

peace was established. Although in theory it remains irrelevant whether a crime against humanity was committed before or during the war, in practice it is difficult to establish a connection between what is alleged to be a crime against humanity and a crime within the jurisdiction of the Tribunal, if the act was committed before the war. . . .

"As pointed out, the International Military Tribunal, in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connection with any crime within the jurisdiction of the Tribunal, which means that it must be closely connected either with a crime against peace or a war crime in the narrower sense. Therefore the Tribunal declined to make a general declaration that acts committed before 1939 were crimes against humanity within the meaning of the Charter. This represents, however, only the general view of the Tribunal and did not prevent it from treating as crimes against humanity acts committed by individual defendants against German nationals before 1st September, 1939, if the particular circumstances of the case appeared to warrant this attitude. The verdict against the defendant Streicher is a case in point, but even in his case the *causal nexus* has been pointed out between his activities and the crimes committed on occupied Allied territory and against non-German nationals, and the most that can be said is that he was also found guilty of crimes against humanity committed before 1st September, 1939, in Germany against German nationals. It cannot be said in the case of any of the defendants that he was convicted only of crimes committed in Germany against Germans before 1st September, 1939.

"The restrictive interpretation placed on the term 'crimes against humanity' was not so strictly applied by the Tribunal in the case of victims of other than German nationality. With respect to crimes committed before 1st September, 1939, against Austrian nationals, the Tribunal established their connection with the annexation of Austria, which is a crime against peace and came, therefore, to the conclusion that they were within the terms of Article 6(c) of the Charter. This consideration is particularly evident in the reasons concerning the case of Baldur von Schirach and, though expressed less precisely, in the case of the defendant Seyss-Inquart. The same applies *mutatis mutandis* to crimes committed in Czechoslovakia before 1st September, 1939, as illustrated in the verdicts on the defendants Frick and von Neurath."<sup>(1)</sup>

Indeed the International Military Tribunal could hardly have decided that no crime against humanity could possibly have been committed before the war, because Article 6(c) of the Charter includes the words "before or during the war" which govern at least the first part of that provision.<sup>(2)</sup>

(b) The Tribunal acting in the *Flick Trial* also came to an important conclusion regarding the extent to which offences against property could be

<sup>(1)</sup> Egon Schwelb, in *British Year Book of International Law*, 1946, pp. 204-205. (Italics inserted.)

<sup>(2)</sup> See p. 44, note 2. It has been argued that the words quoted cover the whole Article since "persecutions" must fall within the description "inhumane acts". This seems to be the opinion of Professor Schick in *The Nuremberg Trial and Future International Law: American Journal of International Law*, October, 1947, p. 787.

regarded as crimes against humanity and here also took the definition of the law on such crimes a step beyond the stage reached in the *Justice Trial*.

It was laid down in the judgment in the trial now under review that offences against industrial property could not constitute crimes against humanity. "In this case," said the Tribunal, "we are only concerned with industrial property. . . . We believe that the proof does not establish a crime against humanity recognised as such by the law of nations when defendants were engaged in the property transactions *here under scrutiny*. . . . It nowhere appears in the judgment that I.M.T. considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-semitic pressure to procure by purchase, or through State appropriation, industrial property owned by Jews."<sup>(1)</sup>

In the *I.G. Farben Trial*,<sup>(2)</sup> the Tribunal was faced with the same question and decided to "adopt the interpretation expressed by Military Tribunal IV in its judgment in the case of the United States of America vs. Friedrich Flick *et al.*, concerning the scope and application of the quoted provision<sup>(3)</sup> in relation to offences against property."

The same trend of thought is visible in the following passages taken from the judgment delivered in the *Einsatzgruppen Trial*:<sup>(4)</sup>

"Murder, torture, enslavement and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations. . . .

"Despite the gloomy aspect of history, with its wars, massacres and barbarities, a bright light shines through it all if one recalls the efforts made in the past in behalf of distressed humanity. President Theodore Roosevelt in addressing the American Congress, said in 1903:

"There are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it."

"President William McKinley in April, 1898, recommended to Congress that troops be sent to Cuba 'in the cause of humanity',

"... and to put an end to the barbarities, bloodshed, starvation and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. . . ."

"Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty. . . .

"At the VIIIth Conference for the Unification of Penal Law held on 11th July, 1947, the Counsellor of the Vatican defined crimes against humanity in the following language:

"The essential and inalienable rights of man cannot vary in time and space. They cannot be interpreted and limited by the social conscience of a people or a particular epoch for they are essentially

<sup>(1)</sup> See pp. 26 and 27. (Italics inserted.)

<sup>(2)</sup> Trial of Carl Krauch and others by a United States Military Tribunal in Nuremberg. See Vol. X of these Reports.

<sup>(3)</sup> Article II(c) (*Crimes against Humanity*) of Control Council Law No. 10.

<sup>(4)</sup> See p. 47.

immutable and eternal. Any injury . . . done with the intention of extermination, mutilation or enslavement against the life, freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being, by reason of his opinion, his race, caste, family or profession, is a crime against humanity." (1)

The judgment in the *Flick Trial* declared that "A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people", (2) and thus left open the question whether such offences against personal property as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity. Even the examples quoted by the Prosecution in its Rebuttal statement, from the judgment of the International Military Tribunal, could refer to acts of economic deprivation of this more personal type:

"The Defence has also argued that persecutions on racial, religious and political grounds must be physical acts directed against the person of a member of the persecuted group analogous to murder, torture, rape, etc. This argument has been made before and has been rejected by the I.M.T. For example, in its enumerations of the crimes of the Leadership Corps of the Nazi Party the I.M.T. states that that group had 'played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power' (I.M.T. judgment, p. 259). Likewise in its enumeration of the criminal activities of Seyss-Inquart the I.M.T. stated that "One of Seyss-Inquart's first steps as Reich Commissioner of the Netherlands was to put into effect a series of laws imposing economic discriminations against the Jews' (I.M.T. judgment, p. 329). Likewise as to the crimes of Walther Funk the I.M.T. stated that he 'had participated in the early Nazi programme of economic discrimination against the Jews' (I.M.T. judgment, p. 305). In the enumeration of the crimes of Frick the I.M.T. stated that he 'drafted, signed and administered many laws designed to eliminate Jews from German life and economy' (I.M.T. judgment, p. 300)." (3)

(1) Italics inserted.

(2) See p. 26.

(3) Compare the Tribunal's attitude to this argument put forward by the Prosecution, see p. 27. Speaking of the Charter of the I.M.T., Article 6(c), in his article *Crimes against Humanity in British Year Book of International Law*, 1946, pp. 178-226, Dr. Schwellb states: "If the English rule of interpretation, known as the *eiusdem generis* rule, could be applied to Article 6(c) the words 'other inhumane acts' would cover only serious crimes of a character similar to murder, extermination, enslavement and deportation. Then, offences against property would be outside the scope of the notion of crimes against humanity. But even quite apart from the *eiusdem generis* rule, this view appears to be supported by the fact that, while the exemplative enumeration of Article 6(b) contains such items as 'plunder of public or private property', 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity', there is no indication in the text that similar offences against property were in the minds of the Powers when agreeing on Article 6(c)". While admitting this, however, Dr. Schwellb continues: "It is, however, doubtful whether this is a sound interpretation. As Professor Lauterpacht has said, 'it is not helpful to establish a rigid distinction between offences against life and limb, and those against property. Pillage, plunder and arbitrary destruction of public and private property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance'. (This Year Book, 21 (1944), p. 79.)"

The same comment could be made of two passages from the judgment of the International Military Tribunal which the Prosecution did not quote: "Goering persecuted the Jews, particularly after the November, 1938, riots, and not only in Germany where he raised the billion mark fine as stated elsewhere, but in the conquered territories as well. His own utterances then and his testimony now show this interest was primarily economic, how to get their property and how to force them out of the economic life of Europe", (1) and "As Reich Governor of Austria, Seyss-Inquart instituted a programme of confiscating Jewish property. Under his regime Jews were forced to emigrate, were sent to concentration camps and were subject to pogroms." (2)

(c) Finally, the Tribunal concurred in the finding of the Tribunal acting in the *Justice Trial* that "crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocities or persecution. . . ." (3) Although the Tribunal did not give its reasons, it held that on these grounds alone the charge of crimes against humanity made in the *Flick Trial* would fail. The Tribunal must be taken to have rejected the claims made in the Prosecution's Rebuttal statement that, "It is unnecessary to labour the obvious point that the crimes charged against the defendants were not isolated episodes but were an integral part of a programme of persecution".

(ii) The related opinion expressed by the Tribunal in the *Justice Trial* (4) that proof of systematic governmental organisation of the acts alleged is a necessary element of crimes against humanity seems to be reflected in certain words which appear in the judgment in the *Einsatzgruppen Trial*: (5)

"It is to be observed that in so far as international jurisdiction is concerned the concept of crimes against humanity does not apply to offences for which the criminal code of any well-ordered State makes adequate provision. They can only come within the purview of this basic code of humanity because the State involved, owing to indifference, impotency or complicity, has been unable or has refused to halt the crimes and punish the criminals."

(iii) Although the present pages are not intended to be an exhaustive analysis of the concept of crimes against humanity, it may be added that, according to the judgment in the *Milch Trial*, (6) the words "or nationals of Hungary and Rumania" could be added to the possible victims in the dictum of the Military Tribunal which conducted the *Justice Trial*, that crimes against humanity may be committed by German nationals against German nationals or *Stateless persons*. (7) It has been seen (8) that, according to the judgment in the *Einsatzgruppen Trial*, Law No. 10, when it deals with crimes against humanity, is not restricted as to the nationality of the victim.

(1) British Command Paper, Cmd. 6964, p. 85.

(2) *Ibid.*, p. 121.

(3) See pp. 47 and 79-80 of Vol. VI and p. 28 of the present volume.

(4) See Vol. VI, pp. 47 and 79-80.

(5) See p. 47.

(6) See Vol. VII, p. 40.

(7) See Vol. VI, pp. 40 and 79.

(8) See p. 47.



In its opening statement in the *Flick Trial*, the Prosecution made the same claim in the following words:

"... the definition of crimes against humanity certainly comprehends such crimes when committed by German nationals against other German nationals. It is to be observed that all the acts (murder, imprisonment, persecution, etc.) listed in the definition of crimes against humanity would, when committed against populations of occupied countries, constitute war crimes. Consequently, unless the definition of crimes against humanity applies to crimes by Germans against Germans, it would have practically no independent application except to crimes against nationals of the satellite countries such as Hungary and Rumania.<sup>(1)</sup> Surely a major category of crimes would not have been created for so relatively trivial a purpose. But the matter is put quite beyond doubt by Article III of Law No. 10, which authorises each of the occupying powers to arrest persons suspected of having committed crimes defined in Law No. 10, and to bring them to trial 'before an appropriate tribunal'. Article III further provides that:<sup>(2)</sup>

"Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or Stateless persons, be a German court, if authorised by the occupying authorities."

"This constitutes an explicit recognition that acts committed by Germans against other Germans are punishable as crimes under Law No. 10 according to the definitions contained therein, since only such crimes may be tried by German courts, in the discretion of the occupying power. If the occupying power fails to authorise German courts to try crimes committed by Germans against other Germans (and in the American Zone of occupation no such authorisation has been given) then these cases are tried only before non-German tribunals, such as these Military Tribunals."

An examination of the judgment in the *Justice Trial* reveals that the Tribunal in that case quoted Article III of the Law No. 10 and did not feel called upon to elaborate the scope of the concept of crimes against humanity to any greater degree.<sup>(3)</sup>

#### 6. ENSLAVEMENT AND DEPORTATION TO SLAVE LABOUR

It will be recalled that Count One of the Indictment made charges of enslavement and deportation to slave labour. In their closing statement, the Prosecution claimed that:

"The defendants used impressed foreign labour and concentration camp labour in enterprises under their control or management, and they did so

<sup>(1)</sup> A footnote to the statement here runs as follows: "Even the crimes in Bohemia and Moravia were war crimes under the Tribunal's decision. Judgment of the International Military Tribunal, Vol. I, *Trial of the Major War Criminals*, p. 334. The Tribunal apparently held that all persecutions, etc., committed after 1939, were crimes against humanity no matter where committed and were also war crimes if committed in a country where the laws of war were applicable. *Id.*, pp. 254-255, 259. Military Tribunal II, in its opinion and judgment in *United States v. Erhard Milch* (16th April, 1947), held that Law No. 10 is applicable to crimes against humanity committed by Germans against nationals of the Axis satellites."

<sup>(2)</sup> In paragraph 1, sub-paragraph (d)."

<sup>(3)</sup> See Vol. VI, p. 40.

with knowledge of the character of such labour. There can be no doubt, therefore, of their guilt of the crime of enslavement under Control Council Law No. 10. The criminal nature of the mere utilisation of slave labour clearly appears, moreover, from the judgment of the International Military Tribunal. In finding Speer guilty of war crimes and crimes against humanity, the Tribunal pointed out that he 'was also directly involved in the utilisation of forced labour as chief of the organisation Todt', that he 'relied on compulsory service to keep it (the organisation Todt) adequately staffed', and that he 'used concentration camp labour in the industries under his control'. The record here contains a story of confinement, suffering, malnutrition and death. But enslavement need involve none of these things. As stated by Tribunal II:

"Slavery may exist even without torture. Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation and beating and other barbarous acts, but the admitted fact of slavery... compulsory uncompensated labour... would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery...."<sup>(1)</sup>

"The defendants are also guilty of the crime of deportation, and of the murders, brutalities and cruelties committed in connection therewith. The German slave-labour programme, as found by the International Military Tribunal, involved criminal deportation of many millions of persons, recruited often by violent methods, to serve German industry and agriculture. The utilisation of the forced labour by defendants make them participants in the crimes committed under such programme. As already demonstrated, the defendants obviously knew of the slave-labour programme and had ample information to put them on notice as to the methods adopted in its execution."

The Judgment did not attempt an analysis of the law on these points. Similar charges were made in the *Milch Trial*, and the notes to that trial appearing in Vol. VII of these Reports have included a commentary on the words of the Tribunal acting in that trial on the questions of deportation and enslavement of Allied civilians and prisoners of war.<sup>(2)</sup> What can safely be said here of the present trial is that an examination of the evidence as summarised by the Tribunal shows that the offences found by the latter to have been proved was that of voluntarily employing forced civilian labour from occupied territories and that of voluntarily employing prisoners of war on work "bearing a direct relation to war operations". The Tribunal was willing to admit, however, that it was possible for an accused to set up a successful plea of necessity if he employed such labour only because it was supplied to him by the State authorities and if refusal to use it would have resulted in sufficiently serious consequences to himself.<sup>(3)</sup> The accused Flick and Weiss were found guilty on Count One because instances had been

<sup>(1)</sup> This quotation is from the Judgment in the *Pohl Trial*. See Vol. VII of this series, p. 49.

<sup>(2)</sup> See Vol. VII, pp. 53-61.

<sup>(3)</sup> See pp. 18-20.

proved of their having *voluntarily* participated in the Reich slave-labour programme.<sup>(1)</sup> It will be noted that nothing more than "knowledge and approval" of Weiss's acts on the part of Flick is mentioned in the Judgment, but it seems clear that the decision of the Tribunal to find him guilty was an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent.<sup>(2)</sup>

The effect of the decisions of the Tribunals which conducted the *Milch* and *Flick Trials* was to overrule the submission that deportation and enslavement were not war crimes since they were not specifically mentioned in the Hague Convention; the Defence in the *Flick Trial* claimed that, on this matter, "The Indictment is based on two provisions, one of which has no connection at all and the other one only a very limited connection with this question, that is, to Articles 46 and 52. Article 46 of the Hague Land Warfare Convention states:

"The honour and the rights of the family, the life of the citizens and private property, as well as religious faith and religious services, are to be respected."

Counsel continued: "I can see no connection whatsoever between this regulation and the conscription of labour. Article 52 says:

"Contributions in kind and services can only be demanded from communities or inhabitants for the requirements of the occupation army. These must be in proportion to the resources of the country and must be of such a kind that they do not oblige the population to take part in military operations against their native country."

"Two restrictions result from this regulation for the compulsory demand of services: firstly, 'only for the requirements of the occupation army', and secondly, 'no participation in military operations'. What is not shown by this Article is a veto to employ these workers outside the occupied territory. On the contrary, if it is practical for the belligerent nation to have the work for the requirements of the occupation army performed in its home country, there is nothing in Article 52 which opposes the compulsory use of workers from the occupied territory for this purpose. This interpretation I base on the aforementioned principle, that exceptions to the unrestricted use of violence in war must be clearly formulated and proved by those who refer to it."

#### 7. THE INTER-RELATION BETWEEN THE INTERNATIONAL MILITARY TRIBUNAL AND THE UNITED STATES MILITARY TRIBUNALS IN NUREMBERG, AND BETWEEN THE LATTER TRIBUNALS THEMSELVES<sup>(3)</sup>

The *Justice Trial* (trial of Altstötter and others)<sup>(4)</sup> was the first and the *Flick Trial* the most recent to be treated in this series of Reports of the trials which have been held in Nuremberg, before United States Military

<sup>(1)</sup> See pp. 20-21.

<sup>(2)</sup> See further on this point Vols. IV, pp. 83-96, VII, pp. 61-64, VIII, pp. 88-89, and the Report upon the *High Command Trial* (Trial of Von Leeb and others), in Vol. XII.

<sup>(3)</sup> See p. 2, footnote 1.

<sup>(4)</sup> See Vol. VI of these Reports, pp. 1-110.

Tribunals acting under Control Council Law No. 10 and Ordinance No. 7 of the Military Government of the United States Zone of Germany. It may be of interest to write a brief note on the relationship between these trials and their forerunner, also held at Nuremberg, the trial before the International Military Tribunal of Goering and others (to which trial they have been said to constitute "subsequent proceedings").

Certain non-legal similarities exist. For instance, in war crime trials before British Military Courts and United States Military Commissions it has not been the rule either for the Prosecution to file detailed indictments or for the courts to pronounce reasoned judgments, despite some rare exceptions in the practice of both. In the "Subsequent Proceedings" trials, however, indictments have been filed which have been somewhat reminiscent in their detail and often also in their form of the indictment drawn up against Goering and others<sup>(1)</sup>, while Article XV of Ordinance No. 7 makes it compulsory for the Tribunals which act under its authority to "give the reasons" on which their judgment as to guilt or innocence are based,<sup>(2)</sup> and the result has been the pronouncement of detailed reasoned judgments which provide the Tribunals' evidential and legal reasons for their findings as did that of the International Military Tribunal.

