CASE No. 57.

THE I.G. FARBEN TRIAL

TRIAL OF CARL KRAUCH AND TWENTY-TWO OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG,

14TH AUGUST, 1947-29TH JULY, 1948

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

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

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

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

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

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

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

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

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

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

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

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

2. THE INDICTMENT

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

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

Count I

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

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

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

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

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

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

Count II

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

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

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

Count III

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

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

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

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

Count IV

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

Count V

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

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

3. PROGRESS OF THE TRIAL

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

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

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

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

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

4. THE EVIDENCE BEFORE THE TRIBUNAL

(i) *The position of the Accused*

Ambros, Otto :

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

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

Buergin, Ernst :

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

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

Buetefisch, Heinrich :

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

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

Duerrfeld, Walter :

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

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

Gajewski, Fritz :

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

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

Gattineau, Heinrich :

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

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

Haefliger, Paul :

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

Was not a member of the Nazi Party.

Von der Heyde, Erich :

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

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

Hoerlein, Heinrich :

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

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

Ilgner, Max :

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

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

Jaehne, Friedrich :

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

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

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

Von Knieriem, August :

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

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

Krauch, Carl :

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

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

1937 member of Nazi Party ; member of NSFK.

Kuehne, Hans :

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

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

Kugler, Hans :

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

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

1939–1945 member of Nazi Party.

Lautenschlaeger, Carl:

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

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

Mann, Wilhelm:

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

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

Ter Meer, Fritz:

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

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

Oster, Heinrich:

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

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

Schmitz, Hermann :

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

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

Schneider, Christian :

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

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

Von Schnitzler, Georg :

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

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

Wurster, Karl :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Counts I and V involved the same evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) *Alsace-Lorraine.*

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

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

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

(2) *The Francolor Agreement.*

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

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

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

(3) *Rhone-Poulenc.*

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

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

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

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

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

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

(v) *Evidence relating to Count III.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. THE JUDGMENT OF THE TRIBUNAL.

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

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

The Tribunal stated that :

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

After quoting these three paragraphs from the Indictment,(1) the Tribunal continued :

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

(1) See pp. 3–4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) See pp. 14-16.

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

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

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

The Judgment then continued :

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

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

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

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

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

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

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

Nevertheless the Judgment concluded that:

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

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

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

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

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

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

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

On this question the Judgment continued:

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

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

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

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

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

(1) See also p. 47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Transcript*, page 11013.)

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

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

The Judgment went on :

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

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

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

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

The Judgment then continued :

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

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

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

. . . . . .

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

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

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

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

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

'Art. 47. Pillage is formally prohibited.

. . . . . .

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

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

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

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

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

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

. . . . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi) *Individual Responsibility for War Crimes.*

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

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

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

" We quote further :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After declaring these findings and setting out the relevant evidence the

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

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

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

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

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

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

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

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

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

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

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

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

([1]) See p. 23.

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

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

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

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

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

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

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

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

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

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

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

(ix) *Count III ; Slave Labour*

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

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

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

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

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

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

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

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

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

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

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

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

. . . . . .

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

. . . . . .

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

. . . . . .

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

. . . . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

" The I.M.T. said :

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

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

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

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

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

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

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

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

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

Speaking specifically of the accused Schneider, the Tribunal continued :

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

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

Of the defendant Buetefisch, the Judgment states :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xv) *Sentences.*

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

The sentences imposed were as follows:

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

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

B. NOTES ON THE CASE

1. ECONOMIC OFFENCES AS WAR CRIMES

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

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

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

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

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

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

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

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

3. CRIMES AGAINST PEACE

See p. 168.

4. MEMBERSHIP IN CRIMINAL ORGANISATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel continued :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. JUDICIAL NOTICE IN WAR CRIME TRIALS

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

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

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

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

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

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

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

CASE No. 58.

THE KRUPP TRIAL.

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

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

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

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

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