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Speculation

Pleas for
Eberhardt

FINAL PLEA

submitted

by

Dr. Walter Siemers,

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to

American Military Tribunal III

in Case X:

The United States of America

against

Alfried KRUPP et alia

for

Karl EBERHARDT.

Nuernberg, June 1948.

Your Honors,

1. Today for the third time, I plead with your Honors' permission, at the conclusion of lengthy proceedings against a German industrial concern, before an American Military Tribunal, and hope that this will be the last trial in which German industry is indicted on the grounds of its industrial activity before and during the war. I hope that, having seen what problems and what dangers are caused by the assumption on the part of the victors in a war of the role of a more than earthly judge, the search for guilt and the demand for its expiation, urged on relentlessly by the false assumption of the collective guilt of the conquered land, and more especially of the collective guilt of the conquered industry of that land, the Prosecution will now discontinue the fight which it is conducting against the whole of German industry along the lines of thought of the Morgenthau Plan. It is so easy to play the accuser when one has the power - this much we saw in Hitler's fight against the intelligentsia of Germany - but it is so dangerous too. On what does the Prosecution base its assurance that, in total war, the American or British industrialists would not have acted in precisely the same way as did the German industrialists in occupied territories? The Prosecution knows that both then and now, their own industrialists were and are producing the armaments required of them by the State, just as did the German industrialists, and yet they assert that the German industrialists were planning and preparing a war of aggression; it was the judicious decision of this Tribunal which first gave ^{/to the Prosecution/} a clearer insight into the situation, a decision which gave fuller recognition than did the Prosecution to the true relationships and circumstances existing during the war and which therefore dropped the charge connected with wars of aggression contained in Count I of the Indictment in so far as ~~Alfried~~ Krupp and his colleagues were concerned.

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It is on this decision that I base my hope that this Tribunal will also give fuller recognition to the true relationships and circumstances existing during the war in connection with Count III of the Indictment: Spoliation, than did the Prosecution, and will not sentence the accused industrialists because Fate rightly sentenced a certain Hitler and a certain Himmler to death, and the highest court yet conceived by man sent a certain Goering and a certain Frank to their deaths.

2. In this case too, I had undertaken to deal with the basic questions of International Law both from the point of view of legal theory and from that of the practical application of that theory, with reference to so-called spoliation for the entire Defense, thus on behalf of all defendants with the exception of two (Lohmann and Kupke). Accordingly, I propose to attempt firstly to put before the Tribunal the legal principles involved in Count III of the Indictment, and then to apply these legal principles . . .

to the individual cases to be dealt with by the individual Defense lawyers.

The mere study of the legal principles will show that the skilful martialling of the facts on the subject of spoliation in the Prosecution Trial Brief does not in itself suffice to prove the commission of a war crime in the form of spoliation, that it is necessary rather to supply something which the Prosecution has forgotten, namely a sound definition of the concept of spoliation itself, and to establish the scope of International law in this connection, in a word: what is permitted in occupied territories and what is not.

The problem is not as simple as might be thought from the argumentation of the Prosecution. The Prosecution states somewhat naively:

"In accordance with Article 46 of the Hague Rules of Land Warfare, private property must be respected, and private property may not be confiscated; thus not only is confiscation by the State forbidden, but, we submit, any interference whatsoever with any of the normal incidents of enjoyment of quiet occupancy of property."

(Prosecution Trial Brief p.10). Building up on this statement, the Prosecution then proceeds to pronounce criminal every instance of industrial activity in occupied territory, irrespective of whether such activity is governed by contracts with branches of the foreign industry, or whether the activity served as a blessing to the occupied territories and provided for the people and for the country work, a means of livelihood and industrial advantages; its far-reaching assertion is even extended by the Prosecution to include property of the State, despite the fact that, in accordance with the express provisions of Articles 53 and 55 of the Hague Rules of Land Warfare, such property may be confiscated in part, and in part used in accordance with the rules of usufruct, giving, in support of its assertion, reasons which I, in any case, understand in this third case no more than did the American Military Tribunal in the Flick Case, and which, for this reason, the Tribunal rejected unhesitatingly in the Flick Case, establishing that State property "may be confiscated and put into use for the period of occupation" (Judgment in Case V, p.10 750 of the Court Transcript).

But to return to the case in hand. The basic error made by the Prosecution in its argumentation is the assertion that any interference with private property is forbidden by the provisions of Article 46 of the Hague Regulations of Land Warfare. For to draw this conclusion from Article 46 is erroneous simply because the very text of the Hague Rules of Land Warfare expressly sanctions interference with private property if such a policy is rendered necessary by the requirements of war (Article 23 g), if supplies of war materials are involved (Article 53) or if such action is necessary to the maintenance of public welfare, (Article 43).