How far is the latter judgment binding upon the United States Military Tribunals? In the absence of any special legal provision the decisions of a court such as the International Military Tribunal would not bind other courts,<sup>(3)</sup> but the United States Military Tribunals are required to apply Article X of Ordinance No. 7 which provides:

"Article X. The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, 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 in so far as the participation therein or knowledge thereof by any particular persons may be concerned. Statements of the International Military Tribunal in the judgment of Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."<sup>(4)</sup>

This provision may appear to differentiate between "the determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred", and other statements of fact; the first being binding "except in so far as the participation therein or knowledge thereof

<sup>(1)</sup> The relevant part of Article IV(a) of Ordinance No. 7 simply provides that: "The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offences charged".

<sup>(2)</sup> See Vol. III of this series, p. 120.

<sup>(3)</sup> "There is no rule of general international law conferring upon the decision of any international tribunal the power to render binding precedents": Professor Hans Kelsen, *Will Nuremberg Constitute a Precedent?* in *International Law Quarterly*, Vol. I, No. 2, pp. 162-163. The same learned writer claims that: "The Judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied pre-existing rules of law laid down by the International Agreement concluded on 8th August, 1945, in London, for the Prosecution of European Axis War Criminals . . ." (*Ibid*, p. 154).

<sup>(4)</sup> See Vol. III of this series, p. 118.



by any particular person may be concerned", and the latter being binding "in the absence of substantial new evidence to the contrary".

It is, however, possible to interpret the words "the determination of the International Military Tribunal . . . may be concerned" as signifying that the decisions of the International Military Tribunal thus made binding on the United States Military Tribunals included not merely decisions that certain acts were committed or omissions made *but also decisions that such acts or omissions were criminal*. This seems to have been the interpretation placed on the phrase by, for instance, the Prosecution in the *Flick Trial*; their closing brief on Count Two includes these words:

"In view of the Charter definition of war crimes the I.M.T. judgment amounts to a determination that a ruthless 'systematic' 'plunder of public and private property' occurred and that was in violation of the Hague Regulations. Determinations by the I.M.T. that crimes occurred are binding on Tribunal IV and 'shall not be questioned except in so far as participation therein or knowledge thereof by any particular person may be concerned'. Thus, the charge amounts to, and it need only be proved, that the defendants participated in the systematic plunder of property which was held to be in violation of the Hague Regulations. It is, therefore, necessary to determine what the I.M.T. included in its judgment that 'a systematic plunder of public or private property' occurred."

The advantage of such an interpretation is that it explains why Article X makes two separate and different provisions regarding certain decisions of the International Military Tribunal. On the other hand, it is difficult to regard the reference to "invasions" and "atrocities or inhumane acts" as signifying anything more than questions of fact, particularly since "aggressive wars" and "crimes", which do have a legal significance, are mentioned separately.

The Nuremberg Military Tribunals have not thrown conclusive light on this particular problem, even when making reference to Article X<sup>(1)</sup>. They have, however, often quoted or referred to passages from the judgment of the International Military Tribunal, without making reference to Article X. In the *Pohl Trial*,<sup>(2)</sup> the judgment refers back to the latter judgment specifically on a question of fact:

"The story of systematic pillage of occupied countries is related in the judgment of the International Military Tribunal (pp. 238-243, official edition) which this Tribunal adopts as findings of fact in this case."

In the judgment in the *Milch Trial*, there appears a lengthy passage from the judgment of the International Military Tribunal dealing with the use of slave labour in the Reich, and after quoting this the Tribunal does acknowledge the binding force of Article X:

"Under the provisions of Article X of Ordinance No. 7, these determinations of fact by the International Military Tribunal are binding upon this Tribunal 'in the absence of substantial new evidence to the contrary'. Any new evidence which was presented was in no way contradictory of the findings

<sup>(1)</sup> See, for instance, Vol. VI of this series, p. 28.

<sup>(2)</sup> See p. 53 and Vol. VII, p. 49.

of the International Military Tribunal, but on the contrary, ratified and affirmed them."

According to Article I of Law No. 10, the Charter of the International Military Tribunal is made an integral part of the Law, while Article I of Ordinance No. 7 provides: "The purpose of this Ordinance is to provide for the establishment of Military Tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes".

The United States Military Tribunals are therefore bound by the provisions of the *Charter* of the International Military Tribunal. On the other hand, they are bound by the *decisions* of the International Military Tribunal *on points of law* beyond doubt in one respect only. Article II(d) of Law No. 10 provides that "Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal" shall be "regarded as a crime". The Charter of the International Military Tribunal, which binds the United States Military Tribunals, makes a provision of which the second sentence is the significant one in this connection:

"Article 10. In cases where a group or organisation 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 organisation is considered proved and shall not be questioned."

The Military Tribunals are therefore obliged to accept the decisions of the International Military Tribunal as to the criminality or otherwise of groups and organisations.<sup>(1)</sup>

On other legal questions (with the possible exception created by Article X of Ordinance No. 7) the decisions of the International Military Tribunal are not binding on the later Tribunals, and that which conducted the *Flick Trial*, while bound by the provisions of the *Charter* of the International Military Tribunal, was strictly speaking not bound by the *decisions* of the latter on the question of crimes against humanity.<sup>(2)</sup> The judgment is, nevertheless, strongly persuasive and has been constantly followed on points of law in the "Subsequent Proceedings" trials; for instance, in the judgments delivered in the *I.G. Farben Trial* and the *Krupp Trial* close attention was paid to the decisions of the International Military Tribunal on the question of crimes against peace.<sup>(3)</sup>

Turning to the legal inter-relation between the United States Military Tribunals themselves, it is safe to say that they are in no way able to bind one another. As the *Flick Trial* judgment states, there is "no similar mandate" to that contained in Article X of Ordinance No. 7 "either as to findings of fact or conclusions of law contained in the judgments of

<sup>(1)</sup> This topic is further explored in the notes to the *Greifelt Trial* to be reported in Vol. XIII.

<sup>(2)</sup> See pp. 25 and 44.

<sup>(3)</sup> See Vol. X of these Reports.

<sup>(4)</sup> See p. 17.

Co-ordinate Tribunals". The judgment concluded that "The Tribunal will take judicial notice of the judgment but will treat them as advisory only".<sup>(4)</sup> As has been seen the Tribunals have arrived at different conclusions on one aspect of the law relating to crimes against humanity.<sup>(1)</sup>

During the delivery of the closing speeches in the *Flick Trial* the President of the Tribunal asked General Telford Taylor, Chief of Counsel War Crimes, how far the doctrine of precedent applied between the several United States Military Tribunals. The following interchange ensued:

"GENERAL TAYLOR: Well, your honour, there are special provisions about this question in the amendment to Ordinance No. 7, called Ordinance No. 11.

THE PRESIDENT: I know the provision about the courts meeting when there are different rulings.

GENERAL TAYLOR: I should suppose that it follows, from those provisions, that the decisions of the other tribunals are entitled to the same weight that you would give to a co-ordinate decision at home, which is that it is not binding but that it is respectfully treated.

THE PRESIDENT: Yes, it is the judgment of a learned body.

GENERAL TAYLOR: Quite.

THE PRESIDENT: Well, that is as I thought."

As an example of concurrence of opinion between the Tribunals, it may be remarked that, in the *Krupp Trial*,<sup>(2)</sup> the judgment relates that: "The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the United States vs. Milch decided by Tribunal II.<sup>(3)</sup> We regard Judge Phillip's statement of the applicable law as sound, and accordingly adopt it. . . ."

Ordinance No. 11 of the United States Military Government, to which General Taylor made reference, states in its Article II:

"Ordinance No. 7 is amended by adding thereto a new Article following Article V to be designated Article V(B), reading as follows:

"(a) A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of Counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

"(b) A joint session of the Military Tribunals may be called in the same manner as provided in subsection (a) of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

<sup>(1)</sup> See pp. 44-8.

<sup>(2)</sup> See Vol. X of these Reports.

<sup>(3)</sup> See Vol. VII, pp. 45-47.

"(c) Decisions by joint sessions of the Military Tribunals, unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

"(d) The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

"(e) The members of the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

"(f) Decisions shall be by majority vote of the members. If the votes of the members are equally divided, the vote of the member presiding over the session shall be decisive."

It will be recalled that a joint session of the Military Tribunals was held to decide the question whether conspiracy to commit war crimes and crimes against humanity could be regarded as a separate offence.<sup>(1)</sup> It should be noted that the convening of a joint session is within the discretion of the presiding judges and it is not obligatory that a joint session should be held upon a motion being received from Counsel. On the other hand, decisions reached by joint sessions are binding for the future on the individual tribunals, unless altered by a subsequent joint session.

#### CASE No. 49

#### TRIAL OF HANS SZABADOS

PERMANENT MILITARY TRIBUNAL AT CLERMONT-FERRAND  
JUDGMENT DELIVERED ON 23RD JUNE, 1946

#### *Putting to death of Hostages—Destruction of property by arson—Pillage*

#### A. OUTLINE OF THE PROCEEDINGS

The accused, a former German non-commissioned officer of the 19th Police Regiment, who had been stationed at Ugine, Haute-Savoie, during the occupation of France, was charged with "complicity in murder, arson of inhabited buildings, pillage in time of war and wanton destruction of inhabited buildings, by means of explosives" on two different occasions.

On 5th June, 1944, at about 8 a.m., unknown members of the French Resistance Movement had blown up part of the road in the district of the railway station at Ugine, killing nine German soldiers and wounding several others. It was shown that the accused, in the absence of his superiors, Captain Schultz and Lieutenant Rassi, had surrounded the whole area with men of his regiment and arrested a number of local inhabitants and passers-by found on the road. They were detained by the accused as hostages. Upon

<sup>(1)</sup> See Vol. VI, p. 104.



the arrival of the two superior officers, 28 hostages were shot at about 11.30 a.m. on the same day. All the victims except one were duly identified. It was further shown that the accused ordered the inhabitants of several houses in Ugine, regarded as harbouring "terrorists", to leave the premises, whereupon three houses were set on fire. The accused personally threw hand-grenades into the houses and did so while the inhabitants were still removing their belongings, thus endangering their lives.

The following day, 6th June, the accused took part in the destruction by dynamite of a block of three more houses which it was found difficult to set on fire. During these events property of the dwellers was looted. The accused personally took all radio sets.

As a result 421 inhabitants remained without shelter and total damages of 21,000,000 francs were inflicted. The accused claimed to have taken part in the above destruction and looting upon the orders of his superiors.

On the 15th June, 1944, a detachment of the same regiment under the command of Lieutenant Rassi and the accused was passing through Puisot, a hamlet in the area of Annecy. The accused maintained that several shots were fired on the detachment. It was shown that when the officer resumed his journey the accused surrounded the hamlet with his detachment. All the houses were set on fire, several inhabitants shot and their bodies thrown into the fire, including a youth of 16, and food, belongings and other articles of property were looted. Here also, the accused invoked the plea of superior orders.

The accused was found guilty on all Counts, but was not held responsible for the killings which took place at Puisot on the 15th June, 1944. The Tribunal passed the sentence of hard labour for life.

## B. NOTES ON THE CASE

### 1. THE COURT

The trial was held by the Permanent Military Tribunal at Clermont-Ferrand, whose competence, like that of the Tribunals before which the other French trials reported in this volume were held, was based on the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes.<sup>(1)</sup>

### 2. THE NATURE OF THE OFFENCE

#### (a) Putting to death of hostages

The court established that the accused had taken part in the killing of hostages at Ugine, and passed judgment on this count on the basis of Art. 2, para. 4 of the Ordinance of 28th August, 1944, and Art. 296 of the French Penal Code. Art. 2, para. 4 provides that "Premeditated murder, as specified in Art. 296 of the Penal Code, shall include killing as a form of reprisal". Under Art. 296, in conjunction with Arts. 302 and 304 of the Penal Code, premeditated murder is punishable by death or hard labour for life. The accused was found guilty of the crime as an accomplice and in circumstances warranting the life sentence only. In the

<sup>(1)</sup> For the French law relating to the punishment of war crimes, see Vol. III of this series, Annex II, pp. 93-101.

field of international law the provision quoted touches upon the important questions of reprisals and of the permissibility of killing persons detained as hostages. Both questions are given special consideration in Vol. VIII, pp. 76-88 and in Vol. XIV (*Trial of A. Rauter*).

#### (b) Arson and Destruction of Inhabited Buildings by Explosives

The wanton destruction of inhabited buildings by fire and explosive was regarded by the Court in its judgment as being a crime under Article 434 of the French Penal Code. This article prescribes the heaviest penalty, death, for anybody who "wantonly sets fire to buildings, vessels, boats, shops, works, when they are inhabited or used as habitations, and in general to places inhabited or used as habitations".

The specific provision of the laws and customs of war which covers such a type of destruction is Article 23(g) of the Hague Regulations of 1907. It forbids the "destruction or seizure of enemy property" unless it is "imperatively demanded by the necessities of war". It is generally understood that "imperative demands of the necessities of war" can exist only in the course of active military operations, which was not the case with the circumstances of the trial.

Such cases of destruction were regarded as criminal by the 1919 Commission on Responsibilities and were described in item XVIII of its list of war crimes as "wanton devastation and destruction of property".

#### (c) Pillage

The looting of personal belongings and other property of the civilians evicted from their homes prior to their destruction was found by the Court to be provided against by the terms of Article 440 of the French Penal Code, which deals with pillage. In applying this Article the Court appears to have preferred it to Article 221 of the French Code of Military Justice, which deals specifically with pillage by military personnel. One of the differences between the two provisions is that in violation of the Military Code, pillage entails, as a rule, a heavier penalty than pillage contrary to the Penal Code, that is, hard labour for life instead of for a maximum of 20 years. This, however, had no practical effect upon the sentence passed in this case, the accused having been found guilty of other crimes permitting and justifying life sentence. Pillage is included in the list of war crimes of the 1919 Commission on Responsibilities and is expressly forbidden by Article 47 of the Hague Regulations of 1907.

### 3. PLEA OF SUPERIOR ORDERS

The accused's plea that he had acted on the orders of his superiors was not admitted. The Court applied the rule that superior orders do not in themselves exonerate the perpetrator from responsibility when the orders are illegal, as provided in Article 3 of the Ordinance of 28th August, 1944.<sup>(1)</sup>

<sup>(1)</sup> See Vol. III of this series, pp. 54-55. For the development of rules concerning the plea of superior orders as evidenced in the municipal law of other countries as well as in instruments of international law, see Vol. I of this series, pp. 18-20, and 31-33; and (particularly) Vol. V, pp. 13-22.

## CASE No. 50

TRIAL OF ALOIS AND ANNA BOMMER  
AND THEIR DAUGHTERSPERMANENT MILITARY TRIBUNAL AT METZ  
JUDGMENT DELIVERED ON 19TH FEBRUARY, 1947*Theft and receiving stolen goods as war crimes—Civilians as  
war criminals—Responsibility of minors*

## A. OUTLINE OF THE PROCEEDINGS

The accused were a German family of five members, Alois and Anna Bommer and their three unmarried daughters, Elfriede, Maria and Hilde. They were charged with theft of, and receiving, stolen goods belonging to French citizens.

The accused pleaded not guilty. Alois and his wife declared that they had had an inventory made of the property and that they had purchased the furniture and the other objects concerned from the German custodian in charge of the deported Lorrainer's farm. They were, however, unable to prove the point by producing the inventory and the receipt; neither was such evidence found at Maxe. Alois and his wife were prosecuted and convicted for both theft and receiving stolen goods. They were sentenced to 18 months imprisonment each. Two daughters, Maria and Hilde, were prosecuted and convicted on the second Count only, and were sentenced to four months' imprisonment each. The third daughter, Elfriede, who was less than 16 years of age at the time of the offences, was acquitted of the charge of receiving stolen goods on the ground of having "acted without judgment" (*sans discernement*) on account of her age.

## B. NOTES ON THE CASE

## 1. THE NATURE OF THE OFFENCES

The main point of interest in regard to the offences tried is that acts representing theft and receiving stolen goods under French municipal law were treated by the Court as amounting at the same time to war crimes.

The relevant provisions under which the two principal accused, Alois and Anna Bommer, were convicted, were Article 401 of the Penal Code relating to theft, and Article 460 of the same Code relating to receiving stolen goods.

Article 401 concerns any theft, as defined in Article 379 of the Penal Code, which does not fall within any of the specific cases provided in Articles 380-400 of the Code, such as theft at night or with violence. Theft is

defined in Article 379 as "fraudulent removal" (*soustraction frauduleuse*) of someone else's goods and, when not committed in the circumstances covered by Articles 380-400, is punishable with imprisonment of from 1-5 years and/or with a fine of from 200-6,000 francs.

Receiving stolen goods is defined in Article 460 as "knowingly receiving things taken, misappropriated or obtained by means of a crime or delict", and is punishable with the same penalties as theft under Article 401.

When passing sentence under these provisions, the Court also made reference to the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes. According to Article 2, paragraph 8 of this Ordinance, "the removal or export by any means from French territory of goods of any nature, including moveable property and money" is likened to pillage as provided in Article 221 *et seq* of the French Code of Military Justice. The latter deals with pillage by military personnel and, like Article 440 of the Penal Code covering pillage by any person, its definition of the offence is based on the element of the use of violence in taking away property. The description of violence in the Penal Code is couched in general terms and defined as "open force" (*force ouverte*), whereas in the Code of Military Justice it is elaborated in more detail and linked with and, at the same time, restricted to deeds of military personnel. The requisite element of violence consists either in the use of "arms or open force", or in the "breaking of doors or external enclosures", or in "violence against persons" by military personnel.

In the case of Alois and Anna Bommer there was no use of violence whatever, but, by virtue of the foregoing provision of the Ordinance of 28th August, 1944, the mere fact of their having removed French property from France to Germany was sufficient to fall within the notion of pillage as extended by the said Ordinance. It should be emphasised that, while likening such removal to pillage, the Ordinance did not restrict its definition to military personnel, but made it applicable to any perpetrator of the offence, including civilians.

