motivated by one main desire—that upon the successful termination of the war for Germany, the Krupp concern would be firmly established with permanent plants in the conquered territories and even beyond the seas. This was more than a dream. It was nearing completion with each successful thrust of the Wehrmacht. That this growth and expansion on the part of the Krupp firm was due in large measure to the favoured position which it held with Hitler there can be little doubt. The close relationship between the Krupp firm on the one hand and the Reich government, particularly the Army and Navy High Commands on the other hand, amounted to a veritable alliance.

" The war-time activities of the Krupp enterprises were based in part, upon spoliation of other countries and on exploitation and maltreatment of large masses of forced foreign labour.

" In my opinion, the evidence has shown that the basic policy of the Krupp concern which proved to be of such substantial assistance to Hitler's aggressive projects, was established immediately after the First War, that it was carried on during the Weimar Republic, and that it was greatly

intensified during those first years of the Hitler regime when none of the present defendants as yet occupied a position of policy-making responsibility in the Krupp combine. This was a decisive consideration for this Tribunal in dismissing Counts I and IV of the Indictment. For, the Tribunal found it appropriate to adopt a conservative concept of 'common plan' or 'conspiracy' as contained in Control Council Law No. 10.

"Under a widely accepted, less conservative theory of conspiracy, those who, with knowledge of the criminal plan, enter into the common enterprise at a later date, become responsible for everything that was done under the conspiracy previously started. Hence, had the Tribunal adopted that doctrine, it would have had to determine whether Gustav Krupp had the requisite state of mind, and whether, when the defendants reached highly responsible positions, they became parties to his plans, or, in other words, his co-conspirators. For, I am convinced that when the defendants reached their top positions within the Krupp concern, they knew the basic policy of the concern and of Gustav Krupp.

"As said before, the Tribunal did not adopt this line; furthermore, the Tribunal, acting as it did in a comparatively new field of International Law, wished conservatively to restrict the individual Crime against Peace to such persons, who, individually, played a substantial part in the planning, preparation, initiation or waging of aggressive war. But until well into the late 30's the Krupp officials who held the highest positions in the Krupp enterprises, were persons other than the present defendants. And the man who stood at the apex of Krupp's huge industrial combine until 1943 was Gustav Krupp. At that time, all the wars of aggression had started and were well under way. In order to be guilty of Crimes against Peace, a person must be shown to have acted in a manner which actually and substantially influenced the course of international events. Giving the defendants the benefit of what may be called a very slight doubt, and although the evidence with respect to some of them was extraordinarily strong, I concurred that, in view of Gustav Krupp's over-riding authority in the Krupp enterprises, the extent of the actual influence of the present defendants was not as substantial as to warrant finding them guilty of Crimes against Peace."

4. THE JUDGMENT OF THE TRIBUNAL ON COUNTS II AND III

In addition to setting out a summary of the evidence relating to the accused, the Tribunal in its judgment proper dealt with a number of legal points, as is contained in the following paragraphs.

(i) *The Legal Basis of the Trial*

The judgment at the outset related that:

"Following the unconditional surrender of Germany, the supreme legislative authority in that country has been exercised by the Allied Control Council composed of the authorised representatives of the Four Powers: The United States of America, the United Kingdom of Great Britain and Northern Ireland, the French Republic, and the Union of Soviet Socialist Republics. On 20th December, 1945, that body enacted Control Council Law No. 10. The Preamble to Control Council Law No. 10 is as follows:

'In order to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto, and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:'

"Article I reads, in part, as follows:

'The Moscow Declaration of 30th October, 1943, "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8th August, 1945, "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law.'

"In Article III it is provided that 'Each occupying authority within its zone of occupation, shall have the right to cause persons within such zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested . . . shall have the right to cause all persons so arrested and charged . . . to be brought to trial before an appropriate tribunal . . . The Tribunal by which persons charged with offences hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone.'

"Pursuant to the foregoing authority," continued the judgment, "Ordinance No. 7 was enacted by the Military Governor for the United States Zone of Occupation."

After quoting Articles I and II of Ordinance No. 7 (1) the judgment went on:

"The Tribunals authorised by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of Control Council Law No. 10 and administer international law as it finds expression in that enactment and the London Charter which is made an integral part thereof. They are not bound by the general statutes of the United States or by those parts of its Constitution which relate to courts of the United States.

"This Tribunal has recognised and does recognise as binding upon it certain safeguards for persons charged with crime. These were recognised by the International Military Tribunal (I.M.T.). This is not so because of their inclusion in the Constitution and statutes of the United States but because they are understood as principles of a fair trial. These include the presumption of innocence, the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt, and the right of the accused to be advised and defended by counsel.

"The Tribunal has not given and does not give any *ex post facto* application to Control Council Law No. 10. It is administered as a statement of international law which previously was at least partly uncodified. This Tribunal adjudges no act criminal which was not criminal under international law as it existed when the act was committed."

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(1) See Vol. III of this Series, pp. 114 and 115.

(ii) *The Law relating to Plunder and Spoliation*

On the question of plunder and spoliation, the Tribunal made the following legal observations:

" The pertinent portions of Articles 45–52 of the Hague Regulations are:

> 'Private property . . . must be respected' and '. . . cannot be confiscated' (Art. 46); 'Pillage is formally forbidden' (Art. 47); 'an occupying army may make requisitions in kind only "for the needs of the army of occupation"' and 'they shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.' (Art. 52).

" Article 53 provides, in part: 'An army of occupation can only take possession of cash, funds, and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operation.' Article 55 reads: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.'

" In its judgment the International Military Tribunal made the following comment (p. 68):

> '. . . These Articles (1) . . . make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear. . . .'

" We quote further from the I.M.T. Judgment (p. 68):

> 'The evidence in this case has established, however, that the territories occupied by Germany were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. There was in truth a systematic "plunder of public or private property," which was criminal under Article 6 (b) of the Charter. . . . The methods employed to exploit the resources of the occupied territories to the full varied from country to country. In some of the occupied countries in the east and the west, this exploitation was carried out within the framework of the existing economic structure. The local industries were put under German supervision, and the distribution of war materials was rigidly controlled. The industries thought to be of value to the German war effort were compelled to continue, and most of the rest were closed down altogether. Raw materials and the finished products alike were confiscated for the needs of the German industry. . . .'

" In the general summary, the I.M.T. found:

> 'War crimes were committed on a vast scale never before seen in the history of war. They were perpetrated in all the countries occupied by Germany.'

(1) The Articles referred to in the judgment of the International Military Tribunal were 48, 49, 52, 53, 55 and 56.

"It has been urged by the Defence that the provisions of the Hague Convention No. IV, and of the Regulations annexed to it, do not apply in 'total war.'

"This doctrine must be emphatically rejected. This Tribunal fully concurs with the Judgment of the I.M.T. that the Hague Convention No. IV of 1907, to which Germany was a party, had by 1939 become customary law and was, therefore, binding on Germany not only as Treaty Law but also as Customary Law.

"With further reference to the contention that total war would authorise a belligerent to disregard the laws and customs of warfare, the I.M.T. stated—and this Tribunal again fully concurs:

> '. . . There can be no doubt that the majority of them (War Crimes) arose from the Nazi conception of "total war" with which the aggressive wars were waged. For in this conception of "total war" the moral ideas underlying the Conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties, all alike, of no moment; and so, freed from the restraining influences of International Law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. . . .'

"With particular reference to Articles 46–50–52 and 56 of the Hague Regulations, the I.M.T. states:

> '. . . that violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument. . . .'"

It must also be pointed out that in the preamble to the Hague Convention No. IV it is made abundantly clear that in cases not included in the Regulations, the inhabitants and the belligerents remain under the protection and the rule of the principles of the Laws of Nations, as they result from the usages established among civilised peoples, from the laws of humanity, and dictates of the public conscience.

"As the records of the Hague Peace Conference of 1899 which enacted the Hague Regulations show, great emphasis was placed by the participants on the protection of invaded territories, and the preamble just cited, also known as 'Mertens Clause', was inserted at the request of the Belgian delegate, Mertens, who was, as were others, not satisfied with the protection specifically guaranteed to belligerently occupied territory. Hence, not only the wording (which specifically mentions the 'inhabitants' before it mentions the 'belligerents'), but also the discussions which took place at the time make it clear that it refers specifically to belligerently occupied country. The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.

"However, it will hardly be necessary to refer to these more general rules. The Articles of the Hague Regulations, quoted above, are clear

and unequivocal. Their essence is : if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority—permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner.

" It is a matter of historic record that Germany violated these rules even during the first World War ; and though she did it at that time on an immeasurably smaller scale than during the second World War, her practices were generally condemned—condemned by the experts of international law, condemned in the peace treaties (in which Germany promised indemnification for those illegal acts) and condemned by right-thinking Germans themselves. For example, in the sixth revised edition of *International Law* by Oppenheim, revised and edited by Lauterpacht (1944) it is stated :

> ' The Rules regarding movable private property in enemy territory were systematically violated by the central powers during the World War. . . . Factories and workshops were dismantled and their machinery and materials carried away. . . . These are but examples of the wholesale seizure of private property practised by Germany and her allies in the countries which they occupied.'

" About immovable private enemy property, the same leading textbook writer states :

> ' Immovable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings the buyer would acquire no rights whatsoever to the property. Article 46 of the Hague Convention expressly enacts that " private property " may not be confiscated, but confiscation differs from the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war. . . .
>
> ' Private personal property which does not consist of war material or means of transport serviceable for military operations may not, as a rule, be seized. Articles 46 and 47 of the Hague Regulations expressly stipulate that " private property may not be confiscated " and " pillage is formally prohibited ". But it must be emphasised that these rules have, in a sense, exceptions demanded and justified by the necessities of war. Men and horses must be fed ; men must protect themselves against the weather. If there is no time for ordinary requisitions to provide food, forage, clothing and fuel, or the inhabitants of a locality have fled, so that ordinary requisitions cannot be made, a belligerent must take these articles wherever he can get them, and he is justified in so doing. Moreover, quartering of soldiers (who, together with their horses, must be well fed by the inhabitants of the houses where they are quartered) is likewise lawful, although it may be ruinous to the private individuals upon whom they are quartered. . . . '

" Spoliation of private property, then, is forbidden under two aspects ; firstly, the individual private owner of property must not be deprived of it ; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort—always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory.

" Article 43 of the Hague Regulations is as follows :

> ' The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' "

This Article permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety. However, the Article places limitations upon the activities of the occupant. This restriction is found in the clause which requires the occupant to respect, unless absolutely prevented, the laws in force in the occupied country. This provision reflects one of the basic standards of the Hague Regulations, that the personal and private rights of persons in the occupied territory shall not be interfered with except as justified by emergency conditions. The occupying power is forbidden from imposing any new concept of law upon the occupied territory unless such provision is justified by the requirements of public order and safety. An enactment by the German occupation authorities imposing Nazi racial theories cannot be justified by the necessities of public order and safety.

" In Case Number 3, (1) Tribunal III, citing as authority the Preamble to the Hague Convention and Articles 23 (h), 43, and 46 of the Hague Regulations, stated :

> ' The extension to and application in these territories of the discriminatory law against Poles and Jews was in furtherance of the avowed purpose of racial persecution and extermination. In the passing and enforcement of that law the occupying power in our opinion violated the provisions of the Hague Convention.'

" When discriminatory laws are passed which affect the property rights of private individuals, subsequent transactions based on those laws and involving such property will in themselves constitute violations of Article 46 of the Hague Regulations.

" Beyond the strictly circumscribed exceptions, the invader must not utilise the economy of the invaded territory for his own needs within the territory occupied. We quote from Garner's *International Law and The World War*, Volume 2, pp. 124–6, as follows :

> ' Article 52 of the Hague Convention respecting the laws and customs of war expressly forbids requisitions in kind except " for the needs of the army of occupation ".
>
> ' It was clearly not the intention of the conference to authorise the taking away by a military occupant of livestock for the maintenance of

(1) *The Justice Trial*, see Vol. VI of these Reports, pp. 1–110.

his own industries at home or for the support of the civil population of his country. By no process of reasoning can requisitions for such purposes be construed to be for the "needs of the army of occupation." . . .

'A similar charge against the Germans was that of committing spoliations upon Belgian manufacturing industries by dismantling factories and workshops and carrying away their machinery and tools to Germany. . . .

'The Belgian Government addressed a protest to the governments of neutral countries against these acts as being contrary to Article 53 of the Hague Convention respecting the laws and customs of war, which, although it allows, subject to restoration and indemnity for its use, the seizure of war material belonging to private persons, does not authorise the seizure and exportation by the occupying belligerent of machinery and implements used in the industrial arts. The industrial establishments of Northern France were similarly despoiled of their machinery much of it being systematically destroyed.

'What was said above in regard to the illegality of the requisition of live stock and its transportation to Germany for the benefit of German industry and for the support of the civil population at home must be said of the seizure and transportation for similar purposes of the machinery and equipment of Belgian and French factories and other manufacturing establishments. The materials thus taken were not for the needs of the army of occupation, and the carrying of them away was nothing more than pillage and spoliation under the disguise of requisitions.'

"In a footnote on page 126 of the same volume, we find the following pertinent comment:

'The authorities are all in agreement that the right of requisition as recognised by the Hague Convention is understood to embrace only such territory occupied and does not include the spoliation of the country and the transportation to the occupant's own country of raw materials and machinery for use in his home industries. . . . The Germans contended that the spoliation of Belgian and French industrial establishments and the transportation of their machinery to Germany was a lawful act of war under 23 (g) of the Hague Convention which allows a military occupant to appropriate enemy private property whenever it is "imperatively demanded by the necessities of war". In consequence of the Anglo-French blockade which threatened the very existence of Germany it was a military necessity that she should draw in part on the supply of raw materials and machinery available in occupied territory. But it is quite clear from the language and context of Art. 23 (g) as well as the discussions on it in the Conference, that it was never intended to authorise a military occupant to despoil on an extensive scale the industrial establishments of occupied territory or to transfer their machinery to his own country for use in his home industries. What was intended merely was to authorise the seizure or destruction of private property only in exceptional cases when it was an imperative necessity for the conduct of military operations in the territory under occupation. This view is further strengthened by

Art. 46 which requires belligerents to respect enemy private property and which forbids confiscation, and by Art. 47 which prohibits pillage.'

" Another erroneous contention put forward by the Defence is that the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory, so long as no definite transfer of title was accomplished. The Hague Regulations are very clear on this point. Article 46 stipulates that ' private property . . . must be respected.' However, if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogative as owner, it cannot be said that his property ' is respected ' under Article 46 as it must be.

