

Dr. Walter SIMERS

Nuernberg, 26 April 1948.

Defense Counsel for

Room 543.

Karl EBERHARDT, Case X.

To the

American Military Tribunal III,

Nuernberg.

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Secretary General

for Military Tribunal

Defense Center

In matters Alfried KRUPP, et al, for Karl EBERHARDT, Case X.

In the session of 23 April 1948 I had submitted 3 document books to the Court, namely Document Book EBERHARDT II, III and IV, containing the documents which I need as basic documentary evidence for questions involving international law in Count II of the Indictment, the so-called spoliation. The Court had accepted the documents of the Document Book EBERHARDT II, introduced as Exhibits 282 - 291, as evidence. However, the prosecution raised objections against the documents of Document Book III and IV. Therefore, the documents were provided with identification numbers for the time being, namely according to the transcript with the numbers 292 to 337. I had already attempted in Court to show that these documents were relevant. In the course of the arguments the Court suggested that the Prosecution, represented by Mr. RAGLAND, should give the reasons for its objections in a brief and that at the same time I also should submit a brief containing the rebuttal to those objections, that is, establishing the relevancy of the evidence.

Accordingly, in the following I should like to bring a few main points to refute the objections of the Prosecution. In view of the fact that the Prosecution in the trial so far has only touched briefly upon the reasons for its objections I would respectfully ask to be given an opportunity to answer Mr. RAGLAND's brief, in case and insofar as new points are being dealt with in the brief.

The principle reason given in the trial for the basic objections of the Prosecution was that my documents dealt with the time after 8 May 1945, whereas the subject matter of the indictment concerned the time before 8 May 1945. In addition, Mr. RAGLAND maintained that the measures and the conduct of the Allied Military Governments after 8 May 1945 did not in point of view of international law represent parallel cases in regard to the conduct of the German Government and the German industrialists in the occupied territories during the war, that the Hague Rules for Land Warfare were explicitly applicable in the territories occupied by Germany and that they were not so in occupied Germany, that Germany, in contrast to Poland, Russia and France, had surrendered unconditionally and that there existed no Government in Germany, not even an Exil-Government, as for instance in Poland at that time, and that Germany was not occupied by a "belligerent" occupation power.

Against such ideas I should like to state the following and at the same time establish the relevancy of the evidence:

1. The matter at issue does not concern the subject matter of the indictment, but the investigation of its foundation in international law. The foundations in international law can only be found by considering the conduct of all of the belligerent states and not only the conduct of Germany. The international law cannot be found by investigating the conduct of Germany in a legal vacuum without investigating at the same time, how the provisions of international law had been applied by the other states at the same time, or a former or latter time. International law in its substance is a law between nations which is effective between many nations and may be understood only by including all the nations in this investigation and not only one. Whether or not the conduct of the individual nations per chance takes place at the same period of time cannot have any bearing on the legal evaluation. In this connection I should like to recall that in the Nuremberg Trials the Prosecution frequently

based their argumentation concerning questions of international law on parallel cases which also did not coincide chronologically, but took place at a much earlier time. Whether or not the parallel cases took place in an earlier or later time is unimportant in point of law. It is only a matter of chance that the parallel cases took place in a subsequent period of time, only for the reason that at the time Germany had occupied foreign territories the Allies had not yet occupied German territories. Apart from this, the Prosecution forgets that the Allies - in the West as well as in the East - had already completed the occupation of Germany during the war, that is at a time hostilities had not yet ceased and in consequence thereof also during the period of time on which the indictment is based and which includes the time until 8 May 1945. The acts of the Allies which I intend to prove and the documentary evidency of which I need in order to substantiate my legal arguments therefore already partly come within the period of time covered by the indictment.

That the acts of the Allies extend beyond this period of time and that the individual documents and, for instance, also the affidavits, therefore carry a later date does not affect their legal relevancy.

In every Nuremberg Trial the Prosecution has made this date of 8 May the subject of objections, obviously for the reason that it does not like to see the conduct of its own Government being made the subject of legal investigations.

That not only Germany's conduct must be investigated in this connection but also the conduct of the Allied Nations is already indicated in the proceedings before the I.M.T. In these trials the Court clearly let it be known that the conduct of the Allies is also of importance, quite independent of the question whether or not the conduct of the Allies coincided chronologically with the conduct of Germany. I should like to point out two cases:

a. As to the Prosecution's charges concerning the submarine war, Dr. KRANZBUHLER has, for the purpose of investigating international rulings, referred to the parallel case of conduct on part of the United States of America in the submarine war against Japan. The Prosecution at that time raised objections because the submarine war against Japan was at a later time. The court did not follow the prosecution. It obtained a statement from Admiral NIMITZ and thereupon established in its judgment that on account of this parallel case a sentence could not be given.

b. With regard to the Prosecution's charge concerning the occupation of Norway I have in the trial before the International Military Tribunal referred to the attitude of the British Government and the British Admiralty, and this again as legal parallel case, and beyond this to the attitude of the British and French Governments and the British and French military forces as regards the allied plannings concerning Belgium, Holland and as regards the plan to destroy the Caucasian oil wells. The Prosecution objected on the grounds that these actions were not the subject of the trial. However the International Military Tribunal, notwithstanding the objection of the Prosecution, on the whole accepted the documents then submitted by me, so that I was in the position to prove these things in the trial and to present arguments on the attitude of the Allies in the pleas.