In the judgment of the French Court, however, stress was laid on provisions of the Penal Code. It would appear that in face of the extension of the concept of pillage as effected by the above-mentioned Ordinance, there was, strictly speaking, no need for the Court to apply the general provisions of the Penal Code in addition to those of the Ordinance, specifically prescribed for war crimes. This was done apparently because of the deeply-rooted tradition of the French courts that they deal with war crimes on the basis of common penal law.

Another feature of the trial in respect of the offences committed, is that both Alois and Anna Bommer were convicted of having received stolen goods in addition to having committed theft. It is not clear why the Court proceeded on this Count, as the objects concerned were included in the property for which both had been found guilty as thieves. That is to say they were found guilty of receiving the same horses, furniture and linen as they themselves had stolen, with the exception of the silverware, jewellery and money. Neither is the reason for this distinction apparent from the judgment. It may have been that the evidence could not show



which of the various objects had been stolen by each of the two spouses, or that they had stolen every object as joint perpetrators or accomplices, in which case serious doubt remained that for some goods each of the two was guilty as a thief, and that both were thus mutually recipients of the goods stolen by the other.

Be this as it may, the main point in their trial is that relating to theft as a war crime, technically distinct from pillage but likened to it and emerging as one of its varieties in the laws and customs of war as understood by one nation. According to Article 47 of the Hague Regulations of 1907 "pillage is expressly forbidden". Violations of this rule, at any rate since the findings of the 1919 Commission on Responsibilities, have been regarded as war crimes entailing procedure and punishment devised for war criminals. They are included in the list of war crimes drawn up by the Commission, under item XIII. The French law and jurisprudence are now evidence that to pillage in the traditional sense, that is as misappropriation committed with the use of violence, is added ordinary theft or "fraudulent removal" of property, where there is, or need be, no violence. It would appear that, in a sense, there is no extension of the hitherto recognised laws and customs of war. The latter, as contained particularly in the Hague Regulations of 1907, are not limited to the violations defined therein, and are therefore not restricted to pillage in the technical sense. Express reference to this was made in the preamble to the IVth Hague Convention, which includes the said Regulations, in the following terms:

"Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience."

It has not been disputed that the "principles of the laws of nations derived from the usages established among civilised peoples" include general principles of penal law, and there is no doubt that according to these principles theft committed in war-time conditions may be a war crime in the same manner as pillage.

The case against the daughters of the Bommer couple is an illustration of how receiving stolen goods may, under the same principles, equally constitute a war crime. In their case there was no evidence that they were accomplices to the theft committed by their parents, but it was shown that they accepted and kept for their own use some of the stolen goods knowing them to be stolen. This was a clear case of receiving stolen property, so that their being held penally responsible for it as a war crime in the circumstances of the theft was legally justifiable.

It would thus appear that, with regard to the state of the laws and customs of war as authoritatively described in the preamble of the IVth Hague Convention, the findings of the Court concerning theft and receiving stolen goods as war crimes were no legal innovation. They should rather be regarded as a recognition of the principle already admitted that the field of

war crimes is not limited to violations enumerated in the Hague Conventions, or in the itemised list of war crimes of the 1919 Commission on Responsibilities, or in any other existing document relating to the laws and customs of war. This has been expressly recognised in the most recent instruments of international law. Thus, the Nuremberg Charter defines war crimes as violations including but not limited to the offences which are enumerated in its relevant provision.<sup>(1)</sup>

Theft and receiving stolen goods have emerged as war crimes in many other trials held by French courts, which have thus created a firm jurisprudence on the subject. The following can serve as further illustrations:

In the case against August Bauer, a German gendarme, the accused was convicted for stealing a sewing machine and other objects, which he took to Germany during the retreat from France. He was also convicted for removing and using furniture, which his predecessor in the gendarmerie post had stolen from a French inhabitant and which the accused knew belonged to this Frenchman. The conviction on this latter case was for receiving stolen goods.<sup>(2)</sup>

In another case the accused, Willi Buch, a paymaster (Oberzahlmeister) during the occupation of France, was convicted of receiving stolen goods through purchase. The German Kommandantur at Saint-Die had siezed silverware which a French doctor had left behind in crates before leaving the locality. The goods were sold at an auction by the Kommandantur and part of it bought by the accused.<sup>(3)</sup>

In a case similar to that of the Bommers, a German couple named Benz had come during the war to settle in Metz. When going back to Germany at the end of the war they took with them various moveable properties belonging to French inhabitants, including that of the owner of the flat they occupied in Metz. The husband was convicted for theft and the wife for receiving stolen goods.<sup>(4)</sup>

Finally, in the trial of Elisabeth Neber,<sup>(5)</sup> another German settler in France (Lorraine), the accused was found guilty of receiving crockery stolen by her nephew from a French woman, which she took with her when returning to Germany towards the end of the war.

In all these trials conviction was imposed on the basis of the Penal Code and the Ordinance of 28th August, 1944.

## 2. CIVILIANS AS WAR CRIMINALS

The trial of the Bommer family is a confirmation of the principle that laws

<sup>(1)</sup> See Article 6(b) of the Nuremberg Charter.

<sup>(2)</sup> Judgment of the Permanent Military Tribunal at Metz, 10th June, 1947.

<sup>(3)</sup> Judgment of the Permanent Military Tribunal at Metz, 2nd December, 1947.

<sup>(4)</sup> Judgment of the Permanent Military Tribunal at Metz, 4th November, 1947.

<sup>(5)</sup> Judgment of the Permanent Military Tribunal at Metz, 6th April, 1948.

and customs of war are applicable not only to military personnel, combatant or acting as members of occupying authorities, or, generally speaking, to organs of the State and other public authorities, but also to any civilian who violates these laws and customs. As German settlers in occupied France the Bommer were under the obligation to respect the rights of inhabitants of the occupied territory, and by violating this obligation they had committed breaches punishable under rules of international law respecting the protection of the population placed under the authority of their own State as a consequence of war.

### 3. RESPONSIBILITY OF MINORS

Of the Bommer daughters, two were over 16 and under 18, and one, Elfriede, was under 16 at the time of the offence. Sentences in their respect were passed according to Articles 66 and 67 of the French Penal Code. These provide that, in the case of minors above 13 and under 18 the court has a choice between a reprimand or committal of the accused's person to his parent's care<sup>(1)</sup> and a penal conviction, having regard to the circumstances and the accused's personality. In the latter case, if the accused is under 16, the fact of being a minor is considered in itself as an extenuating circumstance and the punishment provided by the Code for the offence tried is reduced to a considerable extent. Capital punishment and hard labour are excluded and the only penalty is imprisonment, the maximum duration of which can in no case exceed 20 years. In the case of a minor above 16 and under 18, the court is at liberty to disregard minority as an extenuating circumstance, and penalties are then governed by the general provisions of the Penal Code. These also contain a rule concerning extenuating circumstances (Article 463) which are applicable to adults and which permit, in the case of unqualified or ordinary theft and of receiving stolen goods, a reduction of penalty to as little as one day's imprisonment.<sup>(2)</sup>

It is under Articles 66 and 67 of the Penal Code that the two daughters between the age of 16 and 18 were condemned to four months' imprisonment each. In both cases the Court passed sentence while admitting that there were extenuating circumstances. As to the third daughter under 16, the Court used its discretionary power to free her from responsibility on account of her age. It directed that she be given to her parents' care.

All three minors were prosecuted and tried as war criminals, and the two convicted were condemned on the same ground.<sup>(3)</sup>

<sup>(1)</sup> Other alternatives, where there are no parents or the latter are not suitable, are committal to the minor's guardian or to an educational institution.

<sup>(2)</sup> Article 463 in conjunction with Article 40 of the Penal Code.

<sup>(3)</sup> In the Belsen Trial, which was conducted by a British Military Court, several of the accused were under age at the time of the offence, and were all convicted to various penalties. Such was, for instance, the case with accused Irma Grese, Heinrich Schriener and Ilse Forster. See Vol. II of this series.

### CASE No. 51

### TRIAL OF KARL LINGENFELDER

PERMANENT MILITARY TRIBUNAL AT METZ  
JUDGMENT DELIVERED ON 11TH MARCH, 1947

### *Destruction of Monuments as a War Crime*

#### A. OUTLINE OF THE PROCEEDINGS

The accused, Karl Lingenfelder, a German from Mussbach, came to France as a settler in the first days of occupation and took possession of a farm called "Bello" at Arry, Moselle, whose owners had been expelled by the German authorities. He was charged with destruction of public monuments and with pillage.

It was shown that, in May, 1941, the accused, acting upon the order of a German official, Buerkel, used four horses to pull down the monument erected by the inhabitants to fellow citizens who died during the war of 1914-1918, destroyed the marble slabs bearing the names of the dead, and broke the statue of Joan of Arc. It was also shown that in September, 1944, the accused left Arry for Germany, and removed with him four horses and two vehicles belonging to the French farm he had occupied during the war.

As alleged by the Prosecution, the accused confessed to the charges and admitted that the order given him by Buerkel was made without threats and that he was under no obligation to render account of its execution.

The Court passed a sentence of imprisonment for one year, while admitting extenuating circumstances.

#### B. NOTES ON THE CASE

The pulling down and partial destruction of the monument erected to the memory of the inhabitants who died during the 1914-1918 war and the destruction of the statue of Joan of Arc, are clear violations of the laws and customs of war, punishable as war crimes.

Under Article 56 of the Hague Regulations, 1907, the property of local authorities in occupied territory, as well as that of institutions dedicated to "public worship, charity, education and to science and art", even if owned by the State, is regarded as private property. The consequence is that, by virtue of Article 46 of the Hague Regulations, such property must be "respected" by the occupying authorities. Violations of this rule are dealt with in the following terms in Article 56:



and customs of war are applicable not only to military personnel, combatant or acting as members of occupying authorities, or, generally speaking, to organs of the State and other public authorities, but also to any civilian who violates these laws and customs. As German settlers in occupied France the Bommer were under the obligation to respect the rights of inhabitants of the occupied territory, and by violating this obligation they had committed breaches punishable under rules of international law respecting the protection of the population placed under the authority of their own State as a consequence of war.

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It is under Articles 66 and 67 of the Penal Code that the two daughters between the age of 16 and 18 were condemned to four months' imprisonment each. In both cases the Court passed sentence while admitting that there were extenuating circumstances. As to the third daughter under 16, the Court used its discretionary power to free her from responsibility on account of her age. It directed that she be given to her parents' care.

All three minors were prosecuted and tried as war criminals, and the two convicted were condemned on the same ground.<sup>(3)</sup>

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"Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of legal proceedings."

It is on the ground of this rule that the 1919 Commission on Responsibilities included the above offence in its list of war crimes, under Item XX, which it described as "wanton destruction of religious, charitable, educational and historic buildings and monuments".

The accused was charged and convicted under the terms of Article 257 of the French Penal Code, which punishes the same type of offence, and thus covers in French municipal law the case dealt with in Article 56 of the Hague Regulations. It runs as follows:

"He who destroys, pulls down, mutilates or damages monuments, statues or other objects dedicated to public utility or embellishment, and erected by public authority, or with their permission, shall be punished with imprisonment from one month to two years, and with a fine of 1,200 to 6,000 francs."

In respect of the removal of horses and vehicles belonging to the owner of the farm "Bello", the Court came to the conclusion that it did not amount to pillage, as provided against in Article 221 of the Code of Military Justice and Article 2, paragraph 2, of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, but constituted a case of theft falling under the terms of Articles 379 and 401 of the Penal Code.<sup>(1)</sup> The punishment to be imposed was therefore limited to a term of imprisonment instead of hard labour. As is the case with all French judgments, no reasons were given for such findings in this case. It may well be that the decision was reached on the basis of the fact that no violence was used by the accused when removing the horses and vehicles. The fact that he did not belong to the category of military personnel, to whom Article 221 of the Code of Military Justice is restricted, may have also been relevant.<sup>(2)</sup>

#### CASE No. 52

#### TRIAL OF CHRISTIAN BAUS

PERMANENT MILITARY TRIBUNAL AT METZ .  
JUDGMENT DELIVERED ON 21ST AUGUST, 1947

#### *Theft and "Abuse of Confidence" as War Crimes*

##### A. OUTLINE OF THE PROCEEDINGS

The accused, Christian Baus, a German transport contractor from Neuenkirchen, the Saar, was, in 1940, appointed by the German authorities

<sup>(1)</sup> Regarding the distinction between theft and pillage in French law, see p. 63.

<sup>(2)</sup> On the question how theft is or may be regarded as a war crime in addition to pillage, see p. 64.

land superintendent (Bauerfuehrer) in occupied France, at Tragny, Moselle. He was charged with theft and "abuse of confidence" (abus de confiance).

The accused's assignment was to control the management of a number of French farms in the area. He himself managed one farm and supervised the management of five other estates. From the indictment and judgment it appears that some of the moveable property from one of these farms had been given him by the owner, Joseph Hocquart, for his personal use during his assignment. This included pieces of furniture, crockery and bed linen. It was shown that, before going back to Germany as a result of the German retreat, Baus discovered at the farm run by him and at that of Hocquart, hidden places containing various belongings of the two farms' owners. It was further shown that during the retreat he took with him to Germany a large amount of the property, including that lent him by Hocquart. Most of it was found at his home in Germany.

The accused confessed to the charges, but alleged in his defence that part of the furniture had been given him by the German custodian in charge of the farms, and that he had been under the obligation to pay damages in case of loss of the furniture. He alleged that some German soldiers occupying Hocquart's house had told him to take away two pieces of furniture belonging to Hocquart and used by him with Hocquart's consent, and had said that otherwise it would have to be destroyed. He was, however, unable to prove either point.

The Court passed a sentence of two years' imprisonment.

##### B. NOTES ON THE NATURE OF THE OFFENCE

The first Count on which the accused was convicted, was that of theft under the terms of Articles 379 and 401 of the French Penal Code. In regard to the goods stolen by him, the accused was also found guilty under Article 2, paragraph 8, of the Ordinance of 28th August, 1944, which treats as pillage any "removal" of goods from French territory in time of war. A comment on these two offences and their place within the field of war crimes has already been made in connection with another trial.<sup>(1)</sup>

The second Count on which the accused was found guilty was that of "abuse of confidence" (abus de confiance) as covered by Article 406-408 of the Penal Code. The Code provides for several different types and cases of "abuse of confidence". Under Article 408 the offence is committed when a person "misappropriates or dissipates" belongings, goods, moneys or documents entailing financial rights or obligations which were entrusted to him on the basis of various legal acts or contracts, such as for hire, for use free of charge, for legal representation, for safe-keeping, whereby the recipient was under an obligation to return the object or to make a definite use of it. In French penal law whenever such "misappropriation or dissipation" takes place the perpetrator is guilty of abusing the confidence of the

<sup>(1)</sup> See pp. 62-65.

person who gave him any of the above objects for the purpose agreed between the parties. The maximum penalty in such cases is two years' imprisonment and/or a fine not exceeding 120,000 francs; in certain cases, involving public confidence, the penalty can be increased to a maximum of 10 years and/or a fine of up to 600,000 francs.

In the case of Baus, the offence was committed in respect of the goods lent to him by Hocquart, for which he could not, in the circumstances, have been prosecuted as a thief. The decision of the Court on this Count is an illustration of how offences of this nature may fall within the purview of war crimes. Technically speaking, in French law their formal link with war crimes is established in the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes. Under Article 2, paragraph 8, any "removal" of French property from France in time of war, be it as a result of theft, "abuse of confidence" or any other act, is treated as pillage. This rule was applied by the Court not only in respect of the goods technically "stolen" by Baus, but also in respect of those misappropriated by "abusing the confidence" of their owner. Consequently, in French law the case against Baus under this Count was only a case of "pillaging" in the wider sense, brought within the terms of the Penal Code as having been committed by abusing the confidence of the victim of the crime. From the viewpoint of international law, it amounts to a specific type of pillage as developed by the laws and jurisprudence of one nation.

The interesting point, however, is that when passing sentence, the Court did not apply the penalty provided for pillage<sup>(1)</sup> but that for "abuse of confidence". This procedure would tend to indicate that the Court had taken the view that misappropriation by abuse of confidence was in itself a war crime, and that, consequently, the accused would have been held responsible even if he had not removed the property from French territory. In such case the trial would evidence a further illustration of war crimes against property, and of the laws and customs of war as understood by one nation. A justification for such a legal approach could then be founded on the terms of the preamble of the IVth Hague Convention and the claim made that it amounted to no innovation but only to the application of the general principles of penal law.<sup>(2)</sup> On the other hand it may well be that such a decision was due only to the French courts' tradition of subjecting war crimes to provisions of common penal law, instead of satisfying itself with implementing special war crimes legislation, as do certain other nations.

Sentences passed against war criminals for "abuse of confidence" are to be found in a number of other trials held by French courts.

In one case, the accused, Heinrich Weber, a German farmer who settled in France during the war, was charged with having abused his lodger's confidence by removing the latter's wireless set to Germany. He was convicted under Article 408 of the Penal Code and Article 2, paragraph 8,

<sup>(1)</sup> Article 2, paragraph 8, of the Ordinance of 28th August, 1944, prescribes the penalty provided in Article 221 of the French Code of Military Justice, dealing with pillage in time of war. The penalty is hard labour and not imprisonment, as provided for "abuse of confidence" under Article 408 of the Penal Code.

<sup>(2)</sup> See p. 64.

of the Ordinance of 28th August, 1944, the penalty being a short term of imprisonment as provided in the Penal Code (six months).<sup>(1)</sup>

In a similar case,<sup>(2)</sup> the accused, Elisa Kespar, wife of a German settler in France, removed to Germany the furniture of the French family whose dwelling she occupied with her husband. She was convicted for abuse of confidence and sentenced to imprisonment for four months.

In another case the accused was a German engineer who rented a French enterprise. He was convicted for abusing the owner's confidence by selling a horse belonging to the enterprise and "dissipating" the money received from the sale. Here again the conviction was made under Article 408 of the Penal Code and Article 2, paragraph 8, of the Ordinance of 28th August, 1944, the sentence being, as in the previous case, set out in the Penal Code (six months' imprisonment).<sup>(3)</sup>

### CASE No. 53

#### TRIAL OF PHILIPPE RUST

PERMANENT MILITARY TRIBUNAL AT METZ  
JUDGMENT DELIVERED ON 5TH MARCH, 1948

#### *Illegal and Abusive Requisitioning*

#### A. OUTLINE OF THE PROCEEDINGS

The accused, Philippe Rust, an S.S. Obersturmfuehrer serving in occupied France, district of Moselle, was charged with "abusive and illegal requisitioning" of French property and with "employing French subjects on military works".