" The general rule contained in Article 46 is further developed in Articles 52 and 53. Article 52 speaks of the ' requisitions in kind and services ' which may be demanded from municipalities or inhabitants,(1) and it provides that such requisitions and services ' shall not be demanded except for the needs of the Army of Occupation.' As all authorities are agreed, the requisitions and services which are here contemplated and which alone are permissible, must refer to the needs of the Army of Occupation. It has never been contended that the Krupp firm belonged to the Army of Occupation. For this reason alone, the ' requisitions in kind ' by or on behalf of the Krupp firm were illegal. All authorities are again in agreement that the requisitions in kind and services referred to in Article 52, concern such matters as billets for the occupying troops and the occupation authorities, garages for their vehicles, stables for their horses, urgently needed equipment and supplies for the proper functioning of the occupation authorities, food for the Army of Occupation, and the like.

" The situation which Article 52 has in mind is clearly described by the second paragraph of Article 52 :

' Such requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.'

" The concept relied upon by the defendants—namely : that an aggressor may first overrun enemy territory, and then afterwards industrial firms from within the aggressor's country may swoop over the occupied territory and utilise property there—is utterly alien to the laws and customs of warfare as laid down in the Hague Regulations, and is clearly declared illegal by them because the Hague Regulations repeatedly and unequivocally point out that requisitions may be made only for the needs of, and on the authority of, the Army of Occupation.

" There is one important exception, contained in Article 53 (2) :

' All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, and must be restored and compensation fixed when peace is made.'

(1) Elsewhere the Tribunal observed that :

" Article 52 of the Hague Regulations protect ' Municipalities ' of belligerently occupied territories as much as ' inhabitants '. In addition, Article 56 of the Hague Regulations reiterates : ' The property of Municipalities . . . should be treated as private property . . .'."

"The offence of spoliation is committed even if no definite alleged transfer of title was accomplished. The reason why the Hague Regulations do not permit the exploitation of economic assets (except to the limited extent outlined) for the war effort of the occupant, are clear and compelling. If an economic asset which, under the rules of warfare, is not subject to requisition, is nevertheless exploited during the period of hostilities for the benefit of the enemy, the very things result which the law wants to prevent, namely,

(*a*) the owners and the economy as a whole as well as the population are deprived of the respective assets ;

(*b*) the war effort of the enemy is unfairly and illegally strengthened ;

(*c*) the products derived from the spoliation of the respective asset are being used, directly or indirectly, to inflict losses and damages to the peoples and property of the remaining (non-occupied) territory of the respective belligerent, or to the peoples and property of its allies.

"The defendants cannot as a legal proposition successfully contend that, since the acts of spoliation of which they are charged were authorised and actively supported by certain German governmental and military agencies or persons, they escape liability for such acts. It is a general principle of criminal law that encouragement and support received from other wrongdoers is not excusable. It is still necessary to stress this point as it is essential to point out that acts forbidden by the laws and customs of warfare cannot become permissible through the use of complicated legal constructions. The defendants are charged with plunder on a large scale. Many of the acts of plunder were committed in a most manifest and direct way, namely, through physical removal of machines and materials. Other acts were committed through changes of corporate property, contractual transfer of property rights, and the like. It is the results that count, and though the results in the latter case were achieved through 'contracts' imposed upon others, the illegal results, namely, the deprivation of property, was achieved just as though materials had been physically removed and shipped to Germany."

(iii) *The Plea of National Emergency*

The Judgment continued :

"Finally, the Defence has argued that the acts complained of were justified by the great emergency in which the German War Economy found itself. With reference to this argument it must be said at the outset that a defendant has, of course, the right to avail himself of contradictory defence arguments. This Tribunal has the duty carefully to consider all of them ; but the Tribunal cannot help observing that the Defence, by putting forth such contradictory arguments, weakens its entire argument. The 'emergency argument' implies clearly the admission that, in and of themselves, the acts of spoliation charged to the defendants were *illegal*, and were only made legal by the 'emergency.' This argument is bound to weaken the other argument of the Defence, according to which the acts charged to them were legal, anyway.

"However, quite apart from this consideration, the contention that the rules and customs of warfare can be violated if either party is hard pressed

in any way must be rejected on other grounds. War is by definition a risky and hazardous business. That is one of the reasons that the outcome of a war, once started, is unforeseeable and that, therefore, war is a basically-unrational means of "settling" conflicts—why right-thinking people all over the world repudiate and abhor aggressive war. It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."

(iv) *The Tribunal's Application of these Rules to the facts of the Case : Findings on Count II*

In the following paragraphs the Tribunal is seen to have made specific application, to certain of the facts of the case, of the rules elaborated above :

" We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by the Krupp firm (1) constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected : that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected : that the Krupp firm, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plant and in leasing the Paris property : (2) and that there was no justification for such action, either in the interest of public order and safety or the needs of the army of occupation. . . .

" From a careful study of the credible evidence we conclude there was no justification under the Hague Regulations for the seizure of the Elmag property and the removal of the machinery to Germany.(3) This confiscation was based on the assumption of the incorporation of Alsace into the Reich and that property in Alsace owned by Frenchmen living outside of Alsace could be treated in such a manner as to totally disregard the obligations owned by a belligerent occupant. This attempted incorporation of Alsace into the German Reich was a nullity under international law and consequently this interference with the rights of private property was a violation of Article 46 of the Hague Regulations." (4)

Of the taking of machines from the Als-Thom Factory,(5) the Tribunal also ruled : " We conclude from the credible evidence that the removal and

(1) See pp. 85–7.
(2) See pp. 86–7.
(3) See pp. 87–8.
(4) Regarding the status of Alsace during the German occupation, see a similar opinion reported in Vol. III, p. 45.
(5) See pp. 88–9.

detention of these machines was a clear violation of Article 46 of the Hague Regulations."

Again, the Tribunal decided that: "We conclude that it has been clearly established by credible evidence that from 1942 onwards illegal acts of spoliation and plunder were committed by, and in behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly between about September, 1944, and the spring of 1945, certain industries of the Netherlands were exploited and plundered for the German war effort, 'in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy. . . .' "(1)

After ruling that "with respect to the acquisition of the Berndorfer plant in Austria by the Krupp firm we are of the opinion that we do not have jurisdiction to which conclusion Judge Wilkins dissents," (2) the Tribunal set out its findings on Count II as follows:

"Upon the facts hereinabove found we conclude beyond a reasonable doubt that the defendants Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt are guilty on Count II of the Indictment. . . .

"The nature and extent of their participation was not the same in all cases, and therefore these differences will be taken into consideration in the imposition of the sentences (3) Karl Pfirsch, Heinrich Korschan, Max Ihn and Friedrich von Buelow we deem insufficient to support the charge of spoliation against them as set forth in Count II, and we, therefore, acquit Karl Pfirsch, Heinrich Korschan, Max Ihn and Friedrich von Buelow of Count II of the Indictment.

"The defendants Werner Lehmann and Hans Kupke were not charged with this offence."

(v) *The law governing the Employment of Prisoners of War and the Illegal Use of French Prisoners of War*

Turning its attention to Count III of the Indictment,(4) the Tribunal summarised certain provisions of the Hague and Geneva Conventions governing the employment of prisoners of war:

"Under the Hague Regulations of Land Warfare, the employment of prisoners of war must be 'according to their rank and aptitude'. (Article 6, para. 1). 'Their tasks shall not be excessive and shall have no connection with the operations of war.' (Article 6, para. 2).

"Article 29 of the Geneva Convention, provides 'no prisoner of war may be employed at labours for which he is physically unfit.' Article 30 stipulates that 'the length of the day's work of prisoners of war, including therein the trip and returning, shall not be excessive and must not, in any case, exceed that allowed for civil workers in the region employed at the same work. Every prisoner shall be allowed a rest of twenty-four hours of every week, preferably on Sunday'. Article 31, paragraph 1, provides that 'labour furnished for prisoners of war shall have no direct relation with war operations. It is especially prohibited to use prisoners for manu-

(1) See pp. 90–2.
(2) See pp. 152–3.
(3) It is assumed that the words "The evidence relating to" are to be understood at this point.
(4) See pp. 4–5.

facturing and transporting arms or munitions of any kind or for transporting material intended for combat units'. By Article 32, it is forbidden to use prisoners of war at unhealthy or dangerous work. And the same article also provides that any aggravation of the conditions of labour by discipline measures is forbidden."

In the Tribunal's opinion, "practically every one of the foregoing provisions was violated in the Krupp enterprises".

Before leaving the legal aspects of the employment of prisoners of war, the Tribunal announced the following conclusion regarding a Defence claim concerning the position of French prisoners of war used in the German Armament industry:

"By way of justifying the use of French prisoners of war in armament industry it is claimed that this was authorised by an agreement with the Vichy Government made through the Ambassador to Berlin. As to this, it first may be said that there was no credible evidence of any such agreement. No written treaty or agreement was produced. The most any witness said was he understood there had been such agreement with Laval, communicated to competent Reich authorities by the Vichy Ambassador. If so, there is no trustworthy evidence that any of these defendants acted upon the strength of it or even personally knew of it.

"Moreover, if there was any such agreement it was void under the law of nations. There was no treaty of peace between Germany and France but only an armistice, the validity of which for present purposes only may be assumed. It did not put an end to the way between those two countries but was only intended to suspend hostilities between them. This was not fully accomplished. In France's oversea possessions and on allied soil, French armed forces fighting under the command of Free French authorities waged war against Germany. In occupied France more and more Frenchmen actively resisted the invader and the overwhelming majority of the population was in full sympathy with Germany's opponent. Under such circumstances we have no hesitancy in reaching the conclusion that if Laval or the Vichy Ambassador to Berlin made any agreement such as that claimed with respect to the use of French prisoners of war in German armament production, it was manifestly *contra bonus mores* and hence void.

"In view of this conclusion it is unnecessary to decide in this case whether the Vichy Government was legally established according to the requirements of the French constitution." (1)

(vi) *The Law governing the Deportation and Employment of Foreign Civilian Workers and Concentration Camp Inmates*

The Tribunal turned next to the legal aspect of the deportation and employment of civilians from occupied territories and concentration camp prisoners:

(1) These words should be compared with those of the Judgment in the *Milch Trial* on a similar plea. See Vol. VII of these Reports, pp. 38, 46 and 56–7. The Tribunal in the *High Command Trial* (Von Leeb and others) said of the plea: "Certainly a conquering power cannot set up and dominate a puppet government which barters away the rights of prisoners of war while the nationals of that country under substantial patriotic leadership are still in the field."

" It is contended that the forcible deportation of civilians from occupied territory was perfectly lawful. The argument made in this connection by the ostensible leader of Defence counsel needs an answer, if for no reason other than to indicate the nature of the principal defences upon this phase of the case.

" The substance of the argument is as follows : There exists in the Hague Rules of Land Warfare no provision explicitly prohibiting the use of manpower from occupied territories for the purpose of war economy. Article 48 is certainly not conclusive . . . Reference to international common law is not more conclusive. For the only case in modern history, the conscription of Belgian labour during the first world war, has remained as completely open question as regards its admissibility under international law.

" It is therefore insisted that the Prosecution's position with respect to wholesale deportation on a compulsory basis of members of a civilian population of occupied territories ' is based on a fundamental misconception of the first rule of war, viz., that measures necessary for achieving the purpose of war are permissible unless they are expressly prohibited, and that methods required for achieving the purpose of war are determined by the development of war into total war, especially in the field of economic warfare '.

" In principle this is the same argument made in connection with the asserted proposition that the concept of total war operated to abrogate the Hague Rules of Land Warfare. But the reference to the deportation of Belgian labour to Germany during the first world war requires an additional answer, if for no other reason than to keep the record straight. That crime on the part of imperial Germany caused world-wide indignation.(1)

" The deportations began after the German Supreme Command had issued its notorious order of 3rd October, 1916, ' concerning restrictions of public relief '. Shortly prior thereto the Reich Chancellery had declared in an expert opinion that ' under the law of nations, the intended deportation (Auschiebung) of idle (arbeitsscheue) Belgians to Germany for compulsory labour can be justified if (*a*) idle (arbeitsscheue) persons become a charge of public relief ; (*b*) work cannot be found in Belgium ; (*c*) forced labour is not carried on in connection with operations of war. . . . Hence, their employment in the actual production of munitions should be avoided '. (2)

" The obvious subterfuge lies in the fact that the measure was ostensibly directed against vagrants to combat unemployment in Belgium as an economic measure. But no one was deceived by this pretence and it was soon abandoned in a manner which indicated an awareness of the illegality of the procedure.

" The protests were so widespread and vigorous that the Kaiser was forced to retreat. These protests were based upon whether the general principles of international law and humanity or specifically upon the Hague Regulations. For instance, the United States Department of State protested ' against this action which is in contravention of all precedent and of those humane principles of international practice which have long been accepted

"(1) Oppenheim, Lauterpacht, *International Law*, 5th Edition London, 1935, p. 353."
"(2) *American Journal of International Law*, Vol. 40, April, 1946, p. 309."

and followed by civilised nations in their treatment of noncombatants in conquered territory.' (1)

" The protest of the Netherlands Government pointed out the incompatibility of the deportations with the precise stipulations of Article 52 of the Hague Regulations. It was pointed out by Professor James W. Garner, scholar and author of high repute, that if ' a belligerent were allowed to deport civilians from occupied territory in order to force them to work in his war industries and thereby to free his own workers for military service, this would make illusory the prohibition to compel enemy citizens to participate in operations of war against their own country. " The measure must be pronounced as an act of tyranny, contrary to all notions of humanity, and one entirely without precedent in the history of civilized warfare." ' (2)

" Negotiations through diplomatic and church channels to repatriate the deportees and stop the practice were partially successful. From February, 1917, Belgians were no longer deported from the Belgian ' Government General ' and the Kaiser promised that by 1st June, 1917, deportees who would not volunteer to remain in Germany would be repatriated.

" Nevertheless, long after the end of the first world war, the unsuccessful effort of the Kaiser's Government was to an extent upheld in Germany. A parliamentary commission created by the German Constituent Assembly to investigate charges made against that nation of having violated international law during the war by a majority report submitted 2nd July, 1926, stating that the deportations had been in conformity with the law of nations, and, more particularly, with the Hague Regulations. The report proceeded upon the theory that ' workers in question did not find sufficient opportunity to work in Belgium and that the measure was indispensable for re-establishing or maintaining order and public life in the occupied territory'. (3) The Belgian Minister of Foreign Affairs expressed the sentiment of the civilised world when he declared that his country had erred in its belief ' that at least on this point, the war policy of the Kaiser's Government would no longer find defenders '. (4) And it should be noted in this connection that even a minority of the German parliamentary commission above mentioned found no justification for the practice and upon the other hand, squarely condemned it.