In the first Nuernberg economic trial, namely Case V. the Prosecution raised exactly the same objections as now in the KRUPP case and that concerning exactly the same documentary evidence that I am now submitting, and likewise also against the material which I presented in connection with the Einsatz question and the treatment of prisoners of war in the FLICK trial, and this again material dating largely from the time after 8 May 1945. I beg for consideration of the fact that after a circumstantial debate and consultation the American Military Tribunal No. IV in the FLICK case accepted my documents concerning the spoliation question, Point II of the Indictment

and also concerning the Prisoners of War question, Point III of the Indictment as evidence and has given them exhibit numbers, and this notwithstanding the special objection of the Prosecution. The Prosecution merely was reserved the right to make a motion to strike off those documents later on. However, in the FLICK case the Prosecution did not make this motion.

Regarding various other documents in the FLICK case the Tribunal declared that it would officially take notice of the documents and respectively declared that formally it would not recognize these documents because they dealt with newspaper messages, but that I was entitled to quote those documents in the plea and to use them as a basis for it.

In the following I want to list the documents which were expressly accepted as evidence in the FLICK case, which documents had been taken notice of officially, and moreover I will add a few documents as example of those which the Tribunal declared I could use as basis for my plea.

(For completeness sake I want to remark that a part of the documents which I have submitted now, have not yet been submitted in the FLICK case, consequently not all the documents could be listed below.)

Document Karl Eberhardt

EBERHARDT- No.	Identifica- tion No.	Description of the document	FLICK transcript page
109	293	JCS 1067	official notice taken P. 9611/14
110	294	proclamation of the Control- Council	official notice taken P. 9615
114	298	General CLAY denies applicat- ion of Hague Rules of Land Warfare	reference admissible P. 9627/29
118	302	"Present International Law" by Prof. Dr. Rudolf LAUN	basic for plea P. 9629
125	307	Affidavit BECKHAEUSER concern- ing dismantling of 3/4 of the German Heavy Tool Machine Industry	admitted as evidence, WEISS exhibit 177 P. 9627
126	308	Affidavit Oscar WALDRICH Dismantling at the firm of WALDRICH	admitted as evidence WEISS exhibit 179 P. 9627
128	310	Correspondence concerning "Noris"-Zuendlicht (in spite of well founded peace product- ion, incl. letter by the American Brigadier General Walter I. MULLER	admitted as evidence WEISS exhibit 181 P. 9632
129	311	Correspondence concerning dismantling of the factory for transport tools STEIN- BOCK (peace production)	admitted as evidence WEISS exhibit 182 P. 9632
130	312	Correspondence concerning dismantling of the special factory for precision gear cutting tools	admitted as evidence WEISS exhibit 183 P. 9632
131	313	Affidavit WARRENTRUP, incl. letter by Lord PAKENHAM	admitted as evidence WEISS exhibit 176 P. 9627
132	314	Affidavit Johannes SCHROEDER concerning confiscation of scrap valued RM 5 000 000,-- at KRUPP, with opinion of British Military Government	admitted as evidence, WEISS exhibit 178 P. 9627

Newspaper clippings have been admitted as a basis for my plea and have been individually discussed by me in short. Admission of the newspaper clippings as basis for the plea derives from transcript pages 9624/25.

As far as newspaper clippings are concerned I ask that consideration be taken of the fact that the prosecution in the I.G. Farben trial admitted newspaper clippings (as evidence) contrary to the FLICK trial.

May I point out furthermore that I, in my plea in the FLICK trial, was in the position to make use of the documents as stated above. In order to simplify my brief I take the liberty to enclose herewith as

enclosure 1

an excerpt from the plea of November 1947, pages 132/35, 137/42 and 157/58.

May I refer to the statements in enclosure 1, in order to explain the relevancy of the documents in connection with those statements.