It was alleged by the Prosecution that in September, 1944, a local inhabitant, Marcel Schmitt, was ordered and forced by the accused to supply horses and vehicles with which he had to carry German ammunition, and that he was compelled to repair German military bicycles, motor-cycles and electrical installations. It was also alleged that several other French civilians had been subjected to the same treatment, and that the acts of requisitioning were illegally effected in that no receipts were delivered to the owners of horses and vehicles.

The accused pleaded not guilty. He claimed to have acted under superior orders and to have omitted to deliver receipts because the requisitions were in conformity with "usages".

<sup>(1)</sup> Judgment of the Permanent Military Tribunal at Metz, delivered on 21st August, 1947.

<sup>(2)</sup> Judgment of the Permanent Military Tribunal at Metz, delivered on 6th April, 1948.

<sup>(3)</sup> Judgment of the Permanent Military Tribunal at Metz, delivered on the 25th November, 1947.



The accused was found guilty of "abusing powers conferred upon him to requisition men and vehicles by refusing to deliver receipts". He was condemned to imprisonment for one year.

#### B. NOTES ON THE NATURE OF THE OFFENCE

The Prosecution had charged the accused on two Counts. The first Count of "abusive and illegal requisitioning" of property was regarded as a case of pillage in time of war, as covered by Article 221 of the French Code of Military Justice and Article 2 of the Ordinance of 28th August, 1944. This was done in accordance with the latter provision which, in its paragraph 8, explicitly says that "abusive or illegal requisitioning" is treated as pillage, within the terms of Article 221 of the Code of Military Justice. This in turn deals generally with pillage committed by military personnel. The second Count of "using French subjects on military works" of the enemy was treated by the Prosecution as falling under Article 334 of the Penal Code and being a case of "illegal restraint of persons". This was done in accordance with Article 2, paragraph 6, of the Ordinance of 28th August, 1944, which expressly includes under the notion of "illegal restraint" the use of civilians or prisoners of war on military works.

When dealing with these charges the Court made alterations in respect of the offences and the relevant provisions of substantive law. No specific reasons for these alternatives were given in the judgment, but from the questions put by the President to the members of the Tribunal and their answers, it appears that, in view of the evidence, the Court found the accused not guilty of the charges as submitted by the Prosecution. It dismissed the charge that the accused had committed requisitions of property amounting to pillage, and also the charge that civilians were used on military works. Instead, the Court found the accused guilty in respect of both property and civilian labour, of the following offence:

"Abusing powers conferred upon him for the purpose of requisitioning men and vehicles by refusing to deliver receipts for such requisitions."

In this respect the Court applied Article 214 of the Code of Military Justice. This punishes "any military person who abuses powers conferred upon him" in regard to requisitioning or "who refuses to deliver receipts" for such requisitions. These alterations affected the penalty to be imposed. Whereas the offence of illegal requisitioning amounting to pillage under Article 2, paragraph 8, of the Ordinance of 28th August, 1944, and Article 221 of the Code of Military Justice, and the offence of "restraining" civilians by forcing them to perform military work as provided in Article 2, paragraph 6 of the Ordinance and Article 344 of the Penal Code, both entail hard labour, as a rule for life, the punishment for an offence under Article 214 of the Code of Military Justice is limited to imprisonment for from two months to two years.

It should be noted that in the findings of the Court as quoted above, the objects requisitioned were specifically stated to comprise not only property but also manpower or labour. It equally follows from the same findings that the abuse for which the accused was found guilty consisted in the requisition being made without due delivery of receipts concerning the property and labour requisitioned.

The alteration of relevant provisions of substantive law was effected by the Court in accordance with a rule of procedure contained in Article 88 of the Code of Military Justice. Under this provision the findings of the Military Tribunal are reached by means of questions put by the President to the Judges, in which he sums up the issues at stake as deriving from the indictment. In this connection whenever the President finds that the main offence may be regarded as an act entailing a different punishment or representing an offence against common penal law, he is entitled to submit to the Court subsidiary questions to this effect and obtain a decision on the alternatives. It is on the basis of this rule that the Tribunal rejected the charges and provisions invoked by the Prosecution and replaced them by findings of its own.

The charges of the Prosecution and the decision of the Court were centred around the concept of illegal or abusive requisitioning of property and labour. The issue is dealt with in Article 52 of the Hague Regulations, 1907, respecting the Laws and Customs of War on Land, which reads:

"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."

Violations of this rule were included by the 1919 Commission on Responsibilities in its list of war crimes under Item XV and described therein as "exaction of illegitimate or of exorbitant contributions and requisitions". It will be noted that the phraseology used in the previously quoted provision of the French Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, Article 2, paragraph 8, which used the terms "illegal or abusive contributions", is in full accord with both Article 52 of the Hague Regulations and with the 1919 list of war crimes. So also is Article 214 of the French Code of Military Justice, under which the accused was found guilty and convicted. It speaks of "abusive requisitioning", which term is similar to that of "exorbitant" requisitions mentioned in the 1919 list, and treats as "illegal" and criminal the fact of omitting or refusing proper receipt, as required by the Hague Regulations.

In this manner, the offence of the accused appears to be a clear case of a war crime covered by the laws and customs of war as prescribed both in international and French municipal law. The French law referred to by the Prosecution and the Court is an illustration of how rules of international law, such as the one now contained in Article 52 of the Hague Regulations, have found their way into municipal penal law, and how they complemented each other. Provisions of the Ordinance of 28th August, 1944, and of French penal law speak of "illegal" or "abusive" requisitioning without defining either concept. Elements for a definition are to be found in Article 52 of the Hague Regulations. This provides that requisitionings are to be limited to the "needs of the army of occupation" and that they must, at the same time, "be in proportion to the resources of the country". The objects requisitioned are defined so as to include property on the one hand (requisitions "in kind") and manpower or labour on the other (requisitions "in services"). A further legal limitation on acts of requisitioning is that such acts relating to manpower must "not involve the inhabitants in the obligation of taking part in military operations against their own country". Any violation of these limitations amounts to illegal or abusive requisitioning, or both, and constitutes a war crime.

The offence for which the accused was found guilty eventually amounted to a case of "illegal" requisitioning, that of violating the requirements according to which, unless payment is made "in ready money", a receipt is to be given in respect of the objects requisitioned. As already stressed, the Court was not satisfied that any other offence had been committed by the accused. It therefore freed him from the charge that civilians were used on "military works" and that, by requisitioning their labour as well as their horses and vehicles, the accused had gone beyond the limitations imposed by Article 52 of the Hague Regulations. Although no reason for this can be found in the judgment, it is safe to assume that such a decision was reached on the merits of the facts and evidence which were made available to the Court. This probably includes the conclusion that the civilians concerned in the trial and their property were used "for the needs of the army of occupation" and were "in proportion to the resources" of the occupied territory. It may well include also the conclusion that repairs of military bicycles, motor-cycles and electrical installations, as charged by the Prosecution, did not involve the inhabitants in taking part in "military operations against their own country" and consequently did not amount to "military works" in the sense required by the laws and customs of war.

In the circumstances of the trial, the question whether and to what extent, generally speaking, the use of civilians on military work, as distinct from prisoners of war, is forbidden, is not answered in the judgment under review. No light is thrown upon the issue as to whether and if so what kind of "military works" amount to "taking part in military operations" against one's own country.<sup>(1)</sup> This question, however, occurs in other trials which are reported upon in these volumes.<sup>(2)</sup>

<sup>(1)</sup> On the issue at stake, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, H.M. Stationery Office, London, 1948, Chapter IX, B.

<sup>(2)</sup> See especially Vol. VII, pp. 53-58.

## CASE No. 54

## TRIAL OF KARL-HEINZ MOEHLE

BRITISH MILITARY COURT, HAMBURG

15TH TO 16TH OCTOBER, 1946

## A. OUTLINE OF THE PROCEEDINGS

## I. CHARGE AND THE EVIDENCE

The accused was charged with "Committing a war crime in that he, at Kiel, between September, 1942, and May, 1945, when senior officer of the 5th U-boat Flotilla, in violation of the laws and usages of war, gave orders to commanding officers of U-boats who were due to leave on war patrols that they were to destroy ships and their crews".

The Prosecution evidence was entirely documentary, consisting of statements made by the accused. The Defence called no witnesses other than the accused himself.

## 2. COMMON GROUND BETWEEN THE PROSECUTION AND THE DEFENCE

The accused was a Korvetten Kapitän in the German Navy and from September, 1942, to May, 1945, was the officer commanding the 5th U-boat Flotilla at Kiel. In this capacity it fell upon him to brief U-boat commanders prior to their going out on operational patrols. Part of this briefing—though by no means the essential part which was of a technical nature—was to acquaint the U-boat commanders with an order originating from the German U-boat Command. This order, called the "Laconia Order", was issued on the 17th September, 1942. It was in the nature of a standing order which was read regularly to the U-boat commanders. They were never given to them in writing. According to the accused the order stated:

"(1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.

"(2) Orders for bringing in captains and chief engineers still apply.

"(3) Rescue the shipwrecked only if their statements would be of importance for your boat.

"(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities."

The accused agreed that these orders went much further than the previous standing orders which had been issued by the U-boat Command in 1939.



If the U-boat commanders asked no questions, after that briefing, nothing further would be said; if they raised any queries, the accused would give them two examples to elucidate the policy of the Naval High Command. The first example was that of a U-boat reporting in its war log that it had encountered a raft with five British airmen on it in the Bay of Biscay. Being unable to take them on board the U-boat proceeded on its journey. The commander was severely reprimanded by the Commander-in-Chief, U-boats, and it was pointed out that the correct action would have been to destroy the raft since it was highly probable that the airmen would be rescued by the enemy and would once more go into action.

The second example was that of American ships sunk by U-boats off the Caribbean coast. The criticism levelled against the U-boat commanders who had sunk the ships was that the crews were not destroyed but reached the coast and took over new ships. This, according to the U-boat commander, was to be prevented. Ships and crews were to be destroyed.

After giving these two examples, not as his opinion but as the policy of Naval Command, the accused went on to say to the U-boat commanders:

"Officially you cannot get such an order from the U-boat Command. You act in this matter according to the dictates of your conscience. The safety of your own boat must always remain your primary consideration". The accused estimated that he had read out these orders and made the above comments to 300 or more U-boat commanders during the time he commanded the 5th Flotilla at Kiel. Many commanders after the reading of the order said: "That is quite clear and unequivocal, however hard it may be".

### 3. THE ISSUE

Since the Prosecutor and the Defence agreed on the wording of the orders from U-boat Command and the accused admitted having passed them on to all U-boat commanders whom he briefed, the Court had two questions to decide:

- (i) What was the true interpretation of these orders?
- (ii) Having put the true interpretation on them, were they contrary to the laws and usages of war?

#### (i) *The interpretation of the orders*

The Prosecution's case on this first question was that the orders clearly meant that the U-boat commanders should destroy ships and their crews. Quoting from a statement made by the accused, the Prosecutor said: "So far as concerns the order itself it undoubtedly states, and in particular to those who know the manner in which the Commander-in-Chief U-boats was known to have given his orders, that the High Command regarded it as desirable that not only ships but also their crews should be regarded as objects of attack. German propaganda was continuously stressing the shortage of crews for enemy merchant ships and the consequent difficulties. I, too, put this construction on their order".

The Defence case was that the orders were ambiguous and that by passing on these ambiguous orders with the final comment that each commander should follow the dictates of his conscience, Moehle had done the utmost he could do as a serving officer. The orders were ambiguous as they contained a prohibition against saving the crews but not an order to kill them.

During the course of the examination of the accused by the Judge Advocate the following exchange took place:

JUDGE ADVOCATE (after reading paragraph 1 of the orders): Do you agree or not that it comes to the same thing (i.e. the killing of the crew) if you send a lifeboat off in the middle of the Atlantic Ocean without a drop of water on board for the people to drink?

A.: Yes, in its effect it will very often be the same, but the prohibition to save the crew has been issued because of the fact that U-boats whilst trying to save the crews of sunk ships have been attacked. . . ."

Q.: Do you agree that what I have read to you clearly applies to people after they have left the ship?

A.: Yes, that no safety measure should be undertaken.

Q.: Do you think there was a single U-boat commander in the German Navy who could be in any doubt as to the meaning of that first paragraph?

A.: No.

Q.: Do you think if you had tried to make it clearer, you could have made it clearer?

A.: No, the prohibition to undertake rescue measures could not have been explained more explicitly.

Q.: Do you then agree with me that there is no ambiguity whatever in paragraph 1 of that Admiral Doenitz Order?

A.: I agree with that.

#### (ii) *The Legality of the Order*

If the order was an order not to rescue survivors because it was dangerous for the U-boat to do so then it was a legal order. If the order was an order to kill survivors, then it was clearly illegal.

The Judge Advocate, summing up, said: "The Prosecution asked you to say that there is no formidable question of international law involved. They say that you should hold that international law is quite clear. After a ship has been sunk there is a duty upon the submarine commander (if he can, in all circumstances) to save the lives of the crew and they invite you to say (whether you accept that contention or not) that the order is directed to that aspect of the case and no further. They ask you to read it and they ask you to say: does it not all deal with the question of rescuing members of ships sunk after that has taken place. I do not think anybody is putting up the

proposition that if it were possible to save the lives of the crew from a ship that it torpedoed that there is not a duty to try and do so. Now I am sure that the naval officer in the Court will tell you what I think you already know and I think we all concede that the real important duty of the submarine commander is to ensure the safety of his own ship, and if it is a question of saving life or saving his ship, then clearly he must save his ship. But the Prosecution are saying here that that order which was distributed to the U-boat commanders is of the widest possible wording. Whether that is right or not is for you to decide."

#### 4. FINDING AND SENTENCE

The accused Moehle was found guilty and sentenced to five years imprisonment.

### B. NOTES ON THE CASE<sup>1</sup>

#### 1. SUBMARINE WARFARE IN GENERAL

Article 16 of Convention No. 10 agreed upon at the Hague in 1907 says: "After every encounter the two belligerents shall as far as military interests permit, take steps to search for the shipwrecked, wounded and sick and protect them (as well as the dead) against pillage and ill-treatment". This is the general rule of maritime warfare. Its application to submarine warfare was laid down in Article 22 of the Naval Agreement concluded in London in 1930.<sup>(2)</sup> "In their action with regard to merchant ships, submarines must conform to the rule of international law to which surface vessels are subject; in particular, except in cases of persistent refusal to stop on being duly summoned or active resistance to visit and search a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose, ships boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board."

This Naval Agreement was signed by the United States, Great Britain, France, Italy and Japan. When it expired in 1936, the above-mentioned Powers signed in London the "Naval Protocol"<sup>(3)</sup> 6th November, 1936, dealing with submarine warfare. This Naval Protocol incorporated the above-mentioned provisions of the London Agreement of 1930, with regard to submarines. Germany acceded to this Protocol in the same year, and this was the position at the outbreak of the second World War in September, 1939. Shortly after the outbreak of war, Germany embarked once more on

<sup>(1)</sup> Regarding the British law on war crimes questions, see Vol. I, pp. 105-110.

<sup>(2)</sup> Treaty Series No. 1 (1931), Cmd. 3758.

<sup>(3)</sup> Treaty Series No. 29 (1936), Cmd. 5302.

unrestricted submarine warfare against neutral and enemy vessels contrary to the 1936 Naval Protocol. On 27th November, 1939, Great Britain issued an Order in Council pronouncing retaliatory measures on the ground that Germany had violated her obligations under the Naval Protocol. (This Order in Council was modelled on an Order in Council dated 11th March, 1915, protesting against the violation of the Hague Convention by Germany in the first World War.) France and various neutral countries protested against the unrestricted submarine warfare carried out by the German Naval Command as being contrary to international law. Another retaliatory measure adopted by the Allies was the laying of mines in the Skagerrak in April, 1940.

The two main arguments put forward by German writers to justify Germany's conduct are:

(i) That the provisions of the Protocol of 1936 do not apply to attacks on vessels in "operational zones"; by entering such operational zones barred to merchant ships the vessel behaves in a manner which is tantamount to "persistent refusal to stop" and thus puts itself outside the Naval Protocol.<sup>(1)</sup>

This argument was rejected by the International Military Tribunal at Nuremberg. The Judgment points out that the practice of proclaiming operational zones and sinking of merchant vessels entering those zones was employed by Germany in the 1914-1918 war and adopted in retaliation by Great Britain. The Washington Conference of 1922, the Land and Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.

(ii) That Great Britain, in accordance with the Handbook of Instructions of the Merchant Navy of 1938, armed her merchant vessels and in many cases convoyed them with an armed escort, and that these armed merchantmen had orders to send position reports on sighting U-boats, thus integrating the Merchant Navy into the network of naval intelligence. This argument was entertained by the International Military Tribunal at Nuremberg, and in its judgment the Tribunal said with regard to the accused Doenitz: "In the actual circumstances of this case the Tribunal is not prepared to hold Doenitz guilty of his conduct of submarine warfare against British armed merchant ships", and "in view of all the facts proved, and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak 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 that nation entered the war, the sentence on Doenitz

<sup>(1)</sup> "Schmitz Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht" 8 (1938), p. 671. Also Oppenheim-Lauterpacht, International Law, 6th edition, Vol. II, p. 385, footnote 2.



is not assessed on the ground of his breaches of the international law of submarine warfare".<sup>(1)</sup>

## 2. THE TREATMENT OF SURVIVORS AFTER A SINKING OF A VESSEL BY SUBMARINE

If a submarine commander can, without danger to his boat, save or succour survivors, he is no doubt under a duty to do so. If, however, by so doing he would endanger his boat he cannot be held responsible if he does not save any such survivors since it is recognised that the safety of his own boat and its crew must be his primary consideration. It is clearly recognised, on the other hand, that the killing of defenceless survivors of a torpedoed ship is a war crime.<sup>(2)</sup>

The Defence argued that the "Laconia Order" of 1942 was an order to impress upon the U-boat commanders that they should not rescue survivors as doing so endangered their U-boats. The "Laconia Order" was thus a legal order stressing an operational necessity. The Prosecutor argued that the "Laconia Order" was an order to kill survivors and thus against the generally recognised rules of sea warfare. The Judge Advocate left this question—the interpretation of a document, the authenticity of which was agreed by Defence and Prosecution—to the Court, though he suggested in his summing up that the order was an order to kill.