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It is therefore not such a simple matter, and neither the war nor the Hague Rules of Land Warfare are as uncomplex as this might indicate.

I propose to attempt to deal systematically with the basic questions and to provide answers to these questions, in so far as it is in any way possible to find in the Hague Rules of Land Warfare answers which meet all cases, although the Preamble to the Rules itself states:

"It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice". (Defense Exh. 262, Eberhardt Doc. Book II, p.3)

One law only forms the legal basis for this trial, namely Control Council Law No.10, drawn up in Berlin on 20 December 1945. Although it is extremely doubtful whether a retroactive law can establish valid penal provisions for the past - Dr. Kranzbuehler will deal with this subject - , let us admit its validity here without prejudice to the issue. According to Article 2, 1 b, war crimes are "acts of violence or offenses against . . . property, committed in contravention of the laws or customs of war" and the example quoted is the "spoliation of public or private property" (Defense Exh. 264, Eberhardt Document Book II, p.33 a).

A war crime has therefore been committed only if the laws of war have been violated. The only source containing the true legal principles is, in accordance with the above, the laws or customs of war, and these in turn are contained - and with this view the Prosecution concurs - in the Hague Rules of Land Warfare.

From this, the following main questions arise:

What group of people are governed by the Hague Rules of Land Warfare, in what fields and at what times do their provisions apply? What is the definition of the concept "spoliation"? What is the significance of the phrase "necessities of war" as used in the Hague Rules of Land Warfare?

If International Law is to be used as the basis for the judgment of actions of a criminal nature, the most important factor appears to be full and precise knowledge of this International law, the more so when one considers that any indetermination or uncertainty in the legal principles justify scruples on the validity of the charge of spoliation as a whole, particularly where offenses involving property are concerned.

4. The judgment by legal standards of cases of spoliation is extraordinarily difficult, because there is not neither in the Hague Rules of Land Warfare, in literature, in the judgments so far pronounced in Nuernberg, 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. According to the IMT Judgment, however, if the Court is to establish personal guilt under penal law, the defendant must have known and understood at the time of his action what was forbidden by penal law and what was sanctioned by it. It is precisely here that evidence is lacking.

Like the IMT Judgment, American Military Tribunal No. IV referred in the Preamble to its Judgment of 22 December 1947 in the case against the Flick Konzern, to the "rights of civilized nations" and to

the "principles known to all experts on American penal law" and stressed the fact that:

"No-one whose personal guilt has not been proven may be sentenced".

In these proceedings, private industrialists are being held responsible for industrial measures taken by them in occupied territories either on the instructions of their government or, in the case of contracts with foreign industrialists, with the consent of their government. Neither the books of German penal law nor the international provisions of the Hague Rules of Land Warfare decree that a private individual shall be responsible for examining the measures taken by his government in the occupied territories or that he shall be held responsible for the non-violation of International law.

In so far as the IMT Judgment sentenced defendants for crimes of spoliation, the persons concerned were exclusively men who had been the highest military and political leaders of Germany before and during the war. The sentence therefore affected only persons who had acted on behalf of the State and who, by virtue of their official status, were representatives of the State. The International Military Tribunal did not reach a decision on the question of whether an industrialist - a private person, that is - can be held responsible for actions falling under the provisions of International Law. Formerly, the theory of International Law throughout the world represented the view that only the States were bound by the provisions of International Law, irrespective of whether codified laws or the laws of usage were involved. International Law imposes ^{obligations} / upon the State and confers certain rights upon it. Neither ^{obligations} / nor rights fall ^{the} to the lot of private individual under the terms of International Law, albeit isolated provisions

of International Law have been taken over into the penal law of the individual countries, thus becoming national law. This attitude which dominated International Law until the second World War is apparent from legal literature, from the letter and from the spirit of the codified contracts available. I need quote only a few examples:

It is exclusively the "contracting powers" ("Vertragsmächten, les puissances contractantes") which are referred to in the Hague Regulations of Land Warfare of 1907.

In Article 43 of the Appendix to the Hague Regulations of Land Warfare, as in many other articles, mention is made of the "Occupier" and in Article 44 of the "Belligerent". In both cases, it is clear from the general sense of the law that the occupying or belligerent State is meant. Correspondingly, in Article 55 the "Occupying State" is authorized to make use of State property in the occupied area (Defense Exh. 282, Eberhardt Document Book II, p. 21 and 24).