2. The further objection by Mr. RAGLAND of the prosecution, to the effect that the attitude of the Allied Governments in occupied Germany and especially the dismantling of factories does not present a parallel case to the activities with which the defendants are charged, because the Allied Governments are not under obligation to employ the Hague Rules of Land Warfare, in consideration of the unconditional surrender and the lack of a German Government. In order to simplify my brief here too, may I submit as

enclosure 2

an excerpt from the plea by Dr. KRANZBUEHLER in the FLICK trial, pages 26/29, top; may I refer to the statements made there and, in addition, state the following:

a. The unconditional surrender took place in a purely military sphere and can, therefore, not have any legal consequences for the civilian population. DOENITZ, who gave the order to submit the unconditional surrender, did not have the intention to renounce the rights deriving from the Hague Rules of Land Warfare to the disadvantage of Germany, by this surrender. However, a legal prerequisite for a renunciation is the will to renounce and the express declaration of renunciation. Both are missing.

b. The fact that no uniform German Government exists anymore is based upon a clear action of the victorious powers. The unilateral action cannot do away with an agreement, because an agreement, in international law as well as in civil law, can only be cancelled by bilateral action resp. by giving notice as provided for in the contract. Such a notice has not been given, and under no circumstances in the form provided for in the Hague Rules of Land Warfare. In addition I refer to the IMT judgment and to international legal practice which was expressly recognized by the IMT judgment. Even if the Hague Rules of Land Warfare do not exist as an agreement anymore, its basic principles still apply, namely as international moral legal practice. This has been expressly established by the IMT judgment and discussed repeatedly by the prosecution during the trial before the IMT, emphasizing the point, that such a moral, international legal practice applies to victors and vanquished alike.

c. If, however, it should be of importance as far as international law is concerned whether a Government still exists in the enemy territory, and whether the conclusion should be drawn that international law should not apply if a Government has ceased to exist, it cannot be understood why the same American prosecution wants to assert that international law ought to have been applied by the German side, e.g. in Poland and France. Because it is an established fact that the government in Poland had ceased to exist.

and that in the opinion of the Prosecution there was only a puppet government in France, consequently no government either.

As for Poland, f.i., the Soviet Government pointed out in its note of 17 September 1939 to all the foreign governments accredited in Moscow that the Polish State and its government had ceased to exist and that consequently the treaties had become invalid.¹⁾ The Soviet-Union has, thus, maintained toward Poland the same attitude as it is now - consistent in this respect - maintaining towards Germany. The Prosecution, however, is inconsistent in this respect. Against this, General Taylor has at one time urged that there is no parallel because there was a Polish Government-in-exile. I do not believe that this argument can be advanced in good conscience. The Hague Rules of Land Warfare have for their object the protection of the civilian population. It cannot make any difference for the conduct of the victor states towards the civilian population of the vanquished state that somewhere in the world a few men maintained a government-in-exile which in fact was without any significance and effect. Neither is it to be understood where such a distinction can be found in the Hague Rules.

d. Finally, Mr. Ragland has urged for the Prosecution that Germany is not occupied by a "belligerent" power. This contention does not seem to me to be founded on facts. The major part of Germany was conquered as a consequence of fighting and warlike operations in the period from the end of 1944 until the beginning of May 1945. Everyone taking part in these trials has still been able to see the traces of these fights at Nuernberg, that is to say, deep in the interior of Germany. As for the rest, the Hague Rules of Land Warfare do not require at all

1) see Doc. Book Eberhardt III, No. 117, Ident. No. 301.

a "belligerent" occupying power to occupy the country. I have already pointed out in my oral argument that the articles specially involved here, i.e., 43, 48, 49, 53 and 55 only speak of the "occupant" and never of the "belligerent". This is not a mere chance, but is done on purpose, for other articles of the Hague Rules of Land Warfare expressly speak of the "belligerent" and this is the case in such articles that have as their precondition that war is still being waged, that, therefore, no truce or capitulation has been concluded yet, as f.i., article 44.

Ad a - d. Under all the points it is to be noted that according to the Hague Rules of Land Warfare, more precisely according to their third section, article 42 ²⁾, it is quite clear in what case the provisions of the Hague Rules are applicable. Article 42 says textually:

"A territory is considered to be occupied when ^{it is} placed under the actual authority of the enemy army."

It is, thus, quite clear that the Hague Rules of Land Warfare only know the de facto occupation of the enemy territory as a prerequisite. The same is indicated by the heading of this section: "Military Authority over the Territory" of the enemy state.

How the occupation of the enemy territory was obtained, whether through warlike operations or through sudden invasion or in a peaceful way after a capitulation or in part during the fighting and in part after the capitulation, makes no difference to the Hague Rules of Land Warfare. It makes no difference to them whether a government of the enemy territory still exists or not, nor does it make a difference to them whether an army continues to fight or has laid down its arms. Language and purport of the Hague Rules are

2) Doc. Book Eberhardt II, page 21.

completely clear when they always speak of the actual occupation of an enemy territory alone. This one prerequisite, however, has been met in the German occupied territories to the same extent as it has been met in former times by Germany in the occupation of foreign territories.