The International Military Tribunal, in their judgment on Admiral Doenitz, found that by the "Laconia Order" Doenitz had not deliberately ordered the killing of survivors of shipwrecked vessels. The Judgment said: "The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous and deserve the strongest censure". The finding of the Court in the Moehle case can be reconciled with the Nuremberg judgment. The International Military Tribunal decided that the "Laconia Order" was ambiguous. By commenting on this ambiguous order when passing it on, and by giving examples which undoubtedly must have given the U-boat commanders the impression that the policy of the Naval High Command was to kill ship's crews the accused removed this ambiguity. The order he passed on could be interpreted by a reasonable subordinate only in one way, namely, as an order to kill survivors. Thus, whereas there was a reasonable doubt as to the meaning of Doenitz's order and therefore the benefit of that doubt was given to Doenitz by the International Military Tribunal, there was no such doubt in view of the evidence before this Court on the way in which Moehle had added to this order.

## 3. THE DEFENCE THAT THE ILLEGAL ORDERS WERE NOT CARRIED OUT

Counsel for the Defence argued that the accused could not be held responsible "because there were no manifest effects of this order and even the Prosecutor has pointed out that no evidence of criminal actions as a result

<sup>(1)</sup> The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6964, p. 109.

<sup>(2)</sup> See summing up by the Judge Advocate in the Peleus Trial, Vol. I, p. 11.

of this order has been given and I may therefore put it to the Court that such crimes were not committed".

The Judge Advocate's reference to this point in his summing up was this: "Now the Prosecutor has quite clearly told you that he has no evidence to prove and establish that ships were sunk and sailors were drowned by the operations of the U-boat commanders as a result of this order, but generally, you do know that these orders were being repeated over and over again over a period of years, and during that time a great many sailors were killed and it is for you to decide, as service personnel, but do you think it is common sense and quite logical to assume that it is an irresistible inference that such orders and such explanations by the accused must have had some effect upon the ultimate course of conduct of U-boat commanders? Do you think that a U-boat commander, if he is a good German naval officer wishes to flout the views and directions of his higher command? That is a matter for you".

The charge, as laid, charges the accused with giving orders to U-boat commanders "that they were to destroy ships and their crews". Strictly speaking, therefore, what happened at a later date as a result of these orders is not relevant in deciding the question whether the accused did or did not issue the orders to kill the crews. It may, however, be argued that the question before the Court was how a reasonable U-boat commander would interpret the orders given by the accused and that therefore the way in which U-boat commanders did actually interpret these orders is material.

By finding the accused guilty the Court held that a military superior who issues orders which are against the laws and usages of war commits a war crime even if these orders were not carried out by his subordinates. Having found the accused guilty of issuing the illegal orders, the results of this order may be a relevant consideration in assessing the punishment.

## 4. THE RELATION OF THIS TRIAL TO OTHER WAR CRIMES TRIALS

The "Laconia Order" was issued by the German U-boat Command in 1942. It was passed on by Moehle as a commanding officer, 5th Flotilla, continuously from 1942 to 1945. In one case the sinking of the *Peleus* (a Greek ship chartered by the British Ministry of War Transport) by a U-boat, the "Laconia Order" was carried out by a U-boat commander, Heinz Eck.

The indictment against the German Major War Criminals charged the Commander-in-Chief U-boats, Grand Admiral Doenitz, *inter alia*, with the issuing of the "Laconia Order". In its judgment the International Military Tribunal recorded its opinion that the orders were "undoubtedly ambiguous" but were not deliberate orders for the killing of shipwrecked survivors.<sup>(1)</sup>

Heinz Eck was tried and convicted by a British Military Court at Hamburg in October, 1945.<sup>(2)</sup> for firing on and killing shipwrecked members of the crew of the S.S. *Peleus* which he had sunk in the Atlantic Ocean. Eck, though not pleading superior orders in his defence, quoted the "Laconia Order" verbatim when giving his evidence.

<sup>(1)</sup> Cmd. 6964, p. 109.

<sup>(2)</sup> See Vol. I of this series, case No. 1.

These three trials, seen together, deal with three stages of the same order, with the Admiral who originated the order, with the staff officer who passed it on and with the officer at the end of the chain of command who carried it out. Though there was no evidence that Eck had been one of the 300 U-boat commanders briefed by Moehle, he had received the "Laconia Order".

## CASE No. 55

## TRIAL OF HELMUTH VON RUCHTESCHELL

BRITISH MILITARY COURT, HAMBURG  
5TH TO 21ST MAY, 1947

## A. OUTLINE OF THE PROCEEDINGS

## 1. THE CHARGES

All five charges brought against the accused referred to his conduct when he commanded German armed raiders in the North Atlantic between 1940 and 1942. The charges were of three kinds:

- (i) that in two engagements he continued to fire after the enemy had indicated his surrender (first and fifth charges);
- (ii) that in two other engagements he sunk enemy merchant vessels without making any provision for the safety of the survivors (second and fourth charges);
- (iii) that after the engagement forming the subject of the fourth charge he ordered the firing at survivors on life-rafts (third charge).

The accused pleaded not guilty to all five charges.

## 2. THE EVIDENCE AND ARGUMENTS

## (i) Charges of prolongation of hostilities after surrender

(a) The Case of the *Davisian* (first charge)

The Prosecution alleged that the *Davisian*, a British merchant vessel, was attacked in daylight, without warning, by a German armed raider commanded by the accused on 10th July, 1940. The attacker destroyed her wireless aerial with his first salvo. He maintained heavy fire for about five minutes and then signalled "use your radio not". The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal. In spite of this, the raider's firing continued for 15 minutes, wounding 8 or 10 of the crew of the *Davisian*, whilst they were trying to abandon ship. The crew were later picked up by the raider.

The Defence relied on two members of the crew of the accused's ship, and on the log kept by the accused, to prove that no signal was received by the

raider. The log says: "After seven salvos I give the order to cease fire. The crew are taking to their boats. No wireless telegraph has been heard". The defence also contended that there was some movement amidship towards the gun, which caused the accused to re-open fire. The log says (on this point): "Shortly before the boats are put out I see a few men running aft to the gun. I immediately open direct fire on the gun with the 3.7 and 2 cm. The men run back to their boats and lower them to the water".

The Judge Advocate, summing up, directed the minds of the Court to three questions: (1) "Was the signal 'use your radio not' hoisted by the raider"; (2) "If so, was it acknowledged by the *Davisian*"; (3) "Was the accused justified in his belief that he saw men running to the gun, or were the crew of the *Davisian* merely sheltering from his fire?" When considering the last question, the Court had to bear in mind that the raider steamed across to the opposite side of the *Davisian* and the movement on deck of the *Davisian* might have been the natural result of the accused's tactics to spray the deck with anti-aircraft fire in order to hurry the crew in taking to their lifeboats.

(b) The case of the *Empire Dawn* (fifth charge)

The *Empire Dawn*, a British merchant ship, was attacked in the North Atlantic without warning by a raider commanded by the accused during the night of the 12th September, 1942. The first salvo set the bridge on fire and destroyed the wireless, but though the *Empire Dawn* was rendered powerless by the hit she nevertheless continued to progress, and she was still moving forward when she eventually started to sink. Her captain did not open fire. He signalled by means of a torch that he was abandoning ship.

The Prosecution alleged that in spite of this the fire continued whilst the lifeboats were being lowered, breaking the ropes of one of the lifeboats with the result that it crashed into the sea and several members of the crew were killed. The survivors were eventually picked up and taken aboard the raider.

The Defence argued that it was not proved that the torch worked, that even if it did work a signal made with an ordinary torch against the background of the blazing bridge could not be observed on board the raider as the crew were blinded by the flash of their own guns. The accused gave evidence to the effect that he received no signal from the *Empire Dawn*. He kept up the firing to hurry the crew to their lifeboats as it had been repeatedly observed by the German commanders that whilst some of the crew of a sinking ship had taken to their boats, others would continue to resist.

The questions the Court had to consider were similar to those regarding the first charge: (1) "Was the signal of surrender given"; (2) "If so, was it received"; (3) "If it was not received, did the accused by his conduct prevent himself from receiving any signal?"

The Judge Advocate advised the Court that even if they found as a fact that no signal was received by the raider, they could still convict the accused if they came to the conclusion "that the accused deliberately or recklessly avoided any question of surrender by making it impossible for the ship to make a signal".



(ii) *The charges of failing to make provisions for the safety of the survivors after a battle at sea*

(a) *The case of the Beaulieu (second charge)*

The *Beaulieu* was a Norwegian tanker and was attacked without warning by a raider commanded by the accused on the night of the 14th August, 1940.

The Prosecution's case rested entirely on the log kept by the accused. In this log the accused, after pointing out that the *Beaulieu* was sailing without lights and that that was sufficient proof for him that she was an enemy vessel, recorded that he attacked her at 2050 hours and put her out of action by scoring nine direct hits. The *Beaulieu* had stopped and had put on her navigation lights, her masthead lights and her deck lights. She used no radio and did not fire or attempt to man the gun. The log continued: "There is a boat aft at her stern, with a crew of about 18 or 20 men in it. The cutter on the starboard side was not yet in the water. I again bring the deck under fire at close range so as to be secure against a burst of fire from the enemy from rifles or pistols. The enemy boat disappeared in the darkness. I did not see it again and also did not notice how the second one put off. One cannot and may not worry about boats and wounded at night for one cannot be certain in advance when approaching them whether they are going to start rifle fire. If a boat were to come alongside of its own accord to get help I would never send it away, but apparently the tales about us are so brutal that they would rather set out on the long sea trip than approach a warship. There was much in the procedure that my crew had not understood. I had to make clear to them why the attacks had to take place at night now and why we were taking no more prisoners. I had the feeling that for the first time a sense of the seriousness of war had been brought home to my men and that was good."

The accused eventually moved off at 2328 hours without having made an attempt to rescue the survivors. The distance from the place of the sinking to the nearest shore was approximately 1,200 miles. Four members of the crew were killed by the raider's fire, the remainder were picked up by an Allied vessel after five and a half days at sea in their two boats.

The defence case was that the accused sent a party on board the *Beaulieu* to investigate and any survivors who had stayed on board would have been rescued by this boarding party and that the raider stayed in the vicinity of the abandoned *Beaulieu* for two and a half hours, circling round and by increased look-out and special attention did everything possible to trace survivors. The defendant met the argument that he should have put out lifeboats to search for the survivors by saying that a lifeboat in the Atlantic swell could see less than a great number of people who are on a ship five metres above the water level. He also argued that the reason for not using any searchlights was that his searchlights had been dismantled before the action started as past experience had shown that in view of their blinding effect they did more harm than good. Two expert witnesses (a British captain and a former German admiral) agreed that with regard to lowering lifeboats and the use of searchlights, they would have acted in the same way as the accused did.

The Judge Advocate, summing up, pointed out that the *Beaulieu* had done everything that the accused himself in the course of cross-examination had indicated could be expected as a sign of surrender. The accused had furthermore seen with his own eyes 18 to 20 survivors trying to lower the lifeboat. In spite of this he again brought the whole deck under fire. In view of this conduct, the Judge Advocate said the Court may think "that this story that the survivors were voluntarily preferring to travel the Atlantic instead of surrendering," becomes almost fantastic. The accused could not be expected to look indefinitely for persons who were quite voluntarily taking that course of their own accord, but if you come to the conclusion that they were influenced in their decision by a real fear induced by the savage and (as they thought) unreasonable persistence of the attack, then in my opinion if the accused knew they were being so frightened his duty after the sinking became a very much greater one. If you took that view about the matter, you would, in my opinion, be justified in reaching the conclusion (if you are satisfied that these facts had been proved), that the accused was guilty of the charge."

(b) *The case of the Anglo-Saxon (fourth charge)*

On the night of the 21st August, 1940, an armed raider commanded by the accused, attacked the *Anglo-Saxon*, a British merchant vessel, without warning. The first salvo hit the gun and blew up some ammunition, setting the stern ablaze. The raider's log said: "She had stopped and could go no farther". The *Anglo-Saxon* began to send out distress signals but the raider's wireless succeeded in jamming these signals. The log kept by the accused said: "The flak is in action at ranges of less than 1,000 metres and is firing on direct targets. It can scarcely be checked and is making such a noise that the 'cease fire' arrives much too late. For just a short time two lights were noticed in the vicinity of the steamer apparently from two boats which at one time kept a short morse traffic which, however, could not be read. Then no more lights or boats were seen. Since no distress messages of any kind were made I did not undertake any further search operations". One of the survivors of the *Anglo-Saxon* said in an affidavit admitted as evidence by the Court that the raider gave no chance for the launching of lifeboats by keeping up a continuous stream of fire with tracer ammunition. The witness saw two life-rafts signalling to each other, but his own lifeboat tried to avoid the raider's attention in view of the savagery of the attack that had preceded. Only two survivors reached land after 70 days at sea in their lifeboat. All others perished.

The main arguments of the Defence were:

1. That the prolonged spraying of the deck was accidental.
2. That the survivors tried to escape unnoticed, thus making it almost impossible for the raider to rescue them.
3. That, according to the expert witnesses, the place of sinking was on a main shipping route and that persons left in a lifeboat there had a fifty-fifty chance of surviving.

Since the accused must have known that there were survivors who had taken to their boats, the questions to be considered by the Court were:

person who gave him any of the above objects for the purpose agreed between the parties. The maximum penalty in such cases is two years' imprisonment and/or a fine not exceeding 120,000 francs; in certain cases, involving public confidence, the penalty can be increased to a maximum of 10 years and/or a fine of up to 600,000 francs.

In the case of Baus, the offence was committed in respect of the goods lent to him by Hocquart, for which he could not, in the circumstances, have been prosecuted as a thief. The decision of the Court on this Count is an illustration of how offences of this nature may fall within the purview of war crimes. Technically speaking, in French law their formal link with war crimes is established in the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes. Under Article 2, paragraph 8, any "removal" of French property from France in time of war, be it as a result of theft, "abuse of confidence" or any other act, is treated as pillage. This rule was applied by the Court not only in respect of the goods technically "stolen" by Baus, but also in respect of those misappropriated by "abusing the confidence" of their owner. Consequently, in French law the case against Baus under this Count was only a case of "pillagè" in the wider sense, brought within the terms of the Penal Code as having been committed by abusing the confidence of the victim of the crime. From the viewpoint of international law, it amounts to a specific type of pillage as developed by the laws and jurisprudence of one nation.

The interesting point, however, is that when passing sentence, the Court did not apply the penalty provided for pillage<sup>(1)</sup> but that for "abuse of confidence". This procedure would tend to indicate that the Court had taken the view that misappropriation by abuse of confidence was in itself a war crime, and that, consequently, the accused would have been held responsible even if he had not removed the property from French territory. In such case the trial would evidence a further illustration of war crimes against property, and of the laws and customs of war as understood by one nation. A justification for such a legal approach could then be founded on the terms of the preamble of the IVth Hague Convention and the claim made that it amounted to no innovation but only to the application of the general principles of penal law.<sup>(2)</sup> On the other hand it may well be that such a decision was due only to the French courts' tradition of subjecting war crimes to provisions of common penal law, instead of satisfying itself with implementing special war crimes legislation, as do certain other nations.

Sentences passed against war criminals for "abuse of confidence" are to be found in a number of other trials held by French courts.

In one case, the accused, Heinrich Weber, a German farmer who settled in France during the war, was charged with having abused his lodger's confidence by removing the latter's wireless set to Germany. He was convicted under Article 408 of the Penal Code and Article 2, paragraph 8,

<sup>(1)</sup> Article 2, paragraph 8, of the Ordinance of 28th August, 1944, prescribes the penalty provided in Article 221 of the French Code of Military Justice, dealing with pillage in time of war. The penalty is hard labour and not imprisonment, as provided for "abuse of confidence" under Article 408 of the Penal Code.

<sup>(2)</sup> See p. 64.

of the Ordinance of 28th August, 1944, the penalty being a short term of imprisonment as provided in the Penal Code (six months).<sup>(1)</sup>

In a similar case,<sup>(2)</sup> the accused, Elisa Kespar, wife of a German settler in France, removed to Germany the furniture of the French family whose dwelling she occupied with her husband. She was convicted for abuse of confidence and sentenced to imprisonment for four months.

In another case the accused was a German engineer who rented a French enterprise. He was convicted for abusing the owner's confidence by selling a horse belonging to the enterprise and "dissipating" the money received from the sale. Here again the conviction was made under Article 408 of the Penal Code and Article 2, paragraph 8, of the Ordinance of 28th August, 1944, the sentence being, as in the previous case, set out in the Penal Code (six months' imprisonment).<sup>(3)</sup>

### CASE No. 53

#### TRIAL OF PHILIPPE RUST

PERMANENT MILITARY TRIBUNAL AT METZ  
JUDGMENT DELIVERED ON 5TH MARCH, 1948

#### *Illegal and Abusive Requisitioning*

#### A. OUTLINE OF THE PROCEEDINGS

The accused, Philippe Rust, an S.S. Obersturmfuehrer serving in occupied France, district of Moselle, was charged with "abusive and illegal requisitioning" of French property and with "employing French subjects on military works".

It was alleged by the Prosecution that in September, 1944, a local inhabitant, Marcel Schmitt, was ordered and forced by the accused to supply horses and vehicles with which he had to carry German ammunition, and that he was compelled to repair German military bicycles, motor-cycles and electrical installations. It was also alleged that several other French civilians had been subjected to the same treatment, and that the acts of requisitioning were illegally effected in that no receipts were delivered to the owners of horses and vehicles.

The accused pleaded not guilty. He claimed to have acted under superior orders and to have omitted to deliver receipts because the requisitions were in conformity with "usages".

<sup>(1)</sup> Judgment of the Permanent Military Tribunal at Metz, delivered on 21st August, 1947.

<sup>(2)</sup> Judgment of the Permanent Military Tribunal at Metz, delivered on 6th April, 1948.

<sup>(3)</sup> Judgment of the Permanent Military Tribunal at Metz, delivered on the 25th November, 1947.



The accused was found guilty of "abusing powers conferred upon him to requisition men and vehicles by refusing to deliver receipts". He was condemned to imprisonment for one year.