Similarly in the Kellogg-Briand Pact of 27 August 1928, only the "high contracting parties", i.e. the States, are spoken of. (Defense Exh. 282, Eberhardt Document Book II p. 2 and 3).

In the appendix to the Hague Rules of Land Warfare of 1907, the "State" is granted the right to employ prisoners of war (Article 6, Defense Exh. 282, Eberhardt Document Book II, p. 8) and in Article 7, the "Government" is made responsible for the maintenance of the prisoners of war. (op. cit. p. 9)

In Article 41 (op. cit. p.20) of the appendix to the Hague Rules of Land Warfare, it is expressly stated that the State shall be held responsible for damages in cases of the violation of the conditions of armistice on the part of individual persons acting on their own initiative.

In the case of this one exception, in which the private individual has acted on his own initiative, provision is made for the punishment of the individual. But only then in thus far, that the one contracting power may demand of the other contracting power that the offender be punished.

In this connection, however, Article 3 of the Hague Rules of Land Warfare of 1907, in which the case of the violation of the Hague Rules of Land Warfare is expressly dealt with, is absolutely decisive. It is laid down that the "Belligerent Party", i.e. the State shall be obliged to make amends for all damage, and in the second sentence, it is expressly stated that the State is responsible for all actions committed by members of its Armed Forces. (Defense Exh. 282, Eberhardt Document Book II, p.4).

With reference to Count II of the Indictment, it is of particular importance that in the provisions of the Hague Rules of Land Warfare on the conduct of the occupying power in occupied territories, - c.f. Articles 42 - 56 - the "State" only and never the private individual is spoken of.

That the highest organ of arbitration in the field of International Law, namely the Hague International Tribunal stated the following in the year 1928, is completely in keeping with this line of thought:

"It may be readily admitted that, according to a well established principle of International Law, the Beamten-abkommen, being an international agreement, cannot as such create direct rights and obligations for private individuals." (Defense Exh. 285, Eberhardt Document Book II, p. 57).

I am not unaware of the fact that in recent times, there has been a tendency to hold the individual responsible for actions falling within the scope of International Law.

This idea also is dealt with in the I.T. Judgment, and the High Tribunal accepts the responsibility of the individual. One must consider, however, that in the case of the International Military Tribunal, the persons involved were not private individuals such as those appearing in this case, but responsible officials of the State, that is such persons and only such persons as, by virtue of their office, acted on behalf of the State. It may be a much healthier point of view not to adhere in all circumstances to the text of the provisions of International Law, which is, in itself, abundantly clear, but rather to follow the spirit of that law, and to state that anyone who acted on behalf of the State is liable to punishment under the terms of penal law, because, as an anonymous subject, the State itself cannot be punished under the provisions of criminal law, but can at most be held responsible for the compensation of damage. In no circumstances is it permissible, however, to hold criminally responsible a private individual, an industrialist in this case, who has not acted on behalf of the State, who was not an official or an organ of the State, and of whom, furthermore, in the face of the theory of Law as it has been understood up to this time, and as it is outlined above, it is impossible to ascertain that he had any idea, and who, in fact, had no idea that he, together with his State, was under an obligation to ensure adherence to the provisions of International Law.

In this line of argumentation, I also am in harmony with the Prosecution in the big trial held before the International Military Tribunal, even if not with the Prosecution in this trial. I cite from the Prosecution Statement of 17 January 1946 the following words of de Menthon, French Prosecutor:

"It is clear that in a State organized on up-to-date principles, responsibility is restricted to those who act directly for the State, because they alone are in a position to judge the legality of orders given. They alone can and should be prosecuted." (Defense Ltr. 285, Eberhardt Document Book II, p.47).

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Moreover, all I have to do is to point out the statements of the Russian representative of the Prosecution, Colonel POKROVSKY, on 13 February 1946:

"The natural conclusion is drawn (from the Hague Rules for Land Warfare) that in cases of violation of these obligations, the responsibility for a crime against a prisoner-of-war and especially for systematic crimes directed against the dignity, person, health and life of prisoners-of-war must fall on the government of the country which has signed the Convention." (Defense Exhibit 285, Eberhardt Document Book II, Page 51.)

Likewise, the well-known teacher of International Law, Hans KELSEN who arrives at the conclusion:

"If an act is to be imputed to the State and is not to be imputed to the individual who has performed it, the individual, according to general international law, is not to be made responsible for this act by another State."

and also:

"An individual is not responsible for his act if it is an act of State." (Defense Exhibit 285, Eberhardt Document Book II, Page 51/54.)