" It is apparent, therefore, that learned counsel's contention that ' the conscription of Belgian labour during the first world war has remained a completely open question as regards its admissibility under international law ', is based upon the fact that a majority of a committee appointed by the parliamentary body of Republican Germany found it to be in accord with the law of nations. We think it must be conceded that this is at least rather thin ground upon which to establish a negation of international customary law. However this may be, it is certain that this action by the majority of

"(1) G. H. Hackworth, *Digest of International Law*, Vol. VI, Wash., D.C., 1943, p. 399."
"(2) *American Journal of International Law*, Vol. XI, Jan., 1917, p. 106; & J. W. Garner, *International Law and the World War*, New York, 1920, Vol. II, p. 183."
"(3) *American Journal International Law*, Vol. 40, April, 1946, p. 312."
"(4) Belgian Chamber of Representatives, session July 14, 1927. Documents Legislatifs, Chambres des Representants, No. 336. Passelecq, pp. 416–433."

the committee of the German body did not operate to repeal the applicable Hague Rules of Land Warfare, particularly Article 52, which in the present case was shown beyond doubt to have been violated. Deportees were not only used in armament production in the Krupp enterprise, but in the latter years of the war the production of armament on a substantial scale reached could not have been carried on without their labour.

" This was not only a violation of the Hague Rules of Land Warfare but was directly contrary to the expert opinion of the Reich Chancellery hereinabove referred to which preceded the order of the German Supreme Command of 3rd October, 1916, for the deportation of Belgians. As above indicated, that opinion, though providing a subterfuge for the illegal conduct, did annex as one of the conditions ' that forced labour is not carried on in connection with operations of war. . . . Hence their employment in the actual production of munitions should be avoided '.

" The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the United States of America *v.* Milch, decided by Tribunal No. 11.[1] We regard Judge Phillips' statement of the applicable law as sound and accordingly adopt it. It is as follows :

> ' Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime. If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power over its citizens. Articles 43, 46, 49, 52, 55, and 56, Hague Regulations which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.
>
> (1) They must be for the needs of the army of occupation.
>
> (2) They must be in proportion to the resources of the country.
>
> (3) They must be of such a nature as not to involve the inhabitants in the obligation to take part in military operations against their own country.
>
> ' Insofar as this section limits the conscription of labour to that required for the needs of the army of occupation, it is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulations.
>
> ' The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture

(1) See Volume VII of these Reports, pp. 27–66, especially pp. 45–7.

weapons for use against their homeland or to be assimilated in the working economy of the occupying country.

. . . . . .

'The third and final condition under which deportation becomes illegal occurs whenever generally recognised standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterised by inhumane or illegal methods.

. . . . . .

'Article II (1) (c) of Control Council Law No. 10 specifies certain crimes against humanity. Among these is listed the deportation of any civilian population. The general language of this sub-section as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (b) names deportation to slave labour as a war crime. Article II (1) (c) states that the enslavement of any civilian population is a crime against humanity. This Law No. 10 treats as separate crimes and different types of crime "deportation to slave labour" and "enslavement". The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying power are crimes against humanity.'

"In connection with the subject of deportation of civilians from occupied territory, it is interesting to note that as shown by a document introduced by the Defence, General Thoenissen was dismissed from the service by the High Command during World War II because of his 'refusal to violate' the laws of war and to deport French workers to Germany.

"The deportation of Belgians to Germany also was over the vigorous protests of the military commander in Belgium, General von Falkenhausen. With reference to Sauckel's order introducing a compulsory labour service for the Belgians, he deposed that 'this was done against my explicit and constant protest for I had various objections against a compulsory labour allocation and considered it more important to keep the indigenous economy in motion'.

"That the employment of concentration camp inmates under the circumstances disclosed by the record was a crime there can be no doubt. The conclusion is inescapable that they were mostly Jews uprooted from their homes in occupied territories and no less deportees than many of the other foreign workers who were forcibly brought to Germany. The only difference was that they had to go through all of the horrors of a concentration camp under the supervision of the S.S. before they finally landed at the firm of Krupp. That these persecutees had been arrested and confined without trial for no reason other than that they were Jews is common knowledge and in fact not controverted. The subject is dealt with exhaustively by the

judgment of the I.M.T. and there is no need to add anything to what is there said to show the unspeakable horrors to which these unfortunate people were subjected. However, in the present connection, one or two excerpts from the judgment are pertinent. It is there recited that ' the Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories '.

'After referring to the fact that in the summer of 1941, however, plans were made for the ' final solution ' of the Jewish question in all Europe, the judgment continues : ' Part of the " final solution " was the gathering of Jews from all German-occupied Europe in concentration camps. Their physical condition was the test of life and death. All who were fit to work were used as slave labourers in the concentration camps.' The ' final solution ' meant extermination.

" Under the facts of this case it is obvious from what has been said as to the law that the employment of these concentration camp inmates was also a violation of international law in several different particulars."

(vii) *The Plea of Superior Orders or Necessity*

After dealing with the law and evidence regarding the employment of civilians, the Tribunal turned its attention next to a plea put forward by the Defence :

" The real defence in this case, particularly as to Count III, is that known as necessity. It is contended that this arose primarily from the fact that production quotas were fixed by the Speer Ministry ; that it was obligatory to meet the quotas and that in order to do so it was necessary to employ prisoners of war, forced labour and concentration camp inmates made available by government agencies because no other labour was available in sufficient quantities and, that had the defendants refused to do so, they would have suffered dire consequences at the hands of the government authorities who exercised rigid supervision over their activities in every respect.

" The defence of necessity was held partially available to the defendants in the case of the United States of America *v.* Flick, *et al.*, decided by Tribunal IV.[1] There, as here, the defendants were industrialists employing prisoners of war, forced labour and concentration camp inmates in the production of armament in aid of the war effort. Flick and one of his co-defendants were nevertheless found guilty on the charge presently under consideration. This was by way of an exception to the holding that the defence of necessity was applicable. The basis of this aspect of the decision appears from the following quoted from the opinion :

> ' The active steps taken by Weiss with the knowledge and approval of Flick to procure for the Linke-Hofmann Werke increased production quota of freight cars which constitute military equipment within the contemplation of the Hague Convention, and Weiss' part in the procurement of a large number of Russian prisoners of war for work in the manufacture of such equipment deprive the defendants Flick and

[1] Reported upon in Vol. IX, pp. 1–59.

Weiss of the complete defence of necessity. In judging the conduct of Weiss in this transaction, we must, however, remember that obtaining more materials than necessary was forbidden by the authorities just as falling short in filling orders was forbidden. The war effort required all persons involved to use all facilities to bring the war production to its fullest capacity. The steps taken in this instance, however, were initiated not in governmental circles but in the plant management. They were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible.'

"The defence of necessity in municipal law is variously termed as 'necessity', 'compulsion', 'force and compulsion', and 'coercion and compulsory duress'. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

"The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows:

'A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life and limb of the defendant or his relatives, which danger could not be otherwise eliminated'.

"The Anglo-American rule as deduced from modern authorities has been stated in this manner:

'Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil. Homicide through necessity—i.e., when the life of one person can be saved only by the sacrifice of another—will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.' (1)

"As the Prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an overloaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nurnberg Trials of industrialists is novel.

"(1) *Wharton's Criminal Law*, Vol. I, Section 126, p. 177."

" The plea of necessity is one in the nature of confession and avoidance. While the burden of proof is upon the Prosecution throughout, it does not have to anticipate and negative affirmative defences. The applicable rule is that the Prosecution is compelled to establish every essential element of the crime charged beyond a reasonable doubt in the first instance. However, if the accused's defence ' is exclusively one of admission and avoidance or if he pleads some substantive or independent matter as a defence which does not constitute an element of the crime charged, the burden of proving such defence devolves upon him. As a general rule, in matters of defence mitigations, excuse or justification, the accused is required to prove such circumstances by evidence sufficient to prove only a reasonable doubt of his guilt. And if the circumstances relied upon are supported by such proof as produces a reasonable doubt as to the truth of the charge against the accused when the whole evidence is considered by the jury, there must be an acquittal '.(1) The question then is whether, upon a consideration of the whole evidence, it justly can be said that there is such a doubt.

" The defence of necessity is not identical with that of self-defence. The principal distinction lies in the legal principle involved. Self-defence excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right.(2)

" In the view of German writers the law of necessity involves not the assertion of right against right, but of privilege against privilege. But from the standpoint of the present case, the rule of necessity and that of self-defence has, among others, one characteristic in common which is of determinative significance. This is that the question is to be determined from the standpoint of the honest belief of the particular accused in question. Thus, with respect to the law of self-defence, Mr. Wharton quotes Berner, an authoritative German jurist :

> ' Whether the defendant actually transcended the limits of self-defence can never be determined without reference to his individual character. An abstract and universal standard is here impracticable. The defendant should be held guiltless (of malicious homicide) if he only defended himself to the extent to which, according to his honest convictions as affected by his particular individuality, defence under the circumstances appeared to be necessary.' (3)

" Wharton himself says ' that the danger of the attack is to be tested from the standpoint of the party attacked, not from that of the jury or the ideal person '. (4)

" We have no doubt that the same thing is true of the law of necessity. The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defence, the mere fact that such danger was present is not sufficient. There must be an actual *bona fide* belief in danger by the particular individual.

"(1) *Wharton's Criminal Evidence*, Vol. I, Section 211."
"(2) *Wharton's Criminal Law*, Vol. I, Section 128."
"(3) *Wharton's Criminal Law*, Vol. I, Section 623, p. 850."
"(4) *Wharton's Criminal Law*, Vol. I, Section 135, p. 185."

" The evidence of the Prosecution with respect to particular defendants was sufficient to discharge the burden resting upon it in the first instance. Thereupon the burden shifted to the defendants of going forward with the evidence to show all of the essential elements of the defence of necessity to an extent sufficient to raise a reasonable doubt in the minds of the Tribunal upon a consideration of the whole of the evidence. In this respect the evidence falls short in a vital particular.

" Assuming for present purposes the existence of the tyrannical and oppressive régime of the Third Reich which, is relied upon as a basis for the application of the rule of necessity, the competent and credible evidence leaves no doubt that in committing the acts here charged as crimes, the guilty individuals were not acting under compulsion or coercion exerted by the Reich authorities within the meaning of the law of necessity.

" Under the rule of necessity, the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done. Thus, as Lord Mansfield said in the case cited in the Flick opinion as giving the underlying principle of the rule invoked :

> ' Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act.' (1)

" Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. Upon the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct. That is this case.

" Hence the Flick case is distinguishable upon the facts. For instance, a determinative factor in that case is indicated by the following from the opinion : ' With the specific exception above alluded to and as hereinafter discussed, it appears that the defendants here involved were not desirous of employing foreign labour or prisoners of war.' "

" In the present case," said the Tribunal, " the evidence leaves no doubt that just the contrary was true." The judgment then proceeded to survey the evidence on this point, which, in the opinion of the judges, showed the Krupp firm's " ardent desire to employ forced labour ".

The Tribunal dealt with another aspect of the plea of necessity as follows : " It will be observed that it is essential that the 'act charged was done to avoid an evil both serious and irreparable,' and ' that the remedy was not disproportioned to the evil '. What was the evil which confronted the defendants and what was the remedy that they adopted to avoid it ? The evidence leaves no doubt on either score." In the opinion of the Tribunal, in all likelihood the worst fate which would have followed a disobedience

"(1) Stratton's Case, 21 How. St. Tr. (Eng.) 1046–1223."

of orders to use slave labour would have been, for Krupp, the loss of his plant, and for the other accused the loss of their posts.

(viii) *The Individual Responsibility of the Accused*

When dealing with the law protecting prisoners of war, the Tribunal interjected the following remark: "The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt."

After its treatment of the plea of necessity and before delivery of its findings, on Count III, however, the Tribunal emphasised that guilt must be personal. It continued: "The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:

> 'Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers of agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offence or that they be done by his direction or permission. He is liable where his scienter or authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.' *Corpus Juris Secondum*, Vol. 19, pp. 363, American Law Book Co. (1940), Brooklyn, N.Y.

"Under the circumstances as to the set up of the Krupp enterprise after it became a private firm in December, 1943, the same principles apply. Moreover, the essential facts may be shown by circumstantial as well as direct evidence, if sufficiently strong in probative value to convince the Tribunal beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis."

(ix) *The Findings on Count III*

The findings of the Tribunal on Count III were as follows:

"Upon the facts hereinabove found we conclude beyond a reasonable doubt that the defendants Krupp, Loeser, Houdremont, Mueller, Janssen, Ihn, Eberhardt, Korschan, von Buelow, Lehmann and Kupke are guilty on Count III of the Indictment. The reasons upon which these findings of guilt are based have been set forth heretofore in the discussion of the facts under Count III.

"The nature and extent of their participation was not the same in all cases and therefore these differences will be taken into consideration in the imposition of the sentences upon them. The evidence presented against the defendant Karl Pfirsch we deem insufficient to support the charges against him set out in Count III of the Indictment. The defendant Karl Pfirsch, having been acquitted upon all counts upon which he was charged,

shall be discharged by the Marshal when the Tribunal presently adjourns."

5. THE RESERVATIONS OF THE PRESIDING JUDGE

The judgment was signed by the Honourable H. C. Anderson, Presiding Judge, subject to certain reservations ; by Judge William J. Wilkins, who concurred except insofar as appeared in a dissenting judgment by him ; and by Judge Edward J. Daly.

The President's reservations were as follows :

" Upon the question of the guilt or innocence of the defendants under Counts II and III of the Indictment, I concur in the result reached by the Tribunal. As to the punishment,(1) I concur in that fixed for the defendant Kupke. As to the defendant Alfried Krupp, I concur in the length of the prison sentence, but dissent from the order confiscating his property.

" As to all other defendants, I feel bound to disagree with respect to the length of the respective sentences imposed. In general, the basis of my disagreements is this. Having in mind that the defendants were heretofore acquitted of crimes against the peace, I think there are many circumstances in mitigation not mentioned in the judgment which should be given more weight.