#### B. NOTES ON THE NATURE OF THE OFFENCE

The Prosecution had charged the accused on two Counts. The first Count of "abusive and illegal requisitioning" of property was regarded as a case of pillage in time of war, as covered by Article 221 of the French Code of Military Justice and Article 2 of the Ordinance of 28th August, 1944. This was done in accordance with the latter provision which, in its paragraph 8, explicitly says that "abusive or illegal requisitioning" is treated as pillage, within the terms of Article 221 of the Code of Military Justice. This in turn deals generally with pillage committed by military personnel. The second Count of "using French subjects on military works" of the enemy was treated by the Prosecution as falling under Article 334 of the Penal Code and being a case of "illegal restraint of persons". This was done in accordance with Article 2, paragraph 6, of the Ordinance of 28th August, 1944, which expressly includes under the notion of "illegal restraint" the use of civilians or prisoners of war on military works.

When dealing with these charges the Court made alterations in respect of the offences and the relevant provisions of substantive law. No specific reasons for these alternatives were given in the judgment, but from the questions put by the President to the members of the Tribunal and their answers, it appears that, in view of the evidence, the Court found the accused not guilty of the charges as submitted by the Prosecution. It dismissed the charge that the accused had committed requisitions of property amounting to pillage, and also the charge that civilians were used on military works. Instead, the Court found the accused guilty in respect of both property and civilian labour, of the following offence:

"Abusing powers conferred upon him for the purpose of requisitioning men and vehicles by refusing to deliver receipts for such requisitions."

In this respect the Court applied Article 214 of the Code of Military Justice. This punishes "any military person who abuses powers conferred upon him" in regard to requisitioning or "who refuses to deliver receipts" for such requisitions. These alterations affected the penalty to be imposed. Whereas the offence of illegal requisitioning amounting to pillage under Article 2, paragraph 8, of the Ordinance of 28th August, 1944, and Article 221 of the Code of Military Justice, and the offence of "restraining" civilians by forcing them to perform military work as provided in Article 2, paragraph 6 of the Ordinance and Article 344 of the Penal Code, both entail hard labour, as a rule for life, the punishment for an offence under Article 214 of the Code of Military Justice is limited to imprisonment for from two months to two years.

It should be noted that in the findings of the Court as quoted above, the objects requisitioned were specifically stated to comprise not only property but also manpower or labour. It equally follows from the same findings that the abuse for which the accused was found guilty consisted in the requisition being made without due delivery of receipts concerning the property and labour requisitioned.

The alteration of relevant provisions of substantive law was effected by the Court in accordance with a rule of procedure contained in Article 88 of the Code of Military Justice. Under this provision the findings of the Military Tribunal are reached by means of questions put by the President to the Judges, in which he sums up the issues at stake as deriving from the indictment. In this connection whenever the President finds that the main offence may be regarded as an act entailing a different punishment or representing an offence against common penal law, he is entitled to submit to the Court subsidiary questions to this effect and obtain a decision on the alternatives. It is on the basis of this rule that the Tribunal rejected the charges and provisions invoked by the Prosecution and replaced them by findings of its own.

The charges of the Prosecution and the decision of the Court were centred around the concept of illegal or abusive requisitioning of property and labour. The issue is dealt with in Article 52 of the Hague Regulations, 1907, respecting the Laws and Customs of War on Land, which reads:

"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."

Violations of this rule were included by the 1919 Commission on Responsibilities in its list of war crimes under Item XV and described therein as "exaction of illegitimate or of exorbitant contributions and requisitions". It will be noted that the phraseology used in the previously quoted provision of the French Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, Article 2, paragraph 8, which used the terms "illegal or abusive contributions", is in full accord with both Article 52 of the Hague Regulations and with the 1919 list of war crimes. So also is Article 214 of the French Code of Military Justice, under which the accused was found guilty and convicted. It speaks of "abusive requisitioning", which term is similar to that of "exorbitant" requisitions mentioned in the 1919 list, and treats as "illegal" and criminal the fact of omitting or refusing proper receipt, as required by the Hague Regulations.

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In this manner, the offence of the accused appears to be a clear case of a war crime covered by the laws and customs of war as prescribed both in international and French municipal law. The French law referred to by the Prosecution and the Court is an illustration of how rules of international law, such as the one now contained in Article 52 of the Hague Regulations, have found their way into municipal penal law, and how they complemented each other. Provisions of the Ordinance of 28th August, 1944, and of French penal law speak of "illegal" or "abusive" requisitioning without defining either concept. Elements for a definition are to be found in Article 52 of the Hague Regulations. This provides that requisitionings are to be limited to the "needs of the army of occupation" and that they must, at the same time, "be in proportion to the resources of the country". The objects requisitioned are defined so as to include property on the one hand (requisitions "in kind") and manpower or labour on the other (requisitions "in services"). A further legal limitation on acts of requisitioning is that such acts relating to manpower must "not involve the inhabitants in the obligation of taking part in military operations against their own country". Any violation of these limitations amounts to illegal or abusive requisitioning, or both, and constitutes a war crime.

The offence for which the accused was found guilty eventually amounted to a case of "illegal" requisitioning, that of violating the requirements according to which, unless payment is made "in ready money", a receipt is to be given in respect of the objects requisitioned. As already stressed, the Court was not satisfied that any other offence had been committed by the accused. It therefore freed him from the charge that civilians were used on "military works" and that, by requisitioning their labour as well as their horses and vehicles, the accused had gone beyond the limitations imposed by Article 52 of the Hague Regulations. Although no reason for this can be found in the judgment, it is safe to assume that such a decision was reached on the merits of the facts and evidence which were made available to the Court. This probably includes the conclusion that the civilians concerned in the trial and their property were used "for the needs of the army of occupation" and were "in proportion to the resources" of the occupied territory. It may well include also the conclusion that repairs of military bicycles, motor-cycles and electrical installations, as charged by the Prosecution, did not involve the inhabitants in taking part in "military operations against their own country" and consequently did not amount to "military works" in the sense required by the laws and customs of war.

In the circumstances of the trial, the question whether and to what extent, generally speaking, the use of civilians on military work, as distinct from prisoners of war, is forbidden, is not answered in the judgment under review. No light is thrown upon the issue as to whether and if so what kind of "military works" amount to "taking part in military operations" against one's own country.<sup>(1)</sup> This question, however, occurs in other trials which are reported upon in these volumes.<sup>(2)</sup>

<sup>(1)</sup> On the issue at stake, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, H.M. Stationery Office, London, 1948, Chapter IX, B.

<sup>(2)</sup> See especially Vol. VII, pp. 53-58.

## CASE No. 54

## TRIAL OF KARL-HEINZ MOEHLE

BRITISH MILITARY COURT, HAMBURG

15TH TO 16TH OCTOBER, 1946

## A. OUTLINE OF THE PROCEEDINGS

## 1. CHARGE AND THE EVIDENCE

The accused was charged with "Committing a war crime in that he, at Kiel, between September, 1942, and May, 1945, when senior officer of the 5th U-boat Flotilla, in violation of the laws and usages of war, gave orders to commanding officers of U-boats who were due to leave on war patrols that they were to destroy ships and their crews".

The Prosecution evidence was entirely documentary, consisting of statements made by the accused. The Defence called no witnesses other than the accused himself.

## 2. COMMON GROUND BETWEEN THE PROSECUTION AND THE DEFENCE

The accused was a Korvetten Kapitän in the German Navy and from September, 1942, to May, 1945, was the officer commanding the 5th U-boat Flotilla at Kiel. In this capacity it fell upon him to brief U-boat commanders prior to their going out on operational patrols. Part of this briefing—though by no means the essential part which was of a technical nature—was to acquaint the U-boat commanders with an order originating from the German U-boat Command. This order, called the "Laconia Order", was issued on the 17th September, 1942. It was in the nature of a standing order which was read regularly to the U-boat commanders. They were never given to them in writing. According to the accused the order stated:

"(1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.

"(2) Orders for bringing in captains and chief engineers still apply.

"(3) Rescue the shipwrecked only if their statements would be of importance for your boat.

"(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities."

The accused agreed that these orders went much further than the previous standing orders which had been issued by the U-boat Command in 1939.

If the U-boat commanders asked no questions, after that briefing, nothing further would be said; if they raised any queries, the accused would give them two examples to elucidate the policy of the Naval High Command. The first example was that of a U-boat reporting in its war log that it had encountered a raft with five British airmen on it in the Bay of Biscay. Being unable to take them on board the U-boat proceeded on its journey. The commander was severely reprimanded by the Commander-in-Chief, U-boats, and it was pointed out that the correct action would have been to destroy the raft since it was highly probable that the airmen would be rescued by the enemy and would once more go into action.

The second example was that of American ships sunk by U-boats off the Caribbean coast. The criticism levelled against the U-boat commanders who had sunk the ships was that the crews were not destroyed but reached the coast and took over new ships. This, according to the U-boat commander, was to be prevented. Ships and crews were to be destroyed.

After giving these two examples, not as his opinion but as the policy of Naval Command, the accused went on to say to the U-boat commanders:

"Officially you cannot get such an order from the U-boat Command. You act in this matter according to the dictates of your conscience. The safety of your own boat must always remain your primary consideration". The accused estimated that he had read out these orders and made the above comments to 300 or more U-boat commanders during the time he commanded the 5th Flotilla at Kiel. Many commanders after the reading of the order said: "That is quite clear and unequivocal, however hard it may be".

### 3. THE ISSUE

Since the Prosecutor and the Defence agreed on the wording of the orders from U-boat Command and the accused admitted having passed them on to all U-boat commanders whom he briefed, the Court had two questions to decide:

- (i) What was the true interpretation of these orders?
- (ii) Having put the true interpretation on them, were they contrary to the laws and usages of war?

#### (i) *The interpretation of the orders*

The Prosecution's case on this first question was that the orders clearly meant that the U-boat commanders should destroy ships and their crews. Quoting from a statement made by the accused, the Prosecutor said: "So far as concerns the order itself it undoubtedly states, and in particular to those who know the manner in which the Commander-in-Chief U-boats was known to have given his orders, that the High Command regarded it as desirable that not only ships but also their crews should be regarded as objects of attack. German propaganda was continuously stressing the shortage of crews for enemy merchant ships and the consequent difficulties. I, too, put this construction on their order".

The Defence case was that the orders were ambiguous and that by passing on these ambiguous orders with the final comment that each commander should follow the dictates of his conscience, Moehle had done the utmost he could do as a serving officer. The orders were ambiguous as they contained a prohibition against saving the crews but not an order to kill them.

During the course of the examination of the accused by the Judge Advocate the following exchange took place:

JUDGE ADVOCATE (after reading paragraph 1 of the orders): Do you agree or not that it comes to the same thing (i.e. the killing of the crew) if you send a lifeboat off in the middle of the Atlantic Ocean without a drop of water on board for the people to drink?

A.: Yes, in its effect it will very often be the same, but the prohibition to save the crew has been issued because of the fact that U-boats whilst trying to save the crews of sunk ships have been attacked. . . ."

Q.: Do you agree that what I have read to you clearly applies to people after they have left the ship?

A.: Yes, that no safety measure should be undertaken.

Q.: Do you think there was a single U-boat commander in the German Navy who could be in any doubt as to the meaning of that first paragraph?

A.: No.

Q.: Do you think if you had tried to make it clearer, you could have made it clearer?

A.: No, the prohibition to undertake rescue measures could not have been explained more explicitly.

Q.: Do you then agree with me that there is no ambiguity whatever in paragraph 1 of that Admiral Doenitz Order?

A.: I agree with that.

#### (ii) *The Legality of the Order*

If the order was an order not to rescue survivors because it was dangerous for the U-boat to do so then it was a legal order. If the order was an order to kill survivors, then it was clearly illegal.

The Judge Advocate, summing up, said: "The Prosecution asked you to say that there is no formidable question of international law involved. They say that you should hold that international law is quite clear. After a ship has been sunk there is a duty upon the submarine commander (if he can, in all circumstances) to save the lives of the crew and they invite you to say (whether you accept that contention or not) that the order is directed to that aspect of the case and no further. They ask you to read it and they ask you to say: does it not all deal with the question of rescuing members of ships sunk after that has taken place. I do not think anybody is putting up the



proposition that if it were possible to save the lives of the crew from a ship that it torpedoed that there is not a duty to try and do so. Now I am sure that the naval officer in the Court will tell you what I think you already know and I think we all concede that the real important duty of the submarine commander is to ensure the safety of his own ship, and if it is a question of saving life or saving his ship, then clearly he must save his ship. But the Prosecution are saying here that that order which was distributed to the U-boat commanders is of the widest possible wording. Whether that is right or not is for you to decide".

#### 4. FINDING AND SENTENCE

The accused Moehle was found guilty and sentenced to five years imprisonment.

### B. NOTES ON THE CASE<sup>1</sup>

#### 1. SUBMARINE WARFARE IN GENERAL

Article 16 of Convention No. 10 agreed upon at the Hague in 1907 says: "After every encounter the two belligerents shall as far as military interests permit, take steps to search for the shipwrecked, wounded and sick and protect them (as well as the dead) against pillage and ill-treatment". This is the general rule of maritime warfare. Its application to submarine warfare was laid down in Article 22 of the Naval Agreement concluded in London in 1930.<sup>(2)</sup> "In their action with regard to merchant ships, submarines must conform to the rule of international law to which surface vessels are subject; in particular, except in cases of persistent refusal to stop on being duly summoned or active resistance to visit and search a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose, ships boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board."

This Naval Agreement was signed by the United States, Great Britain, France, Italy and Japan. When it expired in 1936, the above-mentioned Powers signed in London the "Naval Protocol"<sup>(3)</sup> 6th November, 1936, dealing with submarine warfare. This Naval Protocol incorporated the above-mentioned provisions of the London Agreement of 1930, with regard to submarines. Germany acceded to this Protocol in the same year, and this was the position at the outbreak of the second World War in September, 1939. Shortly after the outbreak of war, Germany embarked once more on

<sup>(1)</sup> Regarding the British law on war crimes questions, see Vol. I, pp. 105-110.

<sup>(2)</sup> Treaty Series No. 1 (1931), Cmd. 3758.

<sup>(3)</sup> Treaty Series No. 29 (1936), Cmd. 5302.

unrestricted submarine warfare against neutral and enemy vessels contrary to the 1936 Naval Protocol. On 27th November, 1939, Great Britain issued an Order in Council pronouncing retaliatory measures on the ground that Germany had violated her obligations under the Naval Protocol. (This Order in Council was modelled on an Order in Council dated 11th March, 1915, protesting against the violation of the Hague Convention by Germany in the first World War.) France and various neutral countries protested against the unrestricted submarine warfare carried out by the German Naval Command as being contrary to international law. Another retaliatory measure adopted by the Allies was the laying of mines in the Skagerrak in April, 1940.

The two main arguments put forward by German writers to justify Germany's conduct are:

(i) That the provisions of the Protocol of 1936 do not apply to attacks on vessels in "operational zones"; by entering such operational zones barred to merchant ships the vessel behaves in a manner which is tantamount to "persistent refusal to stop" and thus puts itself outside the Naval Protocol.<sup>(1)</sup>

This argument was rejected by the International Military Tribunal at Nuremberg. The Judgment points out that the practice of proclaiming operational zones and sinking of merchant vessels entering those zones was employed by Germany in the 1914-1918 war and adopted in retaliation by Great Britain. The Washington Conference of 1922, the Land and Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.

(ii) That Great Britain, in accordance with the Handbook of Instructions of the Merchant Navy of 1938, armed her merchant vessels and in many cases convoyed them with an armed escort, and that these armed merchant-men had orders to send position reports on sighting U-boats, thus integrating the Merchant Navy into the network of naval intelligence. This argument was entertained by the International Military Tribunal at Nuremberg, and in its judgment the Tribunal said with regard to the accused Doenitz: "In the actual circumstances of this case the Tribunal is not prepared to hold Doenitz guilty of his conduct of submarine warfare against British armed merchant ships", and "in view of all the facts proved, and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak 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 that nation entered the war, the sentence on Doenitz

<sup>(1)</sup> "Schmitz Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht" 8 (1938), p. 671. Also Oppenheim-Lauterpacht, International Law, 6th edition, Vol. II, p. 385, footnote 2.

is not assessed on the ground of his breaches of the international law of submarine warfare".<sup>(1)</sup>

## 2. THE TREATMENT OF SURVIVORS AFTER A SINKING OF A VESSEL BY SUBMARINE

If a submarine commander can, without danger to his boat, save or succour survivors, he is no doubt under a duty to do so. If, however, by so doing he would endanger his boat he cannot be held responsible if he does not save any such survivors since it is recognised that the safety of his own boat and its crew must be his primary consideration. It is clearly recognised, on the other hand, that the killing of defenceless survivors of a torpedoed ship is a war crime.<sup>(2)</sup>

The Defence argued that the "Laconia Order" of 1942 was an order to impress upon the U-boat commanders that they should not rescue survivors as doing so endangered their U-boats. The "Laconia Order" was thus a legal order stressing an operational necessity. The Prosecutor argued that the "Laconia Order" was an order to kill survivors and thus against the generally recognised rules of sea warfare. The Judge Advocate left this question—the interpretation of a document, the authenticity of which was agreed by Defence and Prosecution—to the Court, though he suggested in his summing up that the order was an order to kill.

The International Military Tribunal, in their judgment on Admiral Doenitz, found that by the "Laconia Order" Doenitz had not deliberately ordered the killing of survivors of shipwrecked vessels. The Judgment said: "The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous and deserve the strongest censure". The finding of the Court in the Moehle case can be reconciled with the Nuremberg judgment. The International Military Tribunal decided that the "Laconia Order" was ambiguous. By commenting on this ambiguous order when passing it on, and by giving examples which undoubtedly must have given the U-boat commanders the impression that the policy of the Naval High Command was to kill ship's crews the accused removed this ambiguity. The order he passed on could be interpreted by a reasonable subordinate only in one way, namely, as an order to kill survivors. Thus, whereas there was a reasonable doubt as to the meaning of Doenitz's order and therefore the benefit of that doubt was given to Doenitz by the International Military Tribunal, there was no such doubt in view of the evidence before this Court on the way in which Moehle had added to this order.

## 3. THE DEFENCE THAT THE ILLEGAL ORDERS WERE NOT CARRIED OUT

Counsel for the Defence argued that the accused could not be held responsible "because there were no manifest effects of this order and even the Prosecutor has pointed out that no evidence of criminal actions as a result

<sup>(1)</sup> The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6964, p. 109.