As the Tribunal possibly remembers, I have submitted with my evidence a "Legal opinion concerning the criminal responsibility of individuals for violations of International Law", by Professor Dr. Herbert Kraus, an internationally known teacher of International Law and his expert opinion was accepted for the purpose of legal argument, as Eberhardt Exhibit No. 285. I do not want to take up the time of the Tribunal unnecessarily and therefore I would refer for the further explanation of my legal opinion to this detailed and thorough expert opinion. I would also like to ask the Tribunal to consult this expert opinion in support of my legal view.

In the Flick-trial, General TAYLOR attacked my above statements in his Final Plea on 24 November 1947,

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by asserting that my opinions had been refuted a long time ago, and pointed out single cases of precedence. However, the cases of precedence which he mentioned had been altogether real facts in which criminal acts were charged, which are punishable according to every Penal Code. He spoke, for instance, of murder and ill-treatment and always of acts which had been committed by a single individual. In this case, however, we have to deal with actions of a State in accordance with International Law.

To my surprise, General Taylor took the opportunity to attack his own colleague, namely the chief representative of the French Prosecution de MENTHON, whom I have just quoted. Considering the importance of de Menthon, it is not likely that General Taylor is right in assuming that de Menthon might have had a different opinion in reality from that stated during the trial. I am still less convinced that General Taylor is justified in submitting the argument that de Menthon does not represent the view of the French Government. I might think that also the American Prosecution and General Taylor have supported views in Nuremberg which do not represent the opinion of the American Government.

The legal problem which is of interest here was dealt with by the American Military Tribunal in the Flick-Case and the Tribunal stated:

"It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals."
(Flick Transcript of 22 December, English: Page 10980, German: Page 10722.)

and it referred to the "case" Ex Parte Quirin which was decided a short time ago by the Supreme Court of Justice in the United States. "(Ibid.) Therefore the American Tribunal arrives at the conclusion that action can be brought against a private individual, too, and that the difference between him and a government official,

that is somebody who acts on behalf of the State, is only that his guilt existed "only to the extent and not to the fact." This can be objected to, because in this case the American Military Tribunal says itself that the opinion which I had held "cannot be maintained any longer", which consequently admits that until the decision of the Supreme Court of the United States in 1942, this opinion was justified and represented the prevailing conviction. But if this is the case, then no action can be brought against a German industrialist on the grounds of International Law, just because the Supreme Court of the United States accepted in the middle of the war a new legal conception, a conception which therefore did not yet exist at the time when the acts which interest us here had been committed and which, for the rest, the defendants were informed about only now, after the war is over.

If everything is considered, then an industrialist could not have known during the war, that he was obliged to check on the legality of the economic decrees and the measures of his State, taken in occupied territories, before deciding to engage in a requested collaboration, quite aside from the fact that even if he had had misgivings, he could not have avoided this collaboration in an economic system which was directed by the State and ruled dictatorially.

That is why the defendants had not the slightest idea that they, as private businessmen, were justified in, or what is more, obliged to investigate the permissibility of economic decrees in the occupied territories. In addition to that, they were anyhow not in the position to survey such difficult legal problems or indeed to decide them.

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But even if the Tribunal should adopt the criminal responsibility of individuals for the observation of international provisions of the Hague Rules of Land Warfare in the economic realm, although such a provision is not contained in the Hague Rules and also is not stipulated by the Law of the Control Council, as this again is based only on the H.R. of L.W., then all the more it must be requested that a clearly defined criminal act is legally established or at least can be unambiguously deduced by the Prosecution from the Hague Rules of Land Warfare. Furthermore it must be demanded that these penal provisions of the International Law apply to the entire world, for victors and conquered alike. The fulfilment of this request was already promised by Justice Jackson in the trial before the IMT, but it is not carried out by the Law of the Control Council, which applies only to Germany.

There exists no codified penal International Law for the world, which would correspond to the Law of the Control Council, since the Kellogg-Briand Agreement, the Hague Rules of Land Warfare and the Geneva Convention are not a codified penal code, which has ever been used outside Germany as the basis for criminal proceedings. If this were the case, then an immense number of citizens of the allied nations would have to be convicted, because they had attacked and shot at undefended cities and villages in violation of Article 25 of the Hague Rules of Land Warfare, or because they committed looting in the strictest sense of the word, in violation of Articles 28 and 47 of the H.R. of L.W., or because they, without any military necessity, attacked with machine-guns from low-flying planes helpless men, women and children in the open fields.