In addition, I may be allowed to point out that the position taken by the Prosecution is in contradiction not only to the language and purport of the Hague Rules of Land Warfare but violates, beyond this, in view of the conclusions of the judgment of the IMT, the recognized moral customs and usages upon which the Hague Rules of Land Warfare rely expressly in their preamble. They proclaim that in the cases not covered by the Hague Rules of Land Warfare

"the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

The preamble of the Hague Rules as well as the IMT judgment show that what matters are the public conscience and the moral principles. To these moral principles as recognized by the International Law belong: the protection of the civil population and the safeguarding of the public order, the protection of the economic life, the protection of personal liberty and the protection of private property. If a state has been so completely vanquished as to be forced to surrender unconditionally and as to be without any government the civil population is in much greater need of this protection under International Law than it were if the army of the own state had not surrendered yet and the government was still capable of taking action. Were the opinion of the Prosecution to prevail in International Law this would be a moral deterioration and extremely dangerous for the future. It would mean that the

advisor of a victorious government in question
of international law has to advise his government, to
dissolve at first the government in the occupied enemy territory,
so that the occupying power does not have to adhere any more to
international law. He would even have to advise his government to
arrest all members of the government, if possible, or to eliminate
them, in order not to leave any government in exile and to enable
the occupying power to take away private property irregardless of
international law.

3. I believe that the relevancy of documents submitted by me as
evidence can hardly be better illuminated than by the extensive legal
debates in connection with these documents, at first in the Flick
case and now again in the Krupp case, showing the contrasting opinions
and proving how indefinite and uncertain the legal basis is with
regard to count II. The documents submitted by me do not only furnish
evidence of the contrast in the opinions of the German, Soviet and
Allied governments only, but show, moreover- and this I wish to stress-
the contrasting opinions within the military governments in the West.
From an examination of the individual documents it will be seen
that the various offices of Military Government do not have a
uniform opinion and that the Western Military Governments have also
changed their opinions in the course of the last three years. At one
time one endeavoured to adhere to the Hague rules of land warfare,
at another time they were knowingly disregarded, sometimes un-
knowingly. If, however, there is no uniform legal opinion among
Military Government advisors it is impossible to demand from a private
individual, an industrialist, that he should recognize these complicated
and difficult legal questions. Such a demand is particularly impossible,
if the industrialists contracted with their own government, which
had counsellors with regard to law and international law, thus,
necessarily, making the industrialists believe that such contracts
are legally

permissible. In order not to repeat myself, I should like to refer in this respect to my arguments in the Flick plea, excerpts of which were enclosed with this brief as enclosure 1, as well as my statements in my opening statement of 23 March 1948;

par. 10 dealing with the prerequisite of a sufficient definition of a crime. Conf. Lord Phillimore: "a man must be charged with a definite crime" and the judgement of the Military Tribunal in case III, p. 50, emphasizing the principle, that "criminal statutes should be definite and certain."

par. 11 and 12 with regard to the lack of any and every definition of count II and the difficulty of a definition on the basis of the Hague rules of land war are, conf. particularly the quotations from the IMT and Flick judgement.

par. 13 stating that economic necessities can not be separated any more from military necessities.

par. 14 Article 43 of the Hague rules of land warfare, constantly overlooked by the prosecution, applies to activities with regard to the economy of the occupied territory.

par. 15, where I dealt with the contradiction between JCS 1067 and article 43 Hague rules of land warfare.

With regard to JCS 1067, Eberhardt Doc. No. 109, identification number 293, I wish to say that they originated in the period before the unconditional surrender and that General Eisenhower, on the basis of this directive, occupied and administered a large part of Germany before the unconditional surrender.

May I mention, in addition, that JCS 1067 was requested as evidence from the court trying the Krupp case by Dr. Schilf pointing out that there are different interpretations of the HLC.

This motion was approved by the court which goes to show that this documents was considered relevant.

It is especially noteworthy that the directives of the American government to General Clay of 17 July 1947 (Eberhardt Doc.No. 113, identification No. 297), represent an other point of view with regard to international law than JCS 1067. This point of view taken by the directives is more favorable to Germany and conforms with the Hague rules of land warfare in many parts. As a result the British did not basically object to this document.

In concluding I beg to request the tribunal to admit the documents in evidence thus enabling me to carry on my work as a defense counsel properly and without restrictions in the sphere of international law.

signed (Dr. Siemers)

CERTIFICATE OF TRANSLATION.

We hereby certify that we are duly appointed translators for the German and English languages and that the above is a true and correct translation of the Answer to Prosecution Motion in CASE 10.

Nuremberg, 27 April 1948.

Pages 1 - 3	G. Lauener ETO 20 123
" 4 - 5	E.M. Redelstein X 046 289
" 6 - 8	Jack Markheim AGO D 230 019
" 9 - 11	A. Ehrmann ETO 20 116
" 12 - 14	E. Oettinger AGO A 444 369