<sup>(2)</sup> See summing up by the Judge Advocate in the Peleus Trial, Vol. I, p. 11.

of this order has been given and I may therefore put it to the Court that such crimes were not committed".

The Judge Advocate's reference to this point in his summing up was this: "Now the Prosecutor has quite clearly told you that he has no evidence to prove and establish that ships were sunk and sailors were drowned by the operations of the U-boat commanders as a result of this order, but generally, you do know that these orders were being repeated over and over again over a period of years, and during that time a great many sailors were killed and it is for you to decide, as service personnel, but do you think it is common sense and quite logical to assume that it is an irresistible inference that such orders and such explanations by the accused must have had some effect upon the ultimate course of conduct of U-boat commanders? Do you think that a U-boat commander, if he is a good German naval officer wishes to flout the views and directions of his higher command? That is a matter for you".

The charge, as laid, charges the accused with giving orders to U-boat commanders "that they were to destroy ships and their crews". Strictly speaking, therefore, what happened at a later date as a result of these orders is not relevant in deciding the question whether the accused did or did not issue the orders to kill the crews. It may, however, be argued that the question before the Court was how a reasonable U-boat commander would interpret the orders given by the accused and that therefore the way in which U-boat commanders did actually interpret these orders is material.

By finding the accused guilty the Court held that a military superior who issues orders which are against the laws and usages of war commits a war crime even if these orders were not carried out by his subordinates. Having found the accused guilty of issuing the illegal orders, the results of this order may be a relevant consideration in assessing the punishment.

## 4. THE RELATION OF THIS TRIAL TO OTHER WAR CRIMES TRIALS

The "Laconia Order" was issued by the German U-boat Command in 1942. It was passed on by Moehle as a commanding officer, 5th Flotilla, continuously from 1942 to 1945. In one case the sinking of the *Peleus* (a Greek ship chartered by the British Ministry of War Transport) by a U-boat, the "Laconia Order" was carried out by a U-boat commander, Heinz Eck.

The indictment against the German Major War Criminals charged the Commander-in-Chief U-boats, Grand Admiral Doenitz, *inter alia*, with the issuing of the "Laconia Order". In its judgment the International Military Tribunal recorded its opinion that the orders were "undoubtedly ambiguous" but were not deliberate orders for the killing of shipwrecked survivors.<sup>(1)</sup>

Heinz Eck was tried and convicted by a British Military Court at Hamburg in October, 1945.<sup>(2)</sup> for firing on and killing shipwrecked members of the crew of the S.S. *Peleus* which he had sunk in the Atlantic Ocean. Eck, though not pleading superior orders in his defence, quoted the "Laconia Order" verbatim when giving his evidence.

<sup>(1)</sup> Cmd. 6964, p. 109.

<sup>(2)</sup> See Vol. I of this series, case No. 1.



These three trials, seen together, deal with three stages of the same order, with the Admiral who originated the order, with the staff officer who passed it on and with the officer at the end of the chain of command who carried it out. Though there was no evidence that Eck had been one of the 300 U-boat commanders briefed by Moehle, he had received the "Laconia Order".

### CASE No. 55

#### TRIAL OF HELMUTH VON RUCHTESCHELL

BRITISH MILITARY COURT, HAMBURG  
5TH TO 21ST MAY, 1947

#### A. OUTLINE OF THE PROCEEDINGS

##### 1. THE CHARGES

All five charges brought against the accused referred to his conduct when he commanded German armed raiders in the North Atlantic between 1940 and 1942. The charges were of three kinds:

- (i) that in two engagements he continued to fire after the enemy had indicated his surrender (first and fifth charges);
- (ii) that in two other engagements he sunk enemy merchant vessels without making any provision for the safety of the survivors (second and fourth charges);
- (iii) that after the engagement forming the subject of the fourth charge he ordered the firing at survivors on life-rafts (third charge).

The accused pleaded not guilty to all five charges.

##### 2. THE EVIDENCE AND ARGUMENTS

###### (i) Charges of prolongation of hostilities after surrender

###### (a) The Case of the *Davisian* (first charge)

The Prosecution alleged that the *Davisian*, a British merchant vessel, was attacked in daylight, without warning, by a German armed raider commanded by the accused on 10th July, 1940. The attacker destroyed her wireless aerial with his first salvo. He maintained heavy fire for about five minutes and then signalled "use your radio not". The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal. In spite of this, the raider's firing continued for 15 minutes, wounding 8 or 10 of the crew of the *Davisian*, whilst they were trying to abandon ship. The crew were later picked up by the raider.

The Defence relied on two members of the crew of the accused's ship, and on the log kept by the accused, to prove that no signal was received by the

raider. The log says: "After seven salvos I give the order to cease fire. The crew are taking to their boats. No wireless telegraph has been heard". The defence also contended that there was some movement amidship towards the gun, which caused the accused to re-open fire. The log says (on this point): "Shortly before the boats are put out I see a few men running aft to the gun. I immediately open direct fire on the gun with the 3.7 and 2 cm. The men run back to their boats and lower them to the water".

The Judge Advocate, summing up, directed the minds of the Court to three questions: (1) "Was the signal 'use your radio not' hoisted by the raider"; (2) "If so, was it acknowledged by the *Davisian*"; (3) "Was the accused justified in his belief that he saw men running to the gun, or were the crew of the *Davisian* merely sheltering from his fire?" When considering the last question, the Court had to bear in mind that the raider steamed across to the opposite side of the *Davisian* and the movement on deck of the *Davisian* might have been the natural result of the accused's tactics to spray the deck with anti-aircraft fire in order to hurry the crew in taking to their lifeboats.

###### (b) The case of the *Empire Dawn* (fifth charge)

The *Empire Dawn*, a British merchant ship, was attacked in the North Atlantic without warning by a raider commanded by the accused during the night of the 12th September, 1942. The first salvo set the bridge on fire and destroyed the wireless, but though the *Empire Dawn* was rendered powerless by the hit she nevertheless continued to progress, and she was still moving forward when she eventually started to sink. Her captain did not open fire. He signalled by means of a torch that he was abandoning ship.

The Prosecution alleged that in spite of this the fire continued whilst the lifeboats were being lowered, breaking the ropes of one of the lifeboats with the result that it crashed into the sea and several members of the crew were killed. The survivors were eventually picked up and taken aboard the raider.

The Defence argued that it was not proved that the torch worked, that even if it did work a signal made with an ordinary torch against the background of the blazing bridge could not be observed on board the raider as the crew were blinded by the flash of their own guns. The accused gave evidence to the effect that he received no signal from the *Empire Dawn*. He kept up the firing to hurry the crew to their lifeboats as it had been repeatedly observed by the German commanders that whilst some of the crew of a sinking ship had taken to their boats, others would continue to resist.

The questions the Court had to consider were similar to those regarding the first charge: (1) "Was the signal of surrender given"; (2) "If so, was it received"; (3) "If it was not received, did the accused by his conduct prevent himself from receiving any signal?"

The Judge Advocate advised the Court that even if they found as a fact that no signal was received by the raider, they could still convict the accused if they came to the conclusion "that the accused deliberately or recklessly avoided any question of surrender by making it impossible for the ship to make a signal".

(ii) *The charges of failing to make provisions for the safety of the survivors after a battle at sea*

(a) *The case of the Beaulieu (second charge)*

The *Beaulieu* was a Norwegian tanker and was attacked without warning by a raider commanded by the accused on the night of the 14th August, 1940.

The Prosecution's case rested entirely on the log kept by the accused. In this log the accused, after pointing out that the *Beaulieu* was sailing without lights and that that was sufficient proof for him that she was an enemy vessel, recorded that he attacked her at 2050 hours and put her out of action by scoring nine direct hits. The *Beaulieu* had stopped and had put on her navigation lights, her masthead lights and her deck lights. She used no radio and did not fire or attempt to man the gun. The log continued: "There is a boat aft at her stern, with a crew of about 18 or 20 men in it. The cutter on the starboard side was not yet in the water. I again bring the deck under fire at close range so as to be secure against a burst of fire from the enemy from rifles or pistols. The enemy boat disappeared in the darkness. I did not see it again and also did not notice how the second one put off. One cannot and may not worry about boats and wounded at night for one cannot be certain in advance when approaching them whether they are going to start rifle fire. If a boat were to come alongside of its own accord to get help I would never send it away, but apparently the tales about us are so brutal that they would rather set out on the long sea trip than approach a warship. There was much in the procedure that my crew had not understood. I had to make clear to them why the attacks had to take place at night now and why we were taking no more prisoners. I had the feeling that for the first time a sense of the seriousness of war had been brought home to my men and that was good."

The accused eventually moved off at 2328 hours without having made an attempt to rescue the survivors. The distance from the place of the sinking to the nearest shore was approximately 1,200 miles. Four members of the crew were killed by the raider's fire, the remainder were picked up by an Allied vessel after five and a half days at sea in their two boats.

The defence case was that the accused sent a party on board the *Beaulieu* to investigate and any survivors who had stayed on board would have been rescued by this boarding party and that the raider stayed in the vicinity of the abandoned *Beaulieu* for two and a half hours, circling round and by increased look-out and special attention did everything possible to trace survivors. The defendant met the argument that he should have put out lifeboats to search for the survivors by saying that a lifeboat in the Atlantic swell could see less than a great number of people who are on a ship five metres above the water level. He also argued that the reason for not using any searchlights was that his searchlights had been dismantled before the action started as past experience had shown that in view of their blinding effect they did more harm than good. Two expert witnesses (a British captain and a former German admiral) agreed that with regard to lowering lifeboats and the use of searchlights, they would have acted in the same way as the accused did.

The Judge Advocate, summing up, pointed out that the *Beaulieu* had done everything that the accused himself in the course of cross-examination had indicated could be expected as a sign of surrender. The accused had furthermore seen with his own eyes 18 to 20 survivors trying to lower the lifeboat. In spite of this he again brought the whole deck under fire. In view of this conduct, the Judge Advocate said the Court may think "that this story that the survivors were voluntarily preferring to travel the Atlantic instead of surrendering," becomes almost fantastic. The accused could not be expected to look indefinitely for persons who were quite voluntarily taking that course of their own accord, but if you come to the conclusion that they were influenced in their decision by a real fear induced by the savage and (as they thought) unreasonable persistence of the attack, then in my opinion if the accused knew they were being so frightened his duty after the sinking became a very much greater one. If you took that view about the matter, you would, in my opinion, be justified in reaching the conclusion (if you are satisfied that these facts had been proved), that the accused was guilty of the charge."

(b) *The case of the Anglo-Saxon (fourth charge)*

On the night of the 21st August, 1940, an armed raider commanded by the accused, attacked the *Anglo-Saxon*, a British merchant vessel, without warning. The first salvo hit the gun and blew up some ammunition, setting the stern ablaze. The raider's log said: "She had stopped and could go no farther". The *Anglo-Saxon* began to send out distress signals but the raider's wireless succeeded in jamming these signals. The log kept by the accused said: "The flak is in action at ranges of less than 1,000 metres and is firing on direct targets. It can scarcely be checked and is making such a noise that the 'cease fire' arrives much too late. For just a short time two lights were noticed in the vicinity of the steamer apparently from two boats which at one time kept a short morse traffic which, however, could not be read. Then no more lights or boats were seen. Since no distress messages of any kind were made I did not undertake any further search operations". One of the survivors of the *Anglo-Saxon* said in an affidavit admitted as evidence by the Court that the raider gave no chance for the launching of lifeboats by keeping up a continuous stream of fire with tracer ammunition. The witness saw two life-rafts signalling to each other, but his own lifeboat tried to avoid the raider's attention in view of the savagery of the attack that had preceded. Only two survivors reached land after 70 days at sea in their lifeboat. All others perished.

The main arguments of the Defence were:

1. That the prolonged spraying of the deck was accidental.
2. That the survivors tried to escape unnoticed, thus making it almost impossible for the raider to rescue them.
3. That, according to the expert witnesses, the place of sinking was on a main shipping route and that persons left in a lifeboat there had a fifty-fifty chance of surviving.

Since the accused must have known that there were survivors who had taken to their boats, the questions to be considered by the Court were:



1. Did circling round a few times after the sinking of a merchant ship constitute necessary provisions for the safety of the survivors?

2. If not, was the accused's conduct justified by the attitude of the survivors?

With regard to the first point, the Judge Advocate said: "Do you think or don't you think that knowing that his own flak had gone on much longer than necessary (assuming as is obvious from the log that that was an accident) an armed raider might reasonably have made the most special and exhaustive search for those survivors instead of assuming that since no distress messages of any kind were made, he did not undertake any further search operations?"

With regard to the second point, the Judge Advocate's advice proceeded on the same lines as in the case of the *Beaulieu*.

(iii) *The charge of attempting to kill survivors by firing on lifeboats (third charge)*

One of the two survivors of the *Anglo-Saxon* alleged in his affidavit that whilst in the lifeboats his party was fired upon by the raider. The accused denied this and his Counsel pointed out that the firing was directed above the heads of the survivors in the lifeboats and the ricochets from the ship could easily create the impression among the survivors that they were being fired upon. As the witness who had sworn the affidavit on which the Prosecution's case rested could not be brought before the Court to give his evidence in person, the Prosecutor indicated that he would not pursue this charge any further.

(iv) *Finding and sentence*

The accused was found not guilty of the third and the fifth charges. The accused was found guilty of the first, second and fourth charges. He was sentenced to 10 years' imprisonment. The confirming officer did not confirm the finding of guilty on the second charge. He reduced the sentence to seven years' imprisonment.

## B. NOTES ON THE CASE

(i) *Choice of charges*

The facts underlying all charges are the same in so far as the accused, as commander of various armed raiders, attacked four Allied merchant vessels without warning, and sank them. It was contended by the Prosecution in all four cases that by his methods of attack and by unduly prolonging those attacks after the attacked vessel had surrendered, he had violated the rules of sea warfare. In two cases, however (the case of the *Davisian* and the *Empire Dawn*) he eventually took the survivors on board. In the other two cases (the case of the *Beaulieu* and the case of the *Anglo-Saxon*) he failed to do so. It was apparently felt that the failure to rescue any survivors was the graver offence and that in the two latter cases the lighter offence of unduly

prolonging the attack was merged in the graver offence. The accused was thus charged with the failure to rescue survivors after his attack on the *Beaulieu* and the *Anglo-Saxon*, and with continuing to attack after the surrender in the case of the *Davisian* and the *Empire Dawn*. In no case was he charged with attacking a merchant ship without warning.

## 2. THE LEGALITY OF THE ATTACK ON A MERCHANT SHIP WITHOUT WARNING

The difference between an attack on a warship on the one hand and on a merchant ship on the other, is thus stated by Lauterpacht in the sixth edition of Oppenheim's *International Law*, Vol. II, paragraph 181: "All enemy men-of-war and other public vessels which are met by a belligerent's men-of-war on the high seas . . . may at once be attacked. . . . Enemy merchantmen may be attacked only if they refuse to submit to visit after having been duly signalled to do so". Counsel for the Defence contended that by arming a merchantman, the merchantman becomes a warship and can therefore be attacked without warning. Whilst he admitted that British writers do not share this view, Counsel relied on American writers, one of whom, Hyde, says in his work *International Law* (Vol. II, p. 469): "A merchantman armed in such a manner that she can sink or damage a man-of-war can under no circumstances claim the protections of a merchant vessel". Counsel further argued that by arming her merchantmen and integrating them into the naval intelligence network, Britain forfeited the rights hitherto attached to these ships as merchant vessels. He maintained that the International Military Tribunal at Nuremberg had upheld this view.<sup>(1)</sup>

The Prosecutor pointed out that the question of the legality of the attack did not arise in this case. The accused was not charged with launching any illegal attack and the Court must therefore presume in his favour that his attacks were legal, but whereas the Nuremberg judgment may be interpreted as holding that the unwarned attack on armed merchantmen was legal, the judgment also stressed the fact that the German Naval Command was bound by the London Naval Protocol of 1936.<sup>(2)</sup> The Prosecutor argued that whereas the Nuremberg judgment may provide a defence for an accused who had violated the clause of the London Naval Agreement dealing with unwarned attacks on merchantmen, the judgment did in no way affect the other provisions of the London Agreement such as the duty to give quarter and the duty to rescue survivors.

Three propositions seem to emerge, either from the utterances of the Judge Advocate or from the findings of the Court: (1) no war crime is committed if an unwarned attack is made upon a merchantman who by reason of arms and wireless communication is part of the war effort of the opposing belligerent; (2) the impunity of attack without warning on a merchantman in these circumstances forms an exception to the general rules of sea warfare and imposes upon the attacking warship the duty to use only adequate force

<sup>(1)</sup> Cmd. 6964, p. 109.

<sup>(2)</sup> The Naval Protocol only applies to submarines, but its provisions are taken from the London Naval Agreement (1930) which applies both to submarine and surface vessels. See p. 78

and not to kill or wound a greater number of the crew than is reasonably necessary to secure the defeat of the attacked vessel; (3) as soon as the attacked merchantman is effectively stopped and silenced, all possible steps must be taken by the raider to rescue the crew.

### 3. THE DUTY TO RESCUE SURVIVORS

The duty to rescue survivors after an engagement is laid down for all naval encounters in Article 16 of the 10th Convention of the Hague, 1907, which says that, "The two belligerents will, as far as military interests permit, take steps to look after the shipwrecked, wounded, etc.". This duty has been amplified with regard to the sinking of merchantmen by the London Naval Agreement of 1930<sup>(1)</sup> which provides that a warship (whether surface vessel or submarine) may not sink a merchant vessel "without having first placed the crew and the ship's papers in a place of safety", adding that lifeboats are not places of safety for this purpose "unless the safety of the crew is assured in the existing sea and weather conditions by the proximity of land or presence of another vessel which is in a position to take them on board."<sup>(2)</sup> Thus, even if an armed merchantman was a warship and not a merchantman, and the London Naval Treaty were therefore not applicable, the chief duty laid down by Article 16 of the Hague Convention for all naval encounters still remains.

With regard to Article 16, the Defence argued that this article says that "both belligerents" must after an engagement search for the shipwrecked and protect them. This, according to Counsel for the Defence, places the duty upon the healthy survivors to look after their wounded comrades and to attract the attention of the enemy so that they may be rescued. If they prefer the hazards of a long sea journey to being taken prisoners and take their wounded with them in an attempt to get away, one cannot hold the raider responsible for not rescuing them.