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De lege ferenda it is therefore certainly a great deed if the attempt is made to create a generally valid International Penal Code, and this was attempted by the London Statute and the Control Council. But it seems to be objectionable, that this was not tried subsequently for the whole world, but only effecting the citizens of conquered Germany.

How far we are, even today, from a generally valid International Penal Code is shown by the Charter of the United Nations: in Article 53, Section 2, the "Enemy Nation" is defined as one of those, who during the second World War were the enemy of one of the Signatory Powers. According to Article 107 one must not refer to the Charter, if the actions which are to be undertaken, concern one of the so-called enemy nations. Talleyrand was already fighting against such a differentiation between victors and vanquished at the Congress of Vienna in the interest of the French people. Even General Taylor has the feeling that such a differentiation is dangerous. It is true that this cannot be concluded from his speeches for the Prosecution, but very well from a lecture which he held on 28 July 1947 on the 5th International Congress for Penal Codes, in Geneva. In Geneva he pleaded for the setting up of a Permanent International Tribunal to carry out International Penal Law, with the express argument:

"For the very reason that international penal law is being enforced today against nationals of the defeated Axis powers; the trials of war criminals, and the principles on which they are based, will be stultified by failure to universalize these principles and their attendant sanctions". (Defense Exhibit 297, Eberhardt Document Book VIII, p. 108).

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But even if according to the Prosecution one holds the vanquished to be more guilty than the victor, then at least the principles of every civilised country must be observed, by charging the defendant with a crime which is exactly defined by the law.

I beg to recall that I mentioned as early as in my opening statement, the 34th Conference for International Law, which was held in Vienna between the 5 and 11 August 1926. One participant asked the following question in order to define the responsibility of a private individual with respect to International Law:

"Suppose I were the defendant, how should I know what I should have done and what I should not have done? I do not know what the Public Prosecutor is going to say to me. He starts and says: You did this, this and this. I say: Where is the paragraph which forbids me to do this? And he says: there is no paragraph, but a public opinion of all the lawyers in the world. I say: as I am no lawyer and have never read a juridicial book, I cannot know that."

Lord Phillimore answered to this:

..... a man must be charged with a definite crime,
Nobody doubts that. "

7) In contrast to this principle, the Prosecution has not even undertaken the attempt to define the conception of looting.

All it does is to refer to Article 2 of Control Council Law No. 10. The reference to the Law of the Control Council, however, is no definition, because the Law of the Control Council, too, instead of a definition, contains only a reference to the Laws or Customs of War, i.e. to the Hague Rules of Land Warfare. In the H.R. of L.W., the provisions which have to be applied can be found in Section 3 of the supplement, under the title:

"Military Power on occupied enemy territory",

and thus in Articles 42 - 56.

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"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the 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 same phenomenon as in the IMT-Judgment appears here also, namely the reference to a vague, ill-defined law, to the "public conscience".

" In this connection the reasoning, submitted by the American Military Tribunal in Nuernberg in Case 3, the Justices Trial seems of great significance, and which namely refers to the Legislation which Hitler issued in 28 June 1935 (Reich Law Gazette 1935, Part I, Page 839 and the following). Paragraph 2 of this law reads as follows:

"Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under that law which most closely fits, in regard to fundamental conception." "

" The American Military Tribunal comments on the Hitlerite wording of the law:

"In substance this edict constituted a complete repudiation of the rule that criminal statutes should be definite and certain and vested in the Judge a wide discretion in which Party political ideology and influence were substituted for the control of law as the guide to judicial decision." "

I believe that in this case a parallel exists between the Hitlerite law and the Control Council Law, that is to say, a parallel with regard to the complete vagueness of the issue; the only difference is,

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that the conception of popular feeling in the Control Council Law is replaced by world conscience,

I do not wish to be misunderstood and should therefore like to point out that in this connection, I think only of the facts which are of interest in this case, namely those which are summarized by the Prosecution under the conception of "spoliation", and obviously not to "looting" in the narrow sense of the word, or as the Judgment in the Flick-Case expressed it, "looting in the common sense of the word", which plays no part either in the Flick Case, or in the Krupp Case and which was committed by National Socialist leaders, for instance Goering and Frank in the form of the seizure of objects of art and which is adequately dealt with in the Hague Rules of Land Warfare, in Article 47, in the laconic words:

"Pillage is formally forbidden".

It is the fact that the Prosecution simply designates every action of an industrialist in occupied territory as "spoliation", regardless of whether this activity was carried out in the interests of Germany during the war, or in the interests of the economy of the occupied country, which makes the judgment in the industrial cases so very difficult.