" In my view the evidence as to the defendant Loeser presents a special case. Apart from the fact that during the war he resigned his position with the Krupp firm due to a disagreement with respect to certain policies and apart from other circumstances which seem to me proper to be considered in mitigation, I am convinced that before he joined the Krupp firm in 1937, and continuously thereafter, Dr. Loeser was identified with the underground to overthrow Hitler and the Nazi régime ; and that having been arrested by the Gestapo in connection with the plot of 30th July, 1944, he escaped the death penalty meted out to other similarly involved only through a delay in his trial as a result of which he was liberated by the Allied troops.

" Were I not convinced as a matter of principle that a finding of guilt or innocence by a court or tribunal enforcing criminal laws is not a discretionary matter, I would vote to acquit Dr. Loeser. But even though I feel obliged, as a matter of principle, to concur in the conclusion as to the fact of his guilt, I think, when all circumstances which, from my viewpoint, should be considered in mitigation are weighed, the period for which he has already been confined in prison is ample punishment."

6. JUDGE WILKINS' DISSENTING JUDGMENT

Judge Wilkins stated the subject-matter of his dissent in these words :

" The majority of the Tribunal are of the opinion that the Tribunal has no jurisdiction over the acquisition in 1938 of the Berndorfer plant in Austria.

" With due deference to my colleagues, I feel compelled to dissent from this finding and to the failure of the Tribunal to find that acts of spoliation were committed by these six defendants in three other instances,(2) namely,

(1) Compare p. 158.
(2) These instances were not mentioned specifically in the Tribunal's majority Judgment (see pp. 139–40).

(1) the confiscation of the Montbelleux mining property in France, (2) the illegal acquisition of the Chromasseo mining properties in Yugoslavia, and (3) the participation by the Krupp firm in the spoliation of the occupied Soviet territories.

" May I just interpolate by saying that the six defendants referred to, of course, were the six who were found guilty of the crime of spoliation under Count II."

After summarising the evidence regarding the acquisition of the Berndorfer plant (1) Judge Wilkins expressed the following views :

" A highway robber enters a bank and at the point of a pistol forces officials of the bank to part unwillingly with the assets of the bank. Here the means of coercion was not one pistol but the entire armed and police might that had invaded Austria. That the facts, as proved, constitute extortion there can be no doubt. The question to be determined is whether they constitute a war crime under Article IIb of Control Council Law No. 10 and under the General Laws and Customs of War. To answer this question, reference must be made to the finding of the I.M.T. :

> ' The invasion of Austria was a premeditated aggressive step . . . the facts plainly prove that the methods employed . . . were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered. . . . '

" Concerning Czechoslovakia, the I.M.T. found that Bohemia and Moravia were also seized by Germany, under the threat ' That German troops had already received orders to march and that any resistance would be broken with physical force. . . . '

" The I.M.T. also found that, concerning Bohemia and Moravia, the laws and customs of war applied. Said the I.M.T. :

> ' The occupation of Bohemia and Moravia must . . . be considered a military occupation covered by the rules of warfare.'

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(1) Judge Wilkins here related that the Berndorfer Metallwarenfabrik, Arthur Krupp A. G., a very important factory located near Vienna, had been established in 1843 by a Viennese industrialist named von Schoeller. In a history of " Alfried Krupp and His Family " published in 1943 and produced in evidence by the Prosecution, it was stated:

> " The Anschluss of the Ostmark to the German Reich in March 1938 had the gratifying result as far as the Krupp firm was concerned that an old plant established in 1843 by the Krupp Brothers and the house of Schoeller, the Berndorfer Metallwarenfabrik, could be incorporated in the parent Krupp firm in Essen."

As a result of the economic crisis in 1931–1932 the Creditanstalt Bank of Austria finally became the owner of a majority of the Berndorfer stock. The evidence showed that from the time of the re-financing of the company and until the invasion of Austria in March 1938 the Krupp firm at Essen had tried continuously to obtain ownership of the Berndorfer Plant, but their offers had always been turned down by the Creditanstalt Bank.

As early as February 1937, Gustav Krupp's brother-in-law, Wilmowsky, wrote a letter to Gustav Krupp stating that Lammers, State Secretary in Hitler's Reich Chancellery, had been advised of Gustav's desire for an interview with Hitler about the possibility of acquiring Austrian shares. Pursuant to this and after the German invasion in March, 1938, Goering had promised Gustav Krupp that the Krupp Concern should have the exclusive right to purchase the Bank's controlling interest in the Berndorfer plant.

Shortly after the Anschluss, continued Judge Wilkins, the Creditanstalt Bank received directions from the German authorities that only a sale to the Krupp firm of the Berndorf stock was to be considered. Through coercion and Nazi political pressure by Goering, Keppler, Hitler's personal economic adviser, and other top ranking Nazi officials the Creditanstalt Bank was finally forced to sell the Berndorfer works to Krupp-Essen, contrary to its own desires and in spite of protests, at a price less than one-third of the value as assessed by the Krupp firm itself.

" Such ruling was not made by the I.M.T. concerning Austria because there was no reason to make such a ruling : war crimes concerning Austria were not charged in the case before it. It is difficult to conceive of any real difference between the seizure of Austria and the seizure of Bohemia and Moravia. If anything, the seizure of Austria was a more flagrant act of military aggression because in the case of Bohemia and Moravia, the Czechoslovakian President and Foreign Minister had—although under pressure—consented to the German step. No actual hostilities evolved in either case ; but it would be illogical to construe that the rules and customs of war should apply to the case of Bohemia and Moravia and not to the case of Austria. The rightful Austrian Government which emerged after the Germans left Austria, in fact, considered those who collaborated with the invaders as traitors, i.e., as persons acting for the benefit of the enemy.

" In the case of both Austria and Czechoslovakia, war was used, in the words of the Kellogg Pact, as ' an instrument of policy ' and it was used so successfully, owing to the overwhelming war strength of Germany, that no resistance was encountered. It was, so to speak, in either case a unilateral war. It would be paradoxical, indeed, to claim that a lawful belligerent who had to spend blood and treasure in order to occupy a territory belligerently, is bound by the restrictions of the Hague Convention whereas an aggressor who invades a weak neighbour by a mere threat of war is not even bound by the Hague Regulations. The proven facts show conclusively that spoliation was performed, due to the physical supremacy enjoyed by the invader.

" Professor Quincy Wright wrote in the *American Journal of International Law*, January, 1947, Vol. 41, page 61 :

> ' . . . The law of war has been held to apply to interventions, invasions, aggressions and other uses of armed force in foreign territories even when there is no state of war. . . . '

" To supplement his view, he referred to Professor Wilson's treatise on *International Law*, 3rd Edition, and to the illustrations given by the group of experts on International Law, known as *The Harvard Research on International Law*, Article 14 of ' Resolutions on " Aggression ",' published in the *American Journal of International Law*, Volume 33 (1939), supplement page 905.

" Professor Wright expressed the same view in 1926 (*American Journal of International Law*) Volume 20 (1926), page 270 : quoting various authorities and many precedents he stated :

> ' . . . Publicists generally agree that insurgents are entitled to the privileges of the laws of war in their relations with the armed forces of the *de jure* government. . . .'

" I am of the opinion that the Berndorfer plant was acquired by coercion on the part of Krupp and with the active assistance of the German Reich, and that this acquisition was an act of spoliation within the purview of the Hague Regulations and authorities above cited.

" The defendants Krupp and Loeser took active and leading parts in the acquisition of this plant, and, in my opinion, are guilty of spoliation with respect thereto."

Judge Wilkins next summarised the evidence relating to the Montbelleux mining property in France, the Chromasseo mines in Yugoslavia and the alleged participation of the Krupp firm in the spoliation of Soviet territories.

The tungsten ore mine located at Montbelleux, said Judge Wilkins, had been out of action ever since the first world war due to the fact that the ore was of a rather low grade and could not be mined economically except when prices were inflated. At the time of the German occupation of France this mine was on lease to one Edgar Brandt, who in view of the increased German demands investigated the possibilities of renewed exploitations of the mine. In the beginning of 1942 conferences took place between the German authorities and Brandt representatives. Engineers from the Krupp firm and the Todt Organisation were present at these conferences. The German authorities offered to requisition materials and equipment necessary to re-open the mine provided that a certain percentage of the production would be sent to Germany. The representatives of Brandt, however, stated that they were unable to accept the German conditions.

In August, 1942, the property was seized without notice to the owner and without the issuance of a requisition. A plan was put into operation by the Todt Organisation under the technical direction of the Krupp firm whereby the mine would be producing within a year.

Attempts by Brandt and the French Government on his behalf for a recognition of his interest, were of no avail and no payments were ever received by Brandt for ores extracted from his concession.

According to a contract which was executed by Krupp and the Todt Organisation, the Krupp firm assumed all responsibility for the underground workings, the obligation to provide the bulk of the machinery, workmen, management personnel as well as technical supervision.

The mine was operated until June, 1944, when the Germans were forced to evacuate due to the advance of the Allied forces. During this period at least 50–60 tons of valuable and very scarce metal was shipped to Germany. Before departing however, the equipment was thoroughly and systematically destroyed and surface buildings set on fire. Dynamite was used to destroy much of the surface machinery.

The evidence showed that the Krupp firm participated in the confiscation of the mine, the removal of the ore and the final destruction of the installations and machinery.

The Chromasseo Chromium Ore Mining Company, Judge Wilkins went on, a Yugoslav corporation with a total of 8,000 shares of capital stock of a par value of 1,000 dinars each, owned a number of Yugoslav mining properties. The major ore reserves were in the vicinity of Jeserina, a section of Yugoslavia allocated to Bulgaria by Hitler-Germany under the illegal partition of Yugoslavia. The other properties were located in sections awarded to Albania which were under Italian occupation. The Krupp firm purchased 2,007 shares of Chromasseo stock from one Rudolph Voegeli, a Swiss residing in Yugoslavia. An additional 1,000 shares which were owned by the Asseo family, but which were in Voegeli's possession as a security for a debt of the deceased owner Moses Asseo, were confiscated by the German Delegate General for Economy for Serbia and sold to the

Krupp firm. An employee of the Krupp firm, Georg Ufer, who served both the Reich Government and the Krupp firm during the occupation of Yugoslavia stated in connection with this transaction :

> " These 1,000 shares, as I knew, had been confiscated by the Delegate General for Economy in Serbia, as being Jewish property, and the firm of Krupp A. G. now acquired through me the confiscated property of the Yugoslavian Jew Moses Asseo. The firm of Krupp as well as I were aware of the fact that confiscated property of the Jew Moses Asseo was involved. At no time, however, did I receive instructions of any kind from the firm of Krupp not to acquire the confiscated Jewish property."

The evidence showed that the Krupp firm made strenuous efforts to obtain the remaining 4,933 shares of the Chromasseo Mines stock which in some way did later show up in Italian hands. This controversy became the subject of official negotiations on a high level between the German and Italian Governments.

Meanwhile the Jeserina properties of the Chromasseo Mines had been leased by the Krupp firm at favourable terms from the German Military authorities who had seized all Yugoslavian mining properties immediately upon the invasion.

Under the provisions of the agreement reached at Rome, the interest of the Italian owners in the 4,993 shares and that of the Krupp firm in 3,007 was acknowledged and the Jeserina property was leased to Krupp until 30th October, 1944.

In all, up to September, 1944, the Krupp firm produced and sent to Germany 108,000 tons of Yugoslavian chrome ore.

The accused Krupp was the Vorstand member in charge of the Ore Mining Department at the time of the acquisition of these mining properties. Reports on the activities of the Krupp firm in this field were distributed to the accused Houdremont, Mueller and Janssen.

At the time of the German attack on Soviet Russia on the 22nd June, 1941, Judge Wilkins continued, the Reich Government openly proclaimed that the Hague Conventions were not applicable at all in its relations to Soviet Russia. A decree was issued according to which property already sequestered or still to be sequestered was " to be treated as the marshalled property of the Reich ".

Following the invasion of Russia, the Reich Government formed various quasi-governmental monopoly organisations in order to carry out its policy of exploitation of the Soviet Economy. One of these organisations was the ' Berg-und Huettenwerk Ost ' (B.H.O.). It was founded upon the orders of the plenipotentiary for the Four Year Plan, Goering, who also was to nominate the chairman, vice-chairman and members of the Vervaltungarat. The accused Alfried Krupp was appointed a member of the latter. A man named Paul Pleiger was appointed manager of the company.

The evidence showed that the Krupp firm was desirous of participating in the spoliation of the Eastern territories and that negotiations towards this end took place between the accused Alfried Krupp and Pleiger, BHO's

manager. A meeting was held in the accused Loeser's office in August, 1942, attended by the accused Loeser and Krupp for the purpose of discussing the problems arising in connection with the operation of factories in the Ukraine. As a result of this meeting and later negotiations the Krupp firm succeeded in acquiring the sponsorship of the following Soviet Russian factories and enterprises: the machine factory in Kramatorsk, Kramatorskaja, the steel works Assow, the steel works Iljitsch in Mariupol, the Molotow-works near Djenpropetrowsk, the agricultural machinery factory in Berdjansk, and the carrying out of the so-called Iwan project which concerned the building and operation of an ammunition plant in the Ukraine, based on the Assow works in Mariupol. The accused Krupp, Loeser, Mueller, Pfirsch and Korschan were kept informed.

When the sponsorship of these plants in Russia by the Krupp firm were approved the activities of the firm and its subsidiaries were greatly accelerated. Krupp personnel was sent to Russia to assist in the management of plants. The accused Krupp and other Krupp officials went to Russia to inspect the plants.

In its first business report the BHO stated in connection with its activities in Russia:

> "Up to 30th November, 1942, the following material from the Russian area was available for the German metal industry and the chemical industry for use in connection with the war economy:
>
> | | |
> |---|---|
> | Iron ore .. .. .. | 325,751 tons |
> | Chromium ore .. .. | 6,905 tons |
> | Manganese ore .. .. | 20,145 tons (1941) |
> | Manganese ore .. .. | 417, 886 tons (1942)" |

The change in the military situation in the fall of 1943 prevented the Krupp firm from carrying out the large programme which it had set for itself in Russia. Before and as a result of the withdrawal, huge quantities of scrap metal, machinery, equipment and other goods were shipped or evacuated to Germany by the Krupp firm in co-operation with the Wehrmacht.