The Judge Advocate advised the Court in his summing up, that the duty of the accused was higher than the duty generally owed to survivors. If the raider had, by his methods of attack, intimidated the crew of the attacked vessels. Knowing that they were thus intimidated and that they would possibly avoid him, his search should have been even more thorough than is normally required.

The two following propositions seem to emerge: (1) if the raider is aware of survivors who have taken to their lifeboats, he must make reasonable efforts to rescue them; (2) it is no defence that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given.

<sup>(1)</sup> Throughout the trial the defence and the prosecution referred with regard to this point to Articles 72-74 of the German Prize Ordinance, but this Ordinance repeats almost verbatim the relevant passages of the London Agreement (1930).

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### 4. SURRENDER AT SEA: REFUSAL OF QUARTER

Article 23 of the IVth Hague Convention, 1907, says that it is forbidden "to kill or wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion". According to modern ideas of warfare, quarter can be refused only when those who ask for it attempt to destroy those who have been showing them mercy (Lawrence, *Principles of International Law*, p. 376). Thus far the law is clear. The question, however, on which there is remarkably little authority is what constitutes unconditional surrender at sea. Oppenheim-Lauterpacht, part 2, paragraph 183, says: "As soon as an attacked or counter-attacked vessel hauls down her flag and therefore signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue to attack, though she is ready to surrender and to sink the vessel and her crew would constitute a violation of customary international law and would only as an exception be admissible in case of imperative necessity or of reprisals". This passage was relied on as an authority by the Prosecutor and by Defence Counsel. The latter did not plead necessity or reprisals to bring the case within the exception stated by Oppenheim-Lauterpacht. The central question therefore was: are there generally recognised ways of indicating surrender at sea other than hauling down a ship's flag? Two expert witnesses (a captain in the Royal Navy and a former vice-admiral in the German Navy) gave evidence, *inter alia*, on the customs in this regard of their respective services. The common denominator of their evidence could be thus stated: (1) the attacked ship must stop her engines; (2) if the attacker signals, the signal must be answered—if the wireless is out of action, it must be answered by a signalling pennant by day or by a torch or flashlight by night; (3) the guns must not be manned, the crew should be amidships and taking to the lifeboats; (4) the white flag may be hoisted by day and by night, all the ship's lights should be put on.<sup>(1)</sup>

The Defence argued that Oppenheim-Lauterpacht does not give any alternative to the hauling down of the flag. If the attacked vessel does not strike the flag and, because the wireless is out of action, cannot tell her attacker *expressis verbis* that she is "ready to surrender", the decision when to discontinue the attack must be left to the commander of the attacking vessel. Since the safety of his ship must be his primary consideration, he need not stop the attack until he is satisfied that the safety of his own ship is no longer endangered by his opponent. He can thus press home the attack as long as he considers it operationally necessary.

The Judge Advocate in his summing up said that stopping the ship and switching on navigation lights, masthead lights and deck lights after a night attack is an unequivocal indication of surrender. He also advised the Court that if the accused deliberately or recklessly prevented the attacked ship from surrendering by making it impossible for her to convey her readiness to

<sup>(1)</sup> It was held by the Privy Council in the case of the "Pellworm" (1922 A.C. 292) that hauling down the flag alone is not sufficient indication of surrender if it is accompanied by a change of course. The Privy Council held that "in principle capture consists of compelling the captured vessel to conform to the captor's will. When that is done "Deditio" is complete. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary."



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The Court's findings of guilty in the *Davisian* case and of not guilty in the *Empire Dawn* case are in line with the rules of surrender stated by the naval experts. The *Davisian*, after a day attack, stopped, hoisted a reply pennant and the crew took to the lifeboats. (The Court appeared to have disbelieved the accused's evidence that some of the crew of the *Davisian* were running towards the guns.) The *Empire Dawn*, after a night attack, did not stop, did not switch on her lights and the evidence about the signals given by means of a torch was open to doubt. The Court thus seemed to have held that there were generally recognised rules as to what constituted surrender at sea and that a war crime was committed if the attacking vessel continued her attack after her opponent has communicated her surrender in accordance with these rules. The Defence of operational necessity did not avail the accused in this case.

#### 5. UNCORROBORATED EVIDENCE OF AN ABSENT WITNESS

The Prosecution's case with regard to the third charge rested on the affidavit of one of the survivors admitted as evidence by the Court.

On the ninth day of the hearing, the President stated that it had now become clear that the attendance of that witness could not be procured. The Court decided that subject to anything the Prosecutor may have to say, they did not wish to hear any further evidence on that charge. The Prosecutor said that in view of the fact that the third charge rested on uncorroborated evidence of one absent witness, and in view of the gravity of the charge, he did not feel it proper to press that charge any further.

### CASE No. 56

#### TRIAL OF OTTO SKORZENY AND OTHERS

GENERAL MILITARY GOVERNMENT COURT OF THE U.S. ZONE OF GERMANY

18TH AUGUST TO 9TH SEPTEMBER, 1947

#### A. OUTLINE OF THE PROCEEDINGS

The ten accused involved in this trial were all officers in the 150th Panzer Brigade commanded by the accused Skorzeny. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States. They were also charged with participation in wrongfully obtaining from a prisoner-of-war camp United States uniforms and Red Cross parcels consigned to American prisoners of war.

In October, 1944, the accused Colonel Otto Skorzeny had an interview with Hitler. Hitler knew Skorzeny personally from his successful exploit in liberating Mussolini and commissioned him to organise a special task force for the planned Ardennes offensive. This special force was to infiltrate through the American lines in American uniform and to capture specified objectives in the rear of the enemy. The German High Command directed all army groups to seek volunteers who spoke English for a secret assignment. These volunteers were concentrated in a training centre where a special task force called the 150th Brigade was formed. It was furnished with jeeps and other American vehicles, part of their weapons and ammunition was American and the members were issued with American documents. They received training in English, American mannerisms, driving of American vehicles, and the use of American weapons. The Chief-of-Staff of the German Prisoner-of-War Bureau was approached by Skorzeny to furnish the Brigade with American uniforms. These uniforms were mainly obtained from booty dumps and warehouses, but some were obtained from prisoner-of-war camps where they were taken from the prisoners on orders from two of the accused. Some Red Cross parcels were also obtained in this manner.

The accused Skorzeny took over the command of the brigade on 14th December. On the 16th December the Ardennes offensive began. The objectives of the three combat groups into which the brigade was divided were the three Maas bridges at Angier, Amee and Huy respectively. The men were dressed in American uniforms and wore German parachute overalls over these uniforms. Their orders were to follow the spearhead of the three panzer divisions to which they were attached and as soon as the American lines were pierced they were to discard their overalls and, dressed in American uniforms, make for the three bridges. They were instructed to avoid contact with enemy troops and if possible to avoid combat in reaching their objectives. The piercing of the enemy lines by the S.S. Armoured Division was not successful, and on 18th December Skorzeny decided to abandon the plan of taking the three Maas bridges and put his brigade at the disposal of the commander of the S.S. corps to which it had been attached, to be used as infantry. He was given an infantry mission to attack towards Malmedy. During this attack several witnesses saw members of Skorzeny's brigade, including two of the accused, wearing American uniforms and a German parachute combination in operational areas, but the evidence included only two cases of fighting in American uniform.

In the first case, Lieutenant O'Neil testified that in fighting in which he was engaged about 20th December his opponents wore American uniforms with German parachute overalls, some of them who were captured by him said "that they belonged to the 'First', or the 'Adolf Hitler', or the 'Panzer' Division". The second case was contained in an affidavit of the accused Kocherscheid, who elected not to give evidence in the trial. He said in his affidavit that during the attack on Malmedy he and some of his men were engaged in a reconnaissance mission in American uniform when they were approached by an American military police sergeant. Kocherscheid, fearing that they would be recognised, fired several shots at the sergeant.



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Skorzeny's brigade was relieved by other troops on 28th December and was subsequently disbanded.

All accused were acquitted of all charges.

## B. NOTES ON THE CASE

### I. THE USE OF ENEMY UNIFORMS, INSIGNIA, ETC.

It is a generally recognised rule that the belligerents are allowed to employ ruses of war or stratagems during battles. A ruse of war is defined by Oppenheim-Lauterpacht (*International Law*, Vol. II, paragraph 163) as a "deceit employed in the interest of military operations for the purpose of misleading the enemy". When contemplating whether the wearing of enemy uniforms is or is not a legal ruse of war, one must distinguish between the use of enemy uniforms in actual fighting and such use during operations other than actual fighting.

On the use of enemy uniforms during actual fighting the law is clear. Lauterpacht says: "As regards the use of the national flag, the military insignia and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain of who is friend and who is foe". The Defence, quoting Lauterpacht, pleaded that the 150th Brigade had instructions to reach their objectives under cover of darkness and in enemy uniforms, but as soon as they were detected, they were to discard their American uniforms and fight under their true colours.

On the use of enemy uniforms other than in actual fighting, the law is uncertain. Some writers hold the view that until the actual fighting starts the combatants may use enemy uniforms as a legitimate ruse of war, others think that the use of enemy uniforms is illegal even before the actual attack.

Lawrence (*International Law*, p. 445) says that the rule is generally accepted that "troops may be clothed in the uniform of the enemy in order to creep unrecognised or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assault".

J. A. Hall (*Treatise on International Law*, eighth edition, p. 537), holds it to be "perfectly legitimate to use the distinctive emblem of an enemy in order to escape from him or draw his forces into action".

Spaight (*War Rights on Land*, 1911, p. 105) disagrees with the views expressed above. He argues that there is little virtue in discarding the disguise after it has served its purpose, i.e. to deceive the enemy. "If it is improper to wear the enemy's uniform in a pitched battle it must surely be equally improper to deceive him by wearing it up to the first shot or clash of arms".

Lauterpacht observes (*International Law*, Vol. II, p. 335, note 1) that before the second World War "the number of writers who considered it illegal to make use of the enemy flag, ensigns and uniforms, even before the actual attack, was becoming larger".

Article 23 of the Annex of the Hague Convention, No. IV, 1907, says: "In addition to the prohibitions provided by special conventions it is especially forbidden . . . (f) to make improper use of a flag of truce, of the national flag, or of the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention". This does not carry the law on the point any further since it does not generally prohibit the use of enemy uniforms, but only the improper use, and as Professor Lauterpacht points out, it leaves the question what uses are proper and what are improper, open.

Wheaton (*International Law*, Vol. II, sixth edition, p. 753), points out that Article 23(f) by no means settles the question, and adds that "each case must necessarily be judged on its merit, and determined conformably to the basic principles of war law, special regard being paid to the element of *bona fides*". (As an example for a *bona fides* use of enemy uniforms, he gives the case where no other uniforms are available to the belligerent army.)

Paragraph 43 of the Field Manual published by the War Department, United States Army, on 1st October, 1940, under the title "Rules of Land Warfare", says: "National flags, insignias and uniforms as a ruse—in practice it has been authorised to make use of these as a ruse. The foregoing rule (Article 23 of the Annex of the IVth Hague Convention), does not prohibit such use, but does prohibit their improper use. It is certainly forbidden to make use of them during a combat. Before opening fire upon the enemy, they must be discarded". The *American Soldiers' Handbook*, which was quoted by Defence Counsel, says: "The use of the enemy flag, insignia and uniform is permitted under some circumstances. They are not to be used during actual fighting, and if used in order to approach the enemy without drawing fire, should be thrown away or removed as soon as fighting begins".

The procedure applicable in this case did not require that the Court make findings other than those of guilty or not guilty. Consequently no safe conclusion can be drawn from the acquittal of all accused, but if the two above-mentioned American publications contain correct statements of international law, as it stands today, they dispose of the whole case for the Prosecution, apart from the two instances of use of American uniforms during actual fighting.

The first case, that of Lieutenant O'Neil, has to be disregarded as the evidence does not seem to disclose with sufficient certainty the connection between the men dressed in American uniform whom Lieutenant O'Neil captured and the 150th Brigade. In the second instance, the case of the accused Kocherscheid who in an affidavit admitted that he fired on an American military police sergeant when dressed in American uniform, the accused stated in his affidavit that he fired several shots at the sergeant, but there was no evidence to show that he killed or even wounded him as was alleged in the charge.



## 2. ESPIONAGE

Two Counsel in defence of the accused Kocherscheid, argued that he was on an espionage mission in "no man's land" when he met the military police sergeant. He believed, on reasonable grounds, that he and his men were discovered and shot at the military police sergeant to protect his own life and the lives of his men. Counsel argued that as he returned from the espionage mission to his own lines he was protected by Article 31 of the Hague Convention and could therefore not be punished afterwards for his acts as a spy.

Article 29 of the Annex to the Hague Convention, 18th October, 1907, defines espionage as the "act of a soldier or other individual who clandestinely or under false pretences seeks to obtain information concerning one belligerent in the zone of belligerent operations with the intention of communicating it to the other belligerent". According to Article 31 of the same Convention, a spy who is not captured in the act but rejoins the army to which he belongs and is subsequently captured by the enemy, cannot be punished for his previous espionage but must be treated as a prisoner of war.

The argument put forward by Defence Counsel appears to be unsound. Article 31 gives immunity to a spy who returns to his lines in so far as he cannot be punished as a spy. The accused in this case, however, were not tried as spies but were tried for a violation of the laws and usages of war alleged to have been committed by entering combat in enemy uniforms. Articles 29-31 of the Hague Convention have therefore no application in this case and it would appear that the accused Kocherscheid's acquittal was based on lack of sufficient evidence, as he did not give evidence at the trial and the Prosecution's case rested entirely on his pre-trial affidavit.

## 3. THE TAKING OF UNIFORMS, INSIGNIA, ETC., FROM PRISONERS OF WAR

Article 6 of the Geneva (Prisoner-of-War) Convention, 1929, provides that: "All effects and objects of personal use, except arms, military equipment and military papers, shall remain in the possession of prisoners of war. . . ." The taking of uniforms of prisoners of war is therefore a violation of the Geneva Convention.

Article 37 of the same Convention states that: "Prisoners of war shall be allowed individually to receive parcels by mail containing food and other articles intended for consumption or clothing. Packages should be delivered to the addressees and a receipt given". To appropriate such packages before they reach their addressees is therefore also a violation of the Geneva Convention.

As mentioned above, the Court had not to give any reasons for their findings, but it is possible that having acquitted the accused of the main charge the Court applied the maxim *de minimis non curat lex*, also acquitting the accused of what were lesser violations of the Geneva Convention (cf. Vol. III, p. 70, of this series).

## LAW REPORTS OF TRIALS OF WAR CRIMINALS

*continued from p. 2 of cover*

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## LAW REPORTS OF TRIALS OF WAR CRIMINALS

SELECTED AND PREPARED  
BY THE UNITED NATIONS WAR CRIMES  
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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*

## 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

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1949



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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.<sup>(1)</sup>

### 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,<sup>(2)</sup> Ernst Buergin, Heinrich Bueteisch, Paul Haeffiger, 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

<sup>(1)</sup> 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.

<sup>(2)</sup> 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, Bueteftisch 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.

###### *Bueteffisch, 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 Sparten* 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,<sup>(1)</sup> 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 Przemyśl Chemiczny Boruta, S. A. Zigiery (Boruta), Chemiczna Fabryka Wola Krzystoporska (Wola) and Zakłady 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

<sup>(1)</sup> 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.<sup>(1)</sup>

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 Kvaestoffaktieselskap (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

<sup>(1)</sup> 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 Matieres 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 Chimique 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 negated 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, Bueteftisch, and Duerrfeld. Later on Duerrfeld and Bueteftisch 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 Bueteftisch, 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 Bueteftisch 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, Bueteisch 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 Bueteisch became an Ehrenfuhrer (Honorary Leader) of that organisation on 20th April, 1939. At the same time he was promoted to the rank of Hauptsturmfuhrer (Captain). On 30th January, 1941, he was made a Sturmbannfuhrer (Major). On the 5th March, 1943, he became an Obersturmbannfuhrer (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, Bueteisch, 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.<sup>(1)</sup> 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 fuhrer 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

<sup>(1)</sup> 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,<sup>(1)</sup> 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.'

<sup>(1)</sup> 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 is 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<sup>(1)</sup> 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

<sup>(1)</sup> 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.<sup>(1)</sup> 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

<sup>(1)</sup> 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.<sup>(1)</sup> 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

<sup>(1)</sup> 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."<sup>(1)</sup>

(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

<sup>(1)</sup> 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 of 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<sup>(1)</sup>. . . . 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."<sup>(2)</sup>

(iii) Of the alleged acts of plunder at the Mulhausen plant and at the Strassbourg-Schiltigheim plants in Alsace Lorraine<sup>(3)</sup>: "The violation of the Hague Regulations is clear and Farben's participation therein amply proven". Of the Diedenhofen plant<sup>(4)</sup> 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<sup>(5)</sup> 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<sup>(6)</sup>: "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.<sup>(7)</sup>

After declaring these findings and setting out the relevant evidence the

<sup>(1)</sup> See pp. 19-20.

<sup>(2)</sup> See pp. 20-21.

<sup>(3)</sup> See p. 21.

<sup>(4)</sup> See p. 21.

<sup>(5)</sup> See pp. 21-22.

<sup>(6)</sup> See pp. 22-23.

<sup>(7)</sup> 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<sup>(1)</sup> 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, nor 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

<sup>(1)</sup> 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 Buerger "guilty under Count II of the Indictment."

(viii) "For his connection with, and participation in, the Norwegian enterprise, Haeffiger 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, Bueteffisch, and ter Meer.

The following were held not guilty on Count III: Gajewski, Hoerlein, Buerger, 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. Alstötter *et al*. (Case No. 3),<sup>(1)</sup> 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 Bueteifisch, 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

<sup>(1)</sup> 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.* <sup>(1)</sup>) 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 Buete-fisch. These facts, if established, would only be material to the charge here under consideration as tending to show, in connection with other facts, that Buete-fisch 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 Standartenfuhrer 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. Oberfuhrer in 1939 and S.S. Brigadefuhrer 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 Buete-fisch 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.

(<sup>1</sup>) 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 negated here by the showing of the refusal of Buete-fisch 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 Buete-fisch 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, Buete-fisch 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