It is immensely difficult to give a clear statement, on the basis of the Hague Rules of Land Warfare, on what the occupying power is permitted to do and what not. This difficulty was apparent as early as in the Flick Case and led to numerous debates and finally to the unambiguous statement in the judgment that in any event, activity of an industrial trustee or lessee cannot be regarded as spoliation.

Unfortunately the Prosecution,

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has not permitted itself to be influenced at all by this judgment.

The definition of the conception "spoliation" in the wider sense of the word, cannot be derived from a single provision of the Hague Rules of Land Warfare, as the Prosecution would have it, drawing attention, as it does, to Article 46, according to which private property is to be respected and must not be confiscated. On the contrary, all those provisions of the Hague Rules of Land Warfare which refer to private property or which deal with private property in any way must be considered together, because the Control Council Law does not refer to one definite Article, and particularly not to Article 46, but to the Laws and Customs of War in general.

In order to arrive at the final conclusion in a systematic way, I want to list the most important provisions:

a) Article 23 prohibits the destruction or seizure of enemy property, "unless such destruction or seizure be imperatively demanded by the necessities of war".

b) The preamble stipulates that the provisions are to serve as a general rule of conduct for those conducting the war, for their dealings in their relations with each other and with the population, in order to alleviate the sufferings caused by the war, "as far as this is permitted by military necessities".

c) According to Article 53 "all kinds of ammunition of war may be seized, even if they belong to private individuals".

d) According to Article 43, the occupying power has to take all measures, "to restore and ensure, as far as possible, public order and public safety".

8. This list shows that there are in the Hague Rules of Land Warfare 2 basic conceptions resulting from 2 different spheres of interest, which are at variance with each other, namely the protection of private property on the one side, in the interests of the occupied country, and the military interests of the occupying power on the other. The Hague Rules of Land Warfare do not admit of a clear division of these spheres of interest and obviously it was not intended that they should do so, precisely because the codification of such contradictory interests is hardly possible. Moreover, there are no particular provisions referring to immovable private property and to industrial enterprises and factories, with the exception of the preamble which is couched in general terms, and which again refers on the one hand to the "dictates of the public conscience" and on the other hand to "military interests". It is not astonishing either that the Hague Rules of Land Warfare do not contain any regulations applicable to the cases concerned with economic-industrial activities which are under discussion here. Warfare as conducted in former centuries, which forms the basis of the Hague Rules of Land Warfare, involved neither the civilian population nor the economy of a country. In those times neither economic nor total warfare was known. It was only the total character of modern warfare and of modern economic warfare which embroiled the entire economy and the civilian population and thus of necessity, private property also. The Hague Rules of Land Warfare contain only provisions governing the narrowly limited military occupation and in addition are obviously based on the idea that only a part of the belligerent^{enemy}/country is occupied; it does not contain any direct provisions for economic warfare or in fact

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for total warfare at all, apart from the above-mentioned provisions of the preamble, which is designed to reconcile two contradictory interests and which, consequently, does not lead to any clear definition, since of necessity the following question must always arise: whose interests are the more important in each individual case?

Therefore the provisions of the Hague Rules of Land Warfare can be interpreted only in the 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 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. Accordingly, the International Military Tribunal stated with respect to International Law:

"This law is not rigid, but results from continuous adaptation to the requirements of a changing world."

This maxim was taken into account not only by the IMT Judgment, but, in this very economic sphere, by the American Tribunal in the Flick-Judgment of 22 December 1947. It mentions the necessity for an exact definition and establishes from the preamble that "the provisions are to be regarded as general." The ^{Judgment} then continues:

"They were written in a day when armies traveled on foot, in horse drawn vehicles and on railroad trains; the automobile was in its Ford Model T stage. Use of the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organizations transcending national boundaries had barely begun. Blockades were the principal means of "economic warfare". "Total warfare" only became a reality in the recent conflict.

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These developments 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. (Flick Transcript of 22 December 1947, English: Page 11003-04, German: Page 10747.)

I do not have to add anything to this train of ideas; they show unambiguously that only the spirit of the Hague Rules of Land Warfare may be applied, by way of the observance of its basic principles.

For the details of the development of modern warfare I should like to refer to Dr. Kranzbuchler, who in his plea has established precisely and convincingly the course of this development and the consequences resulting therefrom from the point of view of International Law.