After reviewing this evidence, Judge Wilkins expressed the following legal conclusions:

"I am satisfied from the credible evidence presented before us that the confiscation of this [the French] mine was a violation of Article 46 of the Hague Regulations. The removal of the ore concentrates to Germany and the systematic destruction of the machinery at the time of the evacuation were acts of spoliation in which the Krupp firm participated. . . .

"The activities of the Krupp firm in Yugoslavia which I have just reviewed clearly violated the laws and customs of war and more particularly Articles 43 and 46 of the Hague Regulations. The expropriation of mines in Yugoslavia was not supported by any concern for the needs of public order and safety or by the needs of the occupation. The Krupp firm took the initiative in seeking to participate in the exploitation of the seized property, even urging the government to expropriate properties. It leased the Jeserine mine from the government authorities with knowledge of their illegal expropriation. The seizure of the Asseo shares based upon the anti-Jewish

laws was illegal and subsequent dealings by the Krupp firm with knowledge of the illegality was likewise illegal. . . .

" From Articles 48, 49, 52, 53, 55 and 56 of the Hague Regulations, the International Military Tribunal deduced :

> ' . . . that under the rules of war, the economy of an occupied country can only be required to bear the expense of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.'

" This is sound construction, in accordance with the obvious intentions of the parties to that International Treaty. In 1899 and 1907, when the Hague Regulations were drafted, State property only embraced a comparatively small section of the wealth of the respective countries. But, the rationals of the various articles dealing with the authority of the military occupant, particularly if viewed, as they must be, in the light of the preamble of the Convention, is clearly that the treaty generally condemns the exploitation and stripping of belligerently occupied territory beyond the extent which the economy of the country can reasonably be expected to bear for the expense of the occupation.

" The basic decrees pursuant to which the Reich authorities confiscated and administered Russian industrial property called for the unrestricted exploitation of such property for German war production and without regard to the needs of the occupation or the ability of the country to bear this drain on its resources. . . . .

" It is asserted by the Defence that whatever acts were committed by the defendants in the exploitation of Russia were not illegal in view of the decision of the Tribunal in U.S. *v.* Friedrich Flick, *et al.* With this contention I cannot agree. The factual situation of the Flick case and of that before us is at great variance.

" The Flick judgment found that, as far as Flick's management of a certain French plant was concerned, ' it was, no doubt, Goering's intention to exploit it to the fullest extent for the German war effort. I do not believe that this intent was shared by Flick. Certainly, what was done by his company in the course of its management falls far short of such exploitation '. And again : ' We find no exploitation . . . to fulfill the aims of Goering.' ' Adopting the method used by the I.M.T.—namely, specifically the limitation that the exploitation of the occupied country should not be greater than the economy of the country can reasonably be expected to bear,' the Flick I.M.T., on the basis of the evidence of its own case, found that ' the source of the raw materials (used by Flick in the Russian railway car plant) is not shown except that iron and steel were bought from German firms,' and also considered it relevant to establish that the manufacture of armament by Flick in Russia was not proven. The Flick Tribunal decided that ' when the German civilians departed, all plants were undamaged '. Furthermore, according to the evidence received by the Flick Tribunal, there were other basic differences ; they were paid from government funds and responsible only to Reich officials. At one of the two Russian enterprises operated by Flick, ' the plants barely got into production '. In short, the facts in the Flick case were substantially different.

" Prior to the evacuation of the plants at Kramatorsk and Marjunal as

stated above, the Krupp firm aided in stripping these plants of machinery and raw materials. The property removed did not fall into any category of movable public property which the occupant is authorised to seize under the Hague Regulations and the participation of the Krupp firm in the removal of such materials and machinery was a direct violation of the laws of land warfare. The participation of the Krupp firm in the demolition of these plants was also a violation of the requirements of the Hague Regulations [that] the capital of such properties be safeguarded and administered in accordance with the laws of usufruct."

Judge Wilkins said: "For the reasons above stated I dissent only to the extent indicated. In all other respects I concur in the Judgment of the Tribunal." He then made reference to his special concurring opinion on the dismissal of Counts I and IV which has received attention elsewhere.(1)

7. THE SENTENCES

The sentence passed on the defendant Krupp was delivered as follows by Judge Daly:

"On the Counts of the Indictment on which you have been convicted, the Tribunal sentences you to imprisonment for twelve years and orders forfeiture of all of your property, both real and personal. The same shall be delivered to the Control Council for Germany and disposed of in accordance with the provisions of Article II, Section 3 of Control Council Law No. 10. The period already spent by you in confinement before and during the trial is to be credited on the term already stated and to this end the term of your imprisonment, as now adjudged, shall be deemed to begin on the 11th day of April, 1945."

The defendants Loeser, Houdremont, Mueller, Janssen, Ihn, Eberhardt, Korschan, von Buelow and Lehmann were sentenced to terms of imprisonment of, respectively, seven, ten, twelve, ten, nine, nine, six, twelve and six years. Kupke was sentenced to imprisonment for two years ten months and nineteen days.

All accused were credited with the time already spent in confinement in the same way as Krupp; for Kupke this involved his being released on the day of the delivery of judgment.

After delivering the sentences, Judge Daly said: "During the trial of this case the defendants, Loeser, Houdremont and Korschan, have been excused from attendance at Court on different occasions because of their health. The record indicated that the defendant, Loeser, is not present today because of his present condition.

"The above-named defendants have just been sentenced to imprisonment. We believe that they should not be exposed by incarceration to dangerous consequences to their health. However, we are not in a position to determine whether the present condition of health of any of these defendants is of such a nature that imprisonment will cause fatal or other extremely serious consequences.

"Accordingly, we are writing to General Lucius D. Clay, the U.S. Military Governor of the United States Zone in Germany, calling his

(1) See pp. 128–130.

attention to this with the suggestion that examinations be made for the purpose stated above. If he concludes that such examinations are indicated and is of the opinion thereafter that because of the condition of health of any of the defendants in question, sentence or sentences of any of them should be altered, he has the authority to do so under Article XVII of Ordinance 7 of the Military Government of Germany of the United States."

At the time of going to press, the sentences had not been confirmed by the Military Governor.

B. NOTES ON THE CASE

1. OFFENCES AGAINST PROPERTY AS WAR CRIMES

In its words concerning the law as to plunder and spoliation, the Tribunal concentrated its attention upon the detailed provisions made in Articles 46 *et seq* of Hague Convention No. IV of 1907 and upon the attitude taken by the International Military Tribunal to these provisions. For completeness, it should be added that, as the Prosecution pointed out, Control Council Law No. 10 in its Article II " includes under the definition of war crimes, the ' plunder of public and private property '."

The Defence urged that " Control Council Law No. 10 speaks in paragraph two only of the ' plunder of public or private property,' consequently only of plunder within the strict meaning of the word." This argument may be taken to be elaborated in the following words which Counsel added " The Control Council Law describes in paragraph II, 1b only serious offences as examples of ' war crimes ' such as murder, ill-treatment of prisoners of war and civilians, killing of hostages, wanton destruction of cities, towns or villages or devastation not justified by military necessity. The Control Council Law lists, in all these cases, such crimes as examples which are considered serious crimes in the criminal codes of all countries. It is contrary to the idea of the Control Council Law, if the Prosecution wants to have considered as a war crime every violation, however slight, of the Hague Rules of Land Warfare." It was later claimed that :

" The version of sections (b) and (c) of Article II of the Control Council Law shows beyond a doubt that *only* serious crimes such as murder, mistreatment, deportation, enslavement, torturing, oppression, deprivation of liberty, extermination, etc., are considered as criminal and punishable acts, not, however, every formal trespass against a provision of an agreement. If the latter were the case then every violation of the provisions of the Geneva Convention on wages, on the intellectual needs of prisoners of war, their relations with the outside world and with authorities, the representation of prisoners of war, etc., would have to be considered as war crimes, to say nothing of the numerous service provisions which regulate the life of prisoners of war outside. Even the I.M.T. verdict, however, does not go so far ; it merely ruled that an offence against the provisions of Articles 2, 3, 4, 46 and 51 of the Geneva Convention are crimes.

" The wording of sub-section (b) of Article II of Control Council Law shows clearly that the concept of ' war crimes ' covers actual offences

against humanity only. The mention made of the terms murder, manslaughter, mistreatment, spoliation, indicate this beyond any doubt.

" An offence against the laws and usages of war is criminal and punishable only to the extent that it has any bearing on ' cruelties or offences against *body, life, or property* '."

By and large, however, the case for the defence was based mainly upon the plea of necessity and upon the argument that the international law on spoliation was so vague that the accused were justifiably ignorant of its precise terms and could not be found guilty under them, that these provisions cannot be taken literally under conditions of modern warfare,(1) and that " military necessity " must now include " economic necessity " since economic warfare is now a part of the concept of " total war ". (2)

In the light of the trials reported upon in these Volumes in which war crimes involving offences against property were alleged, it is now possible to set out some tentative generalisations on the branch of international law concerning such offences.(3)

(i) A study of the judgment delivered in the *Flick Trial* has already revealed that the terminology relating to war crimes committed against property rights could profitably undergo some further development.(4) The judgment in the *I.G. Farben Trial* pointed out that, while the Hague Regulations did not employ the term " spoliation ", the Indictment in the case used " spoliation " interchangeably with the words " plunder " and " exploitation " ; the Tribunal fell back on the general statement that " spoliation " was synonymous with the word " plunder " employed in Control Council Law No. 10 and that it embraced offences against property in violation of the laws and customs of war " of the general type charged in the Indictment ".(5)

Article 47 of the Hague Regulations makes the provision that " Pillage is expressly forbidden," but the Charter of the International Military Tribunal speaks, not of " pillage ", but of " plunder of public or private property." The truth seems to be that, while the law relating to war crimes committed against property rights has undergone considerable development since the days when looting by individual soldiers was the offence mainly aimed against, the relevant terminology has not undergone the same degree of elaboration.

(ii) In the numerous attempts which have been made at defining the precise limits of the war crime of pillage, plunder or spoliation, stress has been placed on one or both of the following two possible aspects of the offence :

(*a*) that private property rights were infringed ;

(*b*) that the ultimate outcome of the alleged offences was that the economy of the occupied territory was injured and/or that of the occupying State benefited.

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(1) See pp. 64–67.

(2) This plea was specifically rejected by the Tribunal ; see pp. 138–139.

(3) It will be found that the passages from the Judgments in the *Flick, I. G. Farben* and *Krupp Trials* which are quoted or referred to in the following pages are illustrated by the evidence produced in these trials as to alleged offences against property (see Vol. IX, pp. 10–13, and this vol., pp. 18–23, and 85–92.)

(4) See Vol. IX, p. 40.

(5) See pp. 44–45.

In so far as *private property* is concerned it seems sounder to base a definition of the war crime involved upon the first aspect, namely the infringement of the property rights of individual inhabitants of the occupied territory. The gist of the matter appears in the words which occur in the *Krupp* Judgment:

" Article 46 [of the Hague Regulations] stipulates that ' private property ... must be respected '. However, if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and depriving him from lawfully exercising his prerogative as owner, it cannot be said that his property ' is respected ' under Article 46 as it must be." (1)

War crime trials in which the allegations made turned upon simple violations of private property rights have been many, particularly in countries previously under enemy occupation. Most of the French trials reported upon in the previous volume of these Reports were of this character.(2)

It will be recalled however that the accused Flick (3) was found guilty of a war crime, in so far as he operated a plant in occupied territory of which he was not owner and without the consent of the owner, despite the fact that (*a*) the Tribunal held that " the original seizure may not have been unlawful," (*b*) Flick had nothing to do with the expulsion of the owner, (*c*) the property was left by Flick in an improved condition, and (*d*) there was " no exploitation either for Flick's personal advantage or to fulfil the aims of Goering," there being no proof that the output of the plant went to countries other than those which benefited before the war.

Similarly, dealing with the Francolor Agreement, the *I.G. Farben* judgment states that: " As consent was not freely given, it is of no legal significance that the agreement may have contained obligations on the part of Farben, the performance of which may have assisted in the rehabilitation of the French industries." (4)

It would appear to follow therefore that, at least in the view of the Tribunals which conducted the *Flick Trial*, and *I.G. Farben Trial*, provided a sufficient infringement of private property rights has been proved to bring the offence within the terms of the Hague Convention,(5) the more public effects of the act are immaterial.(6) There is also *some* authority for saying that, conversely, if no illegal breach of private property rights has occurred no war crime can be said to have been committed, irrespective of the effects of the act upon the general economy of the occupied territory of the enemy state. Thus, the Tribunal before which the *I.G. Farben Trial* was held could not " deduce from Article 46 through 55 of the Hague Regulations any principle of the breadth of application " of the claim of the Prosecution in that case that " the crime of spoliation is a ' crime against

(1) See p. 137.
(2) See Vol. IX, pp. 43, 59–66 and 68–74.
(3) See Vol. IX, p. 40.
(4) See p. 51.
(5) The Prosecution was probably correct in claiming that violation of Article 46 of the Hague Convention " need not reach the status of confiscation. Interference with any of the normal incidents of enjoyment of quiet occupancy and use, we submit, is forbidden. Such incidents include, *inter alia*, the right to personal possession, control of the purpose for which the property is to be used, disposition of such property, and the right to the enjoyment of the income derived from the property ".
(6) Except perhaps in relation to the punishment awarded.

the country concerned in that it disrupts the economy, alienates its industry from its inherent purpose, makes it subservient to the interest of the occupying power, and interferes with the natural connection between the spoliated industry and the local economy. As far as this aspect is concerned, the consent of the owner or owners, or their representatives, even if genuine, does not affect the criminal character of the act'." The Tribunal added that the provisions of the Hague Convention regarding private property "relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner. We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner, is, in fact, freely given." (1)

Elsewhere the same judgment states that "to exploit the military occupancy by acquiring private property *against the will and consent of the former owner*" is a violation of international law unless the action is "expressly justified by any applicable provisions of the Hague Regulations",(2) and "we deem it to be of the essence of the crime of plunder or spoliation that the owner be deprived of his property involuntarily and *against his will*".(3) There must be proof that "action by the owner is not voluntary because his consent is obtained by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property *against his will*".(4)

The Tribunal was of the opinion that "the contrary interpretation would make it difficult, if not impossible, for the occupying power in time of war to carry out other aspects of its obligations under international law, including restoration of order to the local economy in the interests of the local inhabitants".(5)

In the *Krupp Trial* Judgment, it may be thought that rather more stress was placed on the second possible approach (6) to war crimes committed against property rights. Here it was stated that "Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner".(7) The Tribunal added later:

"Spoliation of private property, then, is forbidden under two aspects: firstly, the individual private owner of property must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort—always with the proviso that there are exemptions from this rule which are

(1) See p. 46.
(2) See p. 44. (Italics inserted.)
(3) See p. 46. (Italics inserted.)
(4) See p. 47. (Italics inserted.)
(5) See p. 46–7.
(6) See p. 160.
(7) See p. 134.

strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory."(1)

It could be argued that the words " must not be taken over by that occupant " cannot include within their scope agreements between private individual freely arrived at, that the Tribunal tacitly excluded from its meaning transfers of property effected by such agreements, and that, while the public effects of war crimes committed against property are highly significant, there is no crime at all (if the property is private property) unless a private property right has been infringed in violation of Article 46 of the Hague Regulations.

(iii) As is stated in the Judgments delivered in the *I.G. Farben* and *Krupp Trials*, however, some invasions of private property rights are permissible under the law relating to occupied territories. It was stated in the Judgment on the latter trial that Article 43 of the Hague Regulations " permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety ".(2) Articles 52 and 53 of the Regulations make further inroads into the principle of the inviolability of private property ;(3) and the possible effect, in legalising the destruction or seizure of property, of " imperative necessity for the conduct of military operations " was also mentioned in a treatment of Article 23 (*g*) of the Regulations.(4)

The Prosecution in the *Krupp Trial* was itself willing to admit that : " if private property is abandoned, the occupying power may take possession to insure that the property is not destroyed and to re-establish employment. The occupying power is required in such case to treat this possession as conservatory for the rightful owner's interest. . . . Public property, which of necessity must be abandoned by the legitimate power, may also be taken over and operated by the occupant. The necessity for protecting the occupation forces against the dangers of attack may also justify certain types of seizures or expropriation in the interest of public order and safety. This particular phase of the securing of public order and safety is specifically dealt with in Article 53 of the Hague Regulations ".

The *Krupp Trial* Judgment laid down, however, that the laws and usages of war do not authorize " the taking away by a military occupant of livestock for the maintenance of his own industries at home or for the support of the civil population of his country "(5) ; moreover the requisitions and services contemplated by Article 52 " must refer to the needs of the Army of Occupa-

(1) See p. 135. Compare also p. 138.
(2) See p. 135.
(3) See pp. 135 and 137 ; and Vol. IX, p. 22. It is worth repeating that in the opinion of the International Military Tribunal the general effect of the relevant provisions of the Hague Convention is that " the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear." This was also the main authority relied upon by Judge Wilkins in his dissenting judgment in dealing with certain alleged offences in France, Yugoslavia and Russia. See p. 157.
(4) See p. 136 ; See also p. 134. In the *I. G. Farben* Judgment it was simply said that Articles 46, 47, 52, 53 and 55 of the Regulations " admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles' ". (p. 44.)
(5) See p. 136.

tion ", whereas " It has never been contended that the Krupp firm belonged to the Army of Occupation." (1)

(iv) Property offences recognised by modern international law are not limited to offences against physical tangible possessions or to open robbery in the old sense of pillage. The offences against property defined in the Hague Regulations include " plunder or spoliation resulting from acquisition of intangible property such as is involved in the acquisition of stock ownership, or . . . acquisition of ownership or control through any other means, even though apparently legal in form ".(2) Some acts of plunder proved in the *Krupp Trial* " were committed through changes of corporate property, contractual transfer of property rights and the like. It is the results that count. . . . "(3)

The novel forms in which war crimes were committed against private property during the second world war, and at the same time the basic legal principles involved, are also illustrated in the following words from the Judgment in the *Pohl Trial* :(4)

" By what process of law or reason did the Reich become entitled to one hundred million Reichsmarks' worth of personal property owned by persons whom they had enslaved and who died, even from natural causes, in their

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(1) See p. 137. The Prosecution in the *Krupp Trial* stated that : " Authorities as to what requisitions violate the limitations imposed upon requisitions have been analyzed and interpreted " by E. H. Feilchenfeld, in *The International Economic Law of Belligerent Occupation* (1942) ; at pp. 34, 35 and 36, as follows :

" They must not be unnecessary and useless, merely designed to enrich the occupant's home country, destined for an army of the occupant stationed in another occupied or invaded area, levied for the purpose of selling the requisitioned articles or have as their main purpose the ruin of the occupied country or its inhabitants.

"Among the examples quoted by Fauchille are the following : Transport of Brabant cattle and horses to Germany in order to help the Rhineland, seizure of guano and nitrate in Flanders in order to aid farmers in Germany, seizure of raw materials and machines in Belgium in order to aid factories in Germany.

" In the reparation account prepared by the Belgian Government in 1919 for the Peace Conference, the value of machinery and materials carried away by the Germans was stated to amount to two billion francs. The situation in northern France was similar. Under Article 244, Annex I, Germany had to pay an indemnity for these and similar measures.

"According to Garner there is general agreement among authors that the right of requisition can be exercised only for the needs of the occupying army and does not include the spoliation of the country and the transportation to the occupant's own country of raw materials and machinery for use in its home industries.

" Garner also states that the British Manual and the French Manual, as well as Article 345 of the American Rules, agrees in declaring that requisitions can be made only for the indispensable needs of the army of occupation.

" As to the cases concerning the construction of the term ' needs of the army ', it has been held that requisitioning by the occupant for the purpose of shipment to and use in his own country is contrary to Article 52.

" Not only requisitioning for shipment to the occupant's home country has been held illegal, but also requisitioning for resale and profit rather than for the use of the occupying army."

(2) See pp. 45–46.

(3) See p. 138.

(4) Trial of Oswald Pohl and others, United States Military Tribunal, 10th March—3rd November, 1947. As further evidence of the realisation of the diversity of German economic exploitation of occupied territories, compare the circumstances under which Article 2 of the Norwegian Law on the Punishment of Foreign War Criminals was drafted, as set out on p. 84 of Vol. III of these Reports. The Article reads :

" Confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, *and any other form of economic gain illegally acquired by force or threat of force*, are deemed to be crimes against the Civil Criminal Code, Art. 267 and Art. 268, paragraph 3." (Italics inserted.)

servitude ? Robbing the dead, even without the added offence of killing, is and always has been a crime. And when it is organized and planned and carried out on a hundred-million-mark scale, it becomes an aggravated crime, and anyone who takes part in it is a criminal."

(v) To what extent is it necessary that an accused be shown to have intended to acquire the property in question *permanently* ?

The Judgment delivered in the *I.G. Farben Trial* spoke of a private individual or a juristic person becoming a party to " unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently " ;(1) and of owners of property in occupied territory being " induced to part with their property permanently . . . "(2) The words " permanent " and " permanently " appear frequently also in the Tribunal's general finding as to Count Two (3) and findings regarding alleged acts of spoliation in specific localities.(4) Flick hoped to acquire the Rombach plant permanently.(5) While theoretically even a temporary illegal acquisition of property is an invasion of rights of the owner, there is no denying the opinion of the Tribunal conducting the *I.G. Farben Trial* that a taking over of management which was intended to be permanent would be more clearly a war crime than a mere temporary control or operation.(6)

(vi) It has been said that proof that consent was " obtained by threats, intimidation, pressure or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will " would make a transfer illegal under international law.(7) The possible means of coercion were further elaborated upon in the *I.G. Farben* Judgment when it was said that in the many instances " in which Farben dealt directly with the private owners, there was the ever present threat of forceful seizure of the property by the Reich or other similar measures, such, for example as withholding licences, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations or other effective means of bending the will of the owners. The power of the military occupant was the ever present threat in these transactions, and was clearly an important, if not a decisive factor ".(8)

(vii) If property has been acquired without the consent of the owner, the proof of having paid consideration is no defence.(9)

(viii) Neither will the fact that the reality of a transaction was hidden behind a pseudo-legal façade afford a defence. " The forms of the transactions ", runs the *I.G. Farben* Judgment, " were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality ".(10) " The offence of spoliation ", declared the Tribunal acting in the *Krupp Trial*, " is committed even if no definite alleged transfer of title

(1) See p. 44.
(2) See p. 47.
(3) See pp. 49–50.
(4) See p. 51.
(5) See Vol. IX, p. 22.
(6) See p. 50.
(7) See p. 47.
(8) See p. 50.
(9) See pp. 44 and 51.
(10) See p. 50.

was accomplished ".[1] It will be recalled that, on taking control of the Rombach plant the Friedrich Flick Kommanditgesellschaft signed with a public commissioner a contract which afforded an appearance of legality to Flick's subsequent acts relating to the plant.[2]

Similarly, the Tribunal which conducted the *Pohl Trial* [3] looked not at the legal façade but at the reality, in judging Pohl's responsibility for certain of the offences alleged against him :

" Under a plan which was perhaps devised to give some semblance of legality to this inherently lawless plan, Pohl was designated as a trustee of the properties seized in the East and operated by OSTI. This was a strange species of trusteeship. All of the interests of the trustee were violently opposed to those of the *cestuis que trustent*. The recognized concept of a trustee is that he stands in the shoes of his beneficiaries and acts for their benefit and in opposition to any encroachment on their rights. Here, however, the trustee was in the service of adverse interests and acted at all times under an impelling motive to serve those interests at the expense of his beneficiaries. Actually, the trusteeship was a pure fiction. It cannot be believed that it was ever the plan of the Reich to return any of the confiscated property to its former Jewish owners, most of whom had fled and disappeared or been exterminated. The only probative value of this fictitious trusteeship is to furnish another cord to bind Pohl closer to OSTI's criminal purposes."[4]

(ix) If wrongful interference with property rights has been shown, it is not necessary to prove that the alleged wrongdoer was involved in the original wrongful appropriation. " When discriminatory laws are passed which affect the property rights of private individuals, subsequent transactions based on those laws and involving such property will in themselves constitute violations of Article 46 of the Hague Regulations ".[5] If an unlawful confiscation has taken place, " acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations ".[6] Thus the accused Flick was found guilty of wrongful use of the Rombach plant despite his not having been involved in the original misappropriation.[7]

(x) In dealing with *public property*, the United States Military Tribunals have relied upon Article 55 of the Hague Regulations according to which the occupying power has only a right of usufruct over such property, and that only for the duration of the occupation.[8] In a French trial already reported upon,[9] application was made of the rule of international law forbidding the destruction of public monuments which received expression in Articles 56 (and through it Article 46) of the Hague Regulations.

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(1) See p. 138.
(2) See Vol. IX pp. 11 and 22.
(3) See p. 164, note 4.
(4) The International Military Tribunal said that in the Netherlands there had existed " widespread pillage of public and private property which was given colour of legality by Seyss-Inquart's regulations. . . ." (Cmd. 6964, p. 121).
(5) See p. 135.
(6) See p. 44.
(7) See Vol. IX, p. 40.
(8) See Vol. IX, pp. 22, 24 and 41–2 and p. 50 of the present volume.
(9) See Vol. IX, pp. 42–3 and 67–8.

2. DEPORTATION AND FORCED EMPLOYMENT OF FOREIGN CIVILIAN WORKERS AND CONCENTRATION CAMP INMATES

The Tribunal's treatment of the questions of deportation and enslavement of civilians ([1]) was devoted largely to underlining the illegality of the deportation of Belgian labour to Germany during the First World War. The Tribunal added however that it adopted the statement of the relevant law in the *Milch Trial*,([2]) and that the employment of deportees in armament production in the Krupp enterprise violated Article 52 of the Hague Regulations, which provides that :

> Art. 52. Requisitions in kind and services shall not be demanded from local authorities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
>
> " Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> " Contributions in kind shall as far as possible be paid for in ready money ; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

The same questions arose in the *I.G. Farben Trial*, but the Tribunal acting in that case did not enter into any detailed analysis of these matters.([3]) They have however received some further attention in the Judgments delivered in the *Milch Trial* and in the notes thereto.([4])

3. THE EMPLOYMENT OF PRISONERS OF WAR

On the general question of the employment of prisoners of war the Judgment delivered in the *Krupp Trial* is limited to a statement that a number of provisions quoted from the Hague and Geneva Conventions were violated " in the Krupp enterprises ".([5]) In the *I.G. Farben Trial* the Tribunal did not lay down the law beyond saying that : " The use of prisoners of war in war operations and in work having a direct relation to such operations was prohibited by the Geneva Convention."([6]) Here again attention is drawn to the report on the *Milch Trial* which has appeared in this series.([7])

It would, however, be in place to mention here a British trial which further illustrates the responsibility for the welfare of prisoners of war employed in factories of civilians in charge of such establishments. In the trial of Mitsugu Toda and eight others, by a British Military Court in Hong Kong, 7th–28th May, 1947, the accused were charged with " committing a war crime, in that they at Kinkaseki, Formosa, between December 1942 and May 1945, being on the staff of the Kinkaseki Nippon Mining Coy., and as such being responsible for the safety and welfare of the British and American Prisoners of War employed in the mine under their supervisions, were, in violation of the laws and usages of war, concerned in the ill-treatment of the

([1]) See pp. 141–146.
([2]) See pp. 27–66 of Vol. VII of these Reports.
([3]) See p. 53.
([4]) See Vol. VII, pp. 38–40, 43, 45–47, and 53–58.
([5]) See p. 141.
([6]) See p. 54.
([7]) See Vol. VII, pp. 37–38, 43–44, 47, and 58–61.

aforesaid Prisoners of War, contributing to the death of some of them and causing physical sufferings to the others". Two were found guilty on the charge, and six others were found guilty except for the words "contributing to the death of some of them and". The convicted men, who were sentenced to terms of imprisonment of from one to ten years, were shown to have been the General Manager of the mine, the production supervisor and a number of men who supervised the work of the prisoners of war.

4. CRIMES AGAINST PEACE

The Judgments delivered in the *I.G. Farben* and *Krupp Trials* contain much interesting material on the question of crimes against peace; a general commentary on this important question will appear in a later volume of these Reports after some further relevant trials have been reported upon.

5. INDIVIDUALS, INCLUDING BUSINESS MEN, AS WAR CRIMINALS

In the closing statements of Defence Counsel the following passage appears:

"If the Indictment is based on International Law, formally based on the subsequently promulgated Control Council Law No. 10 and supplementarily on International Common Law, the amazing fact follows that industrialists in leading positions of an industrial Konzern and some of their employees—in other words strictly private individuals—are being inducted under criminal law which is based on International Law. The doctrines of International Law throughout the world, heretofore, took the stand that agreements and provisions established on the basis of International Law were binding exclusively for states, irrespective of whether codified law or common law was involved. In the case of international agreements obligations which concern the state and rights which belong to the state are involved. The single individual neither derives rights nor assumes obligations by reason of International Law unless specific provisions were incorporated into the legislation forming part of the criminal law of the individual countries. This opinion which was held unanimously until the second world war is shown by the wording and the meaning of the conventions of the literature on International Law."