By way of conclusion to my remarks on spoliation and in the interests of the understanding of the same, I should merely like to state the following:

As early as in the 1st World War, the entire economy was affected; although the blockade by the Allies was basically directed only against Germany, it of necessity affected the territories which were occupied at that time also. This must obviously have been true to a much greater extent of the 2nd World War, firstly because larger areas and whole countries were occupied and secondly because, due to the development of the weapons of war, total war made its appearance for the first time. The blockade during the 2nd World War damaged not only the German economy but ^{also} the economy of the extensive, occupied territories which suffered to an equal extent. In a total war of such dimensions, the Allies considered Germany, together with the occupied territories, as a single enemy country, although these were countries which were their own allies, and particularly as a single economic unit. This led to the bombardment by the Allies of the occupied territories and to their attacks against the industries of these occupied territories.

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precisely because they had become a single economic unit. French factories, buildings, bridges, roads, etc. were attacked by the Allies from the air. Is it therefore astonishing or is it not rather a matter of course, that the occupying power considered the occupied territories as territory united with Germany in a single economic unit and consequently applied the same economic rules in Holland or in France as those which were valid in Germany? Was it not ~~essen-~~tial for the foreign economy to be directed by the State just as was the German economy? Was it not essential for the whole of German and foreign occupied territory under military leadership to be utilized uniformly for war production, seeing that it was perforce attacked uniformly by the enemy? No iron curtain could be dropped between Germany and the occupied territories, as the war-economy would have been torn apart or would maybe even have collapsed, exactly as it is now torn apart in Germany through the iron curtain dropped in Germany by the Soviet Union.

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. The conditions of warfare have changed to such an enormous degree, that they are no longer included within the scope of the Hague Rules of Land Warfare because the ^{latter} /are based on an entirely different conception of warfare, namely that of a restricted war which affects only a part of the enemy country and not the conception of an all-embracing war, which involves every factory, every workshop, agriculture in its entirety, every citizen, every civilian, yes even every child. The result is sad and tragic, but it

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can be just as little disregarded as the bombing attacks which also affected every factory, every workshop, the whole of agriculture, every civilian, yes even every child.

--- This actual state of affairs cannot be subjected to the strait jacket of the Hague Rules of Land Warfare. The provisions can be applied only in principle and only in accordance with the spirit. But it is precisely this interpretation which corresponds with the basic principle of the Hague Rules of Land Warfare, expressed in the preamble which mentions "Cases" which "are not included in the provisions of the Hague Rules /^{adopted} /by them".

The authors of the Hague Rules of Land Warfare had more foresight than the Prosecution and knew that methods of warfare would develop and might develop in such a way that the provisions ^{could} /no longer be applied literally. This interpretation is not intended to be a license and, within the meaning of the Hague Rules of Land Warfare, it does not, in fact, constitute any such thing, as the tenets of International Law persist and the codified provisions must be interpreted only according to the spirit.

If this hypothesis is applied, then a report by the Chief of the Civilian Administration in Belgium and Northern France can by no means be regarded as so heretical as the Prosecution would assuredly have it, in quoting the same on Page 73 of the Trial Brief. This passage says:

"Considering the waging of a total war, therefore, in an appropriate interpretation of the principles of the Hague Regulations on Land Warfare, requisitions are not only permissible for the needs of the occupying forces in a narrow sense of space, but for the overall interests of the German waging of war. In these are included requisitions in favor of German war economy, as well as requisitions in favor of the German Wehrmacht beyond the occupied territory."

These conclusions are also entirely consistent with the Hague Regulations for War on Land, which always leave a certain margin and are never so restricted as the Prosecution would like. I would draw attention to Article 23g, which speaks expressly of the "Necessities of War" and to article 53, according to which every kind of implement of war can be seized, even when they belong to private persons. This regulation in particular is, of course, in total war of very wide significance. For in total war everything is a war-essential, every production and every machine serving production, just because this war is all-embracing and, like a Moloch, devours everything. The Prosecution does not agree with me, but gives this Article a narrow interpretation. That, however, is inconsistent. ⁱⁿ For, all three of the industrial trials, they gave for the basis of Count I of the Indictment respecting aggressive war, a very wide interpretation to the term "war material" and saw in every kind of production - for example ^{also/} in the case of the I.G. in their dyestuffs production - the supporting and preparation of a war of aggression. If the Prosecution assumes so broad a standpoint that, with respect to a modern economic war, it calls all industrial products war material, it must be consistent and, in consequence, must also reckon the same products likewise as war products, that is, also as war stocks, in dealing with Count II of the Indictment. If that, however, is correct, then, in the sense of the Hague Regulations for War on Land and particularly of Article 53, articles are concerned which may be confiscated "even if they belong to private persons". This necessarily brings in the "Necessities of War" of Article 23 of the Hague Regulations for Land War.

This train of ideas is most particularly applicable to the Krupp Konzern, which the Prosecution itself describes as the greatest armaments factory and the importance of which for war is beyond question. In that case, however,

everything in this Konzern, which, during the war, as the Defense has shown, was not allowed to carry out any peacetime planning or any peacetime production, everything that it produced and everything that it required in machinery and other articles for its production was war material, and that not only in the sense of Count I of the Indictment, but also with respect to the alleged spoliation under Count II of the Indictment.

Finally, I would draw attention to Article 43 of the Hague Regulations for War on Land, reading as follows:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Public order and the public life can, however, only be restored or maintained in occupied territory if the economy of the country is functioning.

Even the Prosecution in their Trial Brief had to admit, concerning spoliation, that this prescription of the Hague Regulations for War on Land, implied the right and the duty of the occupying power to take over the economic plants of the country and economically to administer the country under suitable conditions. The importance of this article becomes especially clear when one remembers that in countless cases industrial works at the moment of occupation of the country were abandoned by their owners or their managers and were brought to a standstill.

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It is certainly a necessary consequence, which has hitherto received far too little attention, that in a modern war the prescription of Article 43 frequently overlaps those of Articles 46, 52 and 53. For, from these three articles, the Prosecution wish to draw the implication of a prohibition to interfere at all with the economic undertakings in occupied territory, whereas Article 43 implies the duty, and therewith also the right, to intervene in the economic life of the country. It is obvious that it will not always be simple to define the correct limits and it is likewise clear that it cannot be required of a private individual industrial^{ist} that he himself should recognise the limits of these Regulations.

The prescription of Article 43 acquires very special significance if one keeps in mind that the territory of the German Reich, together with the occupied territories, in accordance with my earlier statements, represented in the war a single economic unit and that consequently the intervention of the State in the industry of the occupied territories could by no means be avoided - on the one hand, to the benefit of the economy of the occupied territory, which was cut off from the remaining foreign countries, and, on the other hand, to the benefit of the war economy of the German Reich. In total war, the economy of an occupied country can only continue to exist and work in conjunction with the economy of the country that occupies it; for, in consequence of the blockade, it can receive neither raw materials nor orders from other countries, and this has necessarily an alternate effect, under which the industry of the occupied territory, just like the German industry, receives raw materials, quotas and orders from the German side and accordingly, in the same way as German industry,

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is yoked to the State-directed war economy and must deliver up machinery or material exactly like the German plants, if the machinery or material concerned was more urgently needed at another place. Certainly this applies only to war-essential material and certainly also the economy of the occupied territory, precisely in accordance with the provisions of Article 43; must^{not}/be paralysed thereby, because this article rightly requires that the economy of the country shall continue to function. The Prosecution's own statement, however, already shows that the measures taken were justified in the sense of Article 43; for the industrial plants of the occupied territories worked during the war for the benefit of their own country and for the benefit of the German war economy; the two spheres of interest on which the Hague Regulations for War on Land are based are therefore bound up with each other. This will be shown in detail when I deal with the facts which form the basis of the charges of the Prosecution.

In conclusion, may I, with reference to the legal basis, make the following remarks:

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 War on Land include the civilian population, total war lets women and children hunger and die?

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And yet a General who himself helped to conduct such a war, says, as the representative of the Prosecution authorities: Every interference in the private economy is a war crime, every participation in State measures in the economic sphere is a war crime, "regardless of whether particular acts of the defendants constituted in themselves individual acts of spoliation" (Trial Brief, Page 17).

A consistent interpretation of the Hague Regulations of land warfare compels the admission that interference in private property is permissible in so far as, within the meaning of the Hague Regulations of land warfare, the "requirements of total war" make it necessary and the "laws of humanity" and the "requirements of the public conscience", of which the preamble speaks, are duly observed. According to article 43, the State is bound to interfere because, in a single economic sphere, the economy of the occupied territory is dependent on working together with the occupying power; and, according to Articles 23 and 53 and the preamble, the State is authorised to interfere for the same reason of the single economic territory, because, vice versa, the necessities of economic war require it.

For the sake of understanding, please look at only one example:

Holland was completely occupied inclusive of its entire economy. Therefore, because it was separated from other countries, it received from the Germans large deliveries of ores and steel. That, according to Article 43, is the obligation of the occupying power. On the other hand, Dutch plants, just like German plants, gave up from their stocks on the occasion of the so-called stock action (Lager-aktion) 30,000 tons of iron, because

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it was needed for the war economy. That, according to Articles 23 and 53 and the preamble to the Hague regulations for land warfare, is the right of the occupying power.

9. With the permission