This argument was elsewhere elaborated as follows:

"In these proceedings, private industrialists are being held responsible for industrial measures taken by them in occupied territories either on the instructions of their government, or, in the case of contracts with foreign industrialists, with the consent of their government. Neither the books of German penal law nor the international provisions of the Hague Rules of Land Warfare decree that a private individual shall be responsible for examining the measures taken by his government in the occupied territories or that he shall be held responsible for the non-violation of International Law.

"Insofar as the IMT Judgment sentenced defendants for crimes of spoliation, the persons concerned were exclusively men who had been the highest military and political leaders of Germany before and during the war. The sentence therefore affected only persons who had acted on behalf of the State and who, by virtue of their official status, were representatives of the State. The International Military Tribunal did not reach a decision on the

question of whether an industrialist—a private person, that is—can be held responsible for actions falling under the provisions of International Law. Formerly, the theory of International Law throughout the world represented the view that only the States were bound by the provisions of International Law, irrespective of whether codified laws or the laws of usage were involved. International Law imposes obligations upon the State and confers certain rights upon it. Neither obligations nor rights fall to the lot of the private individual under the terms of International Law, albeit isolated provisions of International Law have been taken over into the penal law of the individual countries, thus becoming national law. This attitude which dominated International Law until the Second World War is apparent from legal literature, from the letter and from the spirit of the codified contracts available I need quote only a few examples from the Hague Regulations of Land Warfare of 1907.

" It is exclusively the ' contracting powers ' (' Vertragsmaechten, les puissances contractantes ').

" In Article 43 of the Appendix to the Hague Regulations of Land Warfare as in many other articles, mention is made of the ' Occupier ' and in Article 44 of the ' Belligerent '. In both cases, it is clear from the general sense of the law that the occupying or belligerent state is meant. Correspondingly, in Article 55 the ' Occupying State ' is authorized to make use of State property in the occupied area. . . .

" Similarly in the Kellog-Briand Pact of 27th August, 1928, only the " High contracting parties ', i.e. the States, are spoken of. . . .

" In the appendix to the Hague Rules of Land Warfare of 1907, the ' State ' is granted the right to employ prisoners of war (Article 6), and in Article 7, the ' Government ' is made responsible for the maintenance of the prisoners of war.

" In Article 41 of the Appendix to the Hague Rules of Land Warfare, it is expressly stated that the State shall be held responsible for damages in cases of the violation of the conditions of armistice on the part of individual persons acting on their own initiative.

" In the case of this one exception, in which the private individual has acted on his own initiative, provision is made for the punishment of the individual persons acting on their own initiative.

" In the case of this one exception, in which the private individual has acted on his own initiative, provision is made for the punishment of the individual. But only then insofar, that the one contracting power may demand of the other contracting power that the offender be punished.

" In this connection, however, Article 3 of the Hague Rules of Land Warfare of 1907, in which the case of the violation of the Hague Rules of Land Warfare is expressly dealt with, is absolutely decisive. It is laid down that the ' Belligerent Party ', i.e. the State, shall be obliged to make amends for all damage, and in the second sentence, it is expressly stated that the State is responsible for all actions committed by members of its Armed Forces. . . .

" With reference to Count II of the Indictment, it is of particular importance that in the provisions of the Hague Rules of Land Warfare on the conduct of the occupying power in occupied territories—Articles 42, 56—the ' State ' only and never the private individual is spoken of.

"I am not unaware of the fact that in recent times, there has been a tendency to hold the individual responsible for actions falling within the scope of International Law.

"This idea also is dealt with in the I.M.T. Judgment, and the High Tribunal accepts the responsibility of the individual. One must consider, however, that in the case of the International Military Tribunal, the persons involved were not private individuals such as those appearing in this case, but responsible officials of the State, that is such persons and only such persons as, by virtue of their office, acted on behalf of the State. It may be a much healthier point of view not to adhere in all circumstances to the text of the provisions of International Law, which is, in itself, abundantly clear, but rather to follow the spirit of that law, and to state that anyone who acted on behalf of the state is liable to punishment under the terms of penal law, because, as an anonymous subject, the State itself cannot be punished under the provisions of criminal law, but can at most be held responsible for the compensation of damage. In no circumstances is it permissible, however, to hold criminally responsible a private individual, an industrialist in this case, who has not acted on behalf of the State, who was not an official or an organ of the State, and of whom, furthermore, in the face of the theory of law as it has been understood up to this time, and as it is outlined above, it is impossible to ascertain that he had any idea, and who, in fact, had no idea that he, together with his State, was under an obligation to ensure adherence to the provisions of International Law."

The Prosecution's attitude to this defence was expressed in the following words:

"It has also been suggested that International Law is a vague and complicated thing and that private industrialists should be given the benefit of the plea of ignorance of the law. Whatever weight, if any, such a defence might have in other circumstances and with other defendants, we think it would be quite preposterous to give it any weight in this case. We are not dealing here with small businessmen, unsophisticated in the ways of the world or lacking in capable legal counsel. Krupp was one of the great international industrial institutions with numerous connections in many countries, and constantly engaged in international commercial intercourse. As was said in the judgment in the Flick case:

> '. . . responsibility of an individual for infractions of International Law is not open to question. In dealing with property located outside his own state, he must be expected to ascertain and keep within the applicable law.'

"It is quite true, of course, that in the field of International Law, just as in domestic law, many questions can be asked on which there is much to be said on both sides. But the facts established by the record here fall clearly within the scope of the laws and customs of war, and the language of the Hague Conventions, and we think there is no lack of charity in holding the directors of the Krupp firm to a knowledge of their clear intendment."

The Prosecution in the *Flick Trial* produced an interesting precedent for charging industrialists of committing war crimes:

"Nor is this the first time that private persons who might be described as 'industrialists' have been charged and tried for violations of international

penal law. Twenty-eight years ago, just after the first World War, a very similar proceeding was conducted before a French military tribunal. The defendants included Hermann Roechling—who has been a witness in this very trial and whose name figures largely in the documents on Rombach—, Robert Roechling and half a dozen others who were accused of the plunder of private property in France during the First World War in violation of the laws of war. That case involved certain removals of property as well as dispossession of the owners, but in other respects it was very parallel to the charges in Count II of our Indictment with respect to Rombach. The French military court found the defendants guilty, and imposed sentences of up to 10 years' imprisonment. Upon appeal, the judgment was annulled on purely technical grounds ; the record had not shown the presence of an interpreter at all sessions ; one of the court clerks was below the statutory age of 25 years, etc. Hermann Roechling was not apprehended by the French authorities, and the proceedings were never renewed. But certain observations made in the opening statement by the French prosecutor indicate the striking similarity :

> ' Confronted with such serious facts, the importance of which is to be found not only in the intrinsic value of the objects removed but also in the fatal damage voluntarily inflicted on the industrial life and the prosperity of an entire country ; . . . , it is proper in this case not to forget that it is an individual prosecution brought against named industrialists and that our only mission is limited to finding out precisely what personal rôle they played in these acts, and what is their own responsibility, if it is established that they have provoked and carried out these measures which are opposed to the law of nations, or that they have brought about their execution by stimulating, if necessary, the action of the public authorities in order to make their execution more rapid, complete, and ruthless.
>
> ' The purpose . . . will be to find out . . . whether one must consider that there is a responsibility peculiar to the accused and, for that purpose, to examine the circumstances particular to the removals executed by them, the opportunity that they had to take advantage of such a profitable situation, and the direct, obstinate, constant action through which, by exerting pressure on the official services, they succeeded in obtaining from them the realization of their desires.
>
> ' But, due to the prolongation of the war and the sharpening of its industrial character, having the urgent obligation to ensure the supplying of its factories, deprived of any imports by the strict blockade of the Entente, the German Government considered itself in a sort of state of emergency authorizing the taking of all steps in its power, and arrogated to itself the right to take, wherever it could and especially in invaded territory, the goods and raw materials that it lacked.
>
> ' This very peculiar conception of the right of the occupier, neither provided for nor justified by any international convention and which is directly in opposition to the law of nations, which always maintained a careful distinction between what belongs to the public domain and what is private property, led the " Kriegsministerium " to the creation of a whole series of organisations destined to secure the practical realisation

of the goal. It was with these organisations that the industrialists came into contact.

'. . . the German industrialist who used these means, reaped a personal benefit from them and took advantage, with the purpose of realising a benefit, of the force put at his disposal.' "

The closing statement of the Prosecution in the *Flick Trial* also pointed out that :

" Finally, it is quite clear that Control Council Law No. 10 recognises no such distinction between ' private persons 'and ' officials ' as the defendants seek to draw. Paragraph 2 of Article II of Law No. 10, in clause (*f*), after making reference to persons who held ' high political, civil, or military ' positions in Germany, continues by making reference to persons who held high positions ' in the financial, industrial or economic life ' of Germany. Persons so described unquestionably include individuals such as these defendants. It is quite true that this reference is contained in the clause which relates only to crimes against peace, but it is unthinkable that Law No. 10 intends, or that under International Law one might reach so illogical and preposterous a conclusion, as that private individuals may be tried for the commission of crimes against peace but not for the commission of war crimes or crimes against humanity."

The Prosecution was " quite prepared to concede that the defendants give every indication of devotion to the profit system " but submitted that : " Free enterprise does not depend upon slave labour, and honest business does not expand by plunder. Any businessman is surely entitled to defend himself against charges of criminal conduct. But no businessman should defend himself against such charges by putting on the symbolic silk hat and claiming privileged status. In other proceedings in Nurnberg, we have heard military men claim immunity because they wore a uniform ; now we find civilian clothes resorted to as a parallel sanctuary."

The Tribunal to which these arguments were addressed ruled that " International Law binds every citizen ", it being unsound to argue that private individuals having no official position were exempt from responsibility under it.(1)

The Tribunal in the *Krupp Trial* also stressed, not merely that individuals were personally punishable for war crimes,(2) but also that the laws and customs of war bind private individuals no less than government officials and military personnel.(3) The Judgment delivered in the *I.G. Farben Trial* contained similar passages,(4) while the Judgment in the *Einsatzgruppen Trial* (5) has these remarks to make under a heading *International Law Applied to Individual Wrongdoers* :

" Defence Counsel have urged that the responsibilities resulting from International Law do not apply to individuals. It is a fallacy of no small proportion that international obligations can apply only to the abstract legal

(1) See Vol. IX, p. 18.
(2) See p. 133.
(3) See p. 150.
(4) See pp. 47 and 48.
(5) Trial of Otto Ohlendorf and Others, Nuremberg, 15th September, 1947—10th April, 1948.

entities called States. Nations can act only through human beings, and when Germany signed, ratified and promulgated the Hague and Geneva Conventions, she bound each one of her subjects to their observance. Many German publications made frequent reference to these international pledges. The 1942 edition of the military manual edited by a military judge of the Luftwaffe, Dr. Waltzog, carried the following preface :

> ' Officers and noncoms have, before taking military measures, to examine whether their project agrees with International Law. Every troop leader has been confronted, at one time or another, with questions such as the following : Am I entitled to take hostages : How do I have to behave if bearing a flag of truce ; What do I have to do with a spy ; what with a franctireur ; What may I do as a permitted ruse of war ; What may I requisition ; What is, in turn, already looting and, therefore, forbidden ; what do I do with an enemy soldier who lays down his arms ; How should enemy paratroopers be treated in the air and after they have landed ? '

" An authoritative collection of German Military Law (*Das gesamte Deutsche Wehrrecht*), published since 1936 by two high government officials, with an introduction by Field-marshal von Blomberg, then Reich War Minister and Supreme Commander of the Armed Forces, carried in a 1940 supplement this important statement :

> ' The present war has shown, even more than wars of the past, the importance of disputes on International Law . . . In this connection, the enemy propaganda especially publicizes questions concerning the right to make war and concerning the war guilt, and thereby tries to cause confusion ; this is another reason why it appears necessary fully to clarify and make widely known the principles of International Law which are binding on the German conduct of war.'

" Every German soldier had his attention called to restrictions imposed by International Law in his very paybook which carried on the first page what was known as ' The Ten Commandments for Warfare of the German Soldier '. Article 7 of these rules provided specifically :

> ' The civilian populations should not be injured.'
> ' The soldier is not allowed to loot or to destroy.' "

The responsibility of individuals, including individuals without official or military connections, for war crimes is indeed now beyond doubt. A relevant precedent which was mentioned by the Prosecution in the *Krupp Trial* was the case *Ex Parte Quirin.*[1] A more recent precedent was the trial of *Bruno Tesch and two others* [2] by a British Military Court, in which two German businessmen were condemned to death for committing war crimes in that they arranged for the supply of poison gas to Auschwitz Concentration Camp, knowing that it was to be used there to kill inmates. The responsibility of individuals by breaches of International Law received some treatment during the *Belsen Trial.*[3]

It will be recalled that, just as private individuals cannot escape responsibility for war crimes committed by them, so it was pointed out in the *Justice*

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(1) See Vol. IV, pp. 38 *et seq.*
(2) See Vol. I, pp. 93–103. This trial was conducted on 1st–8th March, 1946.
(3) See Vol. II, pp. 74–75 and 149–150.

Trial that the plea of *Act of State* will not protect government officials from punishment on charges of war crimes.(1)

6. THE PLEA OF SUPERIOR ORDERS OR NECESSITY

The Judgments delivered in the *Flick Trial*,(2) the *I.G. Farben Trial* (3) and the *Krupp Trial* (4) contain a treatment of what is called in each the " defence of necessity ". In dissenting from the opinion of the Tribunal in the *I.G. Farben Trial* on this point, Judge Herbert also referred to " the defence of necessity ".(5) An examination of all four opinions seems to reveal however that the factual claims made by the Defence which were the Tribunal's subject of discussion constituted what has previously in these volumes usually been called the plea of superior orders.

A study of war crime trials reveals that, among others, three pleas of a related character have been put forward by the Defence in such trials :

(i) The argument that the accused acted under orders, which he had the duty to obey, when he committed the acts alleged against him. Sometimes this plea is augmented by the claim that certain consequences would ultimately have followed from disobedience, such as the execution of the person refusing to obey and/or the taking of reprisal action against his family.(6) This may be called the *plea of superior orders.*

(ii) The argument that, in committing the acts complained of, the accused acted under an immediate threat to himself. This may be called the *plea of duress.*

(iii) The argument that a military action carried out by a group of military personnel was justified by the general circumstances of battle. This may be called the *plea of military necessity.*

It is not always easy to distinguish one plea from another and the same argument put forward in court may contain elements of more than one. Nevertheless, the fact that there is a difference between the first and second for instance may be taken to have been recognised by the Tribunal which conducted the *Einsatzgruppen Trial*, in that it applied one test of the knowledge of the illegality of an order in cases where the plea of superior orders is put forward and a different test when the plea of duress is added. The Tribunal said that : " To plead superior orders one must show an excusable ignorance of their illegality ", yet it went on :

" But it is stated that in military law *even if the subordinate realises* that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes

(1) See Vol. VI, p. 60.
(2) See Vol. IX, pp. 18–21.
(3) See pp. 54–57.
(4) See pp. 146–150.
(5) See p. 62.
(6) As the Prosecution said in the *I. G. Farben* and *Krupp Trials* :
" The reason that superior orders are sometimes given weight in military cases, not as a defence but as a plea of mitigation, is based upon two quite distinct ideas. The first is that an army relies strongly, in its organisation and operations, on chain of command, discipline, and prompt obedience; the soldier is in duty bound under ordinary circumstances and also under very extraordinary circumstances, to carry out his commander's orders immediately and unquestioningly. The second reason is that the soldier stands in fear of prompt and summary punishment if he fails to carry out orders or obstructs their prompt execution by over-much questioning."

duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.

" Nor need the peril be that imminent in order to escape punishment." (1)

Further, on examination of the treatment given by the Tribunals which conducted the *Flick*, *I.G. Farben* and *Krupp Trials* to the " defence of necessity " suggests that they regarded an argument based on necessity, if substantiated to constitute a complete defence and not simply a mitigating circumstance. This was particularly clear in the Judgment in the *Flick Trial*, where the Tribunal, referring to Article II (4) (b) of Control Council Law No. 10 (" The fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation ") said : " In our opinion it is not intended that these provisions are to be employed to deprive a defendant of the defence of necessity under such circumstances as obtained in this case with respect to defendants Steinbrinck, Burkart, Kaletsch and Terberger." (2) It may have been this superior value of the defence of duress which caused the Defence in the trials under review to tend to stress it rather than relying on the plea of superior orders alone.(3)

The quotations from Wharton's *Criminal Law* (other than those relating to self-defence) which appear above (4) and in the *Flick Trial* Judgment (5) would seem to relate to the plea of duress rather than to the plea of superior orders as defined in these present pages.

The Judgment delivered in the *Krupp Trial* states that, when what it called " necessity " is pleaded, " the question is to be determined from the standpoint of the honest belief of the particular accused in question. . . . The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defence, the mere fact that such danger was present is not sufficient. There must be an actual *bona fide* belief in danger by the particular individual." (6) This subjective test, here applied to what may be regarded as the plea of duress, has also been applied to the plea of military necessity by the Tribunal acting in the *Hostages Trial.* Regarding the " scorched earth policy " carried out by the accused Rendulic during his retreat from Finmark, the Tribunal said :

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(1) See Vol. VIII of these Reports, p. 91. (Italics inserted).
(2) See Vol. IX, p. 19.
(3) The Prosecution in the *Krupp* and *I. G. Farben Trials* also distinguished between the actual circumstances which would give rise to a successful pleading of superior orders on the one hand and duress on the other. The plea of superior orders, it was argued, might lead to a mitigation of sentence if the accused had been subject to military discipline, but a civilian was possessed of a much greater freedom of action and the plea of duress, which he might be able to plead, depended upon proof of " threatening conduct on the part of another individual or group of individuals " : " More recent decisions of American courts tell us that a threat of *future* injury is not sufficient to raise a defence, that threats from a person who is a mile away at the time of the commission of the crime is no defence . . . "
(4) See pp. 147–8.
(5) See Vol. IX, pp. 19–20.
(6) See p. 148.

" There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist. . . .

" We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time." (1)

In the *Flick*, *I.G. Farben* and *Krupp Trials*, the plea put forward was that the accused were obliged to meet the industrial production quotas laid down by the German Government and that in order to do so it was necessary to use forced labour supplied by the State, because no other labour was available, and that had they refused to do so they would have suffered dire consequences. The test applied by the Tribunal in the *Flick Trial* was whether a " clear and present danger " had threatened the accused at the time of their committing the alleged offences.(2) The test applied in the *I.G. Farben Trial* was that laid down by the International Military Tribunal in dealing with the plea of superior orders, namely, whether a moral choice was possible.(3) In the *Krupp Trial* Judgment it was said that : " Necessity is a defence when it is shown that the act charged was done to avoid an evil severe and irreparable ; that there was no other adequate means of escape ; and that the remedy was not disproportionate to the evil." (4)

In the *Flick Trial* the plea served to acquit all but two defendants of charges of using slave labour ; these two had been shown to have gone beyond the limits of what they were required by the State to do in the matter of the employment of State-supplied forced labour.(5) The Tribunal which conducted the *Krupp Trial* pointed the moral by saying that " if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct ".(6) This principle was accepted by Judge Herbert, who, however, dissented as to its application to the facts of the I.G. Farben case.(7)

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(1) See Vol. VIII, pp. 68–9.
(2) See Vol. IX, p. 20.
(3) See pp. 54 and 57.
(4) See pp. 147 and 149.
(5) See Vol. IX, pp. 20–1.
(6) See p. 149. Similarly, the Judgment in the *Einsatzgruppen Trial* states that : " the doer may not plead innocence to a criminal act ordered by his superior if he is in accord with the principle and intent of the superior. . . . In order successfully to plead the defence of superior orders the opposition of the doer must be constant. It is not enough that he mentally rebel at the time the order is received. If at any time after receiving the order he acquiesces in its illegal character, the defence of superior orders is closed to him." See Vol. VIII, p. 91.
(7) See p. 62. On the question of superior orders, see also Vol. V, pp. 13–22, Vol. VII, p. 65, and Vol. VIII, pp. 90–92.

7. FORFEITURE OF PROPERTY AS A PUNISHMENT FOR WAR CRIMES

Article II (3) of Control Council Law No. 10, on which the Tribunal relied in ordering the forfeiture of the property, both real and personal, of the defendant Krupp,[1] runs as follows :

> " 3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following :
>
> (*a*) Death.
> (*b*) Imprisonment for life or a term of years, with or without hard labour.
> (*c*) Fine, and imprisonment with or without hard labour, in lieu thereof.
> (*d*) Forfeiture of property.
> (*e*) Restitution of property wrongfully acquired.
> (*f*) Deprivation of some or all civil rights.
>
> " Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal."

The commonest punishments meted out to condemned war criminals have been imprisonment and death sentences, but penalties affecting the property of the accused have not been without precedent. In French war crime trials the levying of fines on persons found guilty of war crimes has not been uncommon and if courts of certain other countries have preferred to mete out sentences of imprisonment it has not always been for lack of legal powers to require payment of fines or forfeiture of property.[2]

The question of the ultimate destination of property confiscated by the Military Tribunals in Nuremberg would appear to be solved by Directive No. 57, dated 15th January, 1948, of the Control Council for Germany and entitled : *Disposition of Property Confiscated Under Control Council Law No.* 10 *or Legislation Issued Pursuant to Control Council Directive No.* 38. The text of the Directive is as follows :

> " Pursuant to Control Council Law No. 10 and Control Council Directive No. 38, the Control Council directs as follows :
>
> " Article I.
>
> " All property in Germany of whatever nature arising from the confiscation of property suffered by persons under Control Council Law No. 10 or legislation issued pursuant to Control Council Directive No. 38, shall be disposed of as provided by this Directive.
>
> " Article II.
>
> " 1. Title to property not subject to disposal or use under Article IX having belonged to a trade union, co-operative, political party, or any other democratic organisation before it became the property of any

(1) The Presiding Judge dissented from this order ; see p. 151.
(2) See Vol. I, p. 109 ; Vol. III, pp. 89, 112 and 119 ; Vol. IV, pp. 129–130 ; Vol. V, pp. 100–101 ; and Vol. VII, pp. 82 and 88.

person referred to in Article I hereof shall be transferred to such organisation provided that it is authorised and its activities are approved by the appropriate Zone Commander.

" 2. Where retransfer of title to property cannot be made because no existing organisation is completely identical with the organisation which was the former owner of the property, the title to such property shall be transferred to a new organisation or organisations whose aims are found by the Zone Commander to be similar to those of the former organisation.

" Article III.

" Property not subject to disposal or use under Article IX formerly devoted to relief, charitable, religious or humanitarian purposes, shall be disposed of or used so as to preserve its former character if consonant with democratic principles, and for this purpose shall be transferred to the organisations formerly holding title thereto or to a new organisation or organisations on condition that, in the latter case, the Zone Commander finds that the aims and purposes of these organisations and conform to the principle of the democratisation of Germany or may, at the discretion of the Zone Commander, be transferred to the Länder or Provinces, subject to the same conditions with respect to disposition or use.

" Article IV.

" Property transferred in accordance with Articles II and III above shall be transferred without charge, except that the Zone Commanders may, within their discretion, require that the transferee pay or assume liability for any or all debts or any accretion in value of the property in accordance with the same principles as are established in the case of property subject to restitution within Germany to victims of Nazi persecution.

" Article V.

" 1. Title to property not subject to disposal or use under Article IX or to restoration or transfer pursuant to the provisions of Articles II and III hereof, or which is rejected by organisations referred to in Articles II and III hereof shall be transferred to the Government of the Land or Province in which it is located.

" 2. The Government of the Land or Province may hold and use the property or transfer its use to any administrative district (Kreis or Berzirk) or to a municipality (Gemeinde) within its jurisdiction. The use to which the property is put must fall within the competence of the holder or the transferee and must not be in the opinion of the Zone Commander an improper or unauthorised use of the property.

" 3. The Government of the Land or Province where the property is situated shall, pursuant to this directive and to the regulations of the Zone Commander, sell any property not held and used in accordance with paragraph 2 of this Article. The net proceeds of any such sale shall be accounted for in the budget of the Land or Province concerned

to be expended in a manner which, in the opinion of the Zone Commander, is not an improper or unauthorised use of the proceeds.

" 4. The Government of the Land or Province shall, regardless of whether it holds, transfers, or sells the property in accordance with the provisions of this Article, remain responsible for insuring that the property is not used for any purpose which the Zone Commander finds to be inappropriate.

" 5. When title to the property is transferred to the Land or Province,

" (*a*) Specific charges and encumbrances, whether incurred prior or subsequent to confiscation, on properties transferred under this Article shall devolve on the receiving Land or Province up to an amount not exceeding the value of the property transferred, and

" (*b*) The receiving Land or Province shall accept liability for the debts of any person whose property it receives under this Article provided, however, that this liability shall not exceed the value of the property of such person received by the Land or Province, taking into account any encumbrances on that property and provided further that in the case of partial confiscation of property no liability for debts, under this paragraph, shall attach until creditors have exhausted all remedies against the person whose property was partially confiscated. The total of such payments of debts of a person for which it has accepted responsibility, shall ultimately be borne by the Governments of the Land or Provinces receiving the property proportionately to the value of the property of such person received by each Land or Province, but it shall not be required that this liability shall be discharged until further directions shall have been issued by the Allied Control Authority, nor that any debts shall be discharged in violation of any principle established by the Allied Control Authority and particularly debts shall not be paid in such manner as to compensate the supporters of the Nazi Party and régime.

" Article VI.

" The Zone Commander and in Berlin, Sector Commanders, shall take measures to ensure the disposition and use of the property in accordance with this directive.

" Article VII.

" Title to property located in Berlin will be transferred to the administrative districts (Verwaltungsberzirke) and shall be disposed of according to the same principles as are herein prescribed for property for the rest of Germany. For this purpose, the powers given to the Zone Commanders will in Berlin be exercised by the respective Sector Commanders. The functions, powers, and obligations placed upon the Government of a Land or Province will in regard to property in

Berlin devolve upon the respective administrative districts (Verwaltungsberzirke).

" Article VIII.

" 1. When an order involving confiscation of property has been made against any person either by a tribunal empowered under Control Council Law No. 10 or under procedure lawfully established under Control Council Directive No. 38, the following course shall be observed in each of the four zones :

" (*a*) When an order of this kind has been made and has become final, a copy of it shall be transmitted to each of the four zones and sectors, annexing an inventory describing the property of the convicted person in each of the four zones so far as it is known to it.

" (*b*) On receipt of this copy and the inventory, copies thereof will be transmitted to all the Land Governments in whose jurisdiction any property of the person subject to the order is situated.

" (*c*) The Land Government or Governments concerned shall proceed forthwith to confiscate the property. In event of partial confiscation of property any Land or Province within the area of original jurisdiction shall take the proper percentage of property from the person's property within its jurisdiction and each other Land or Province outside such area in which other property of the person is located shall have the right under the above rules to confiscate up to the same proportion of his property under its jurisdiction.

" 2. When the order imposes a fine, that fine will, in the first instance, be levied upon property, situated in the Land or Province in which the order has been passed ; in the second instance, it will be levied on the property in any other Land or Province of the Zone in which the order has been passed. If any balance remains unpaid, it will be levied in the Land or Province in which the largest amount of the property of the person subject to the order is situated, notice of such fine and of the property of the person convicted being transmitted to the other zones and sectors in the same manner as provided by Section 1 (*a*) above.

" 3. Nothing in this Article shall prevent the person against whom an order has been made from being subjected to further penalties by a new order based on new charges and evidence.

" 4. All accruals under sub-sections (1)-(3) of this Article shall be treated as if they were property governed by Article II, III, V and IX of this directive.

" Article IX.

" 1. The Zone Commander shall destroy property subject to being destroyed as war potential, designate for reparations property subject to reparations, use for the purposes of occupation property subject to such use, and restitute :

"(*a*) To the Government concerned, property subject to restitution under the Allied Control Authority definition of restitution ;

"(*b*) Property of victims of Nazi persecution,

in the same way as similar property not included among that of the persons referred to in Article I of this Directive.

"2. In order to accomplish the purpose of this Article, the Zone Commander may at any time, set aside or modify any transactions or measures with respect to property transferred pursuant to this Directive, which he deems inconsistent with the aims and spirit of this Directive.

"Article X.

"The present Directive comes into force from the date of signature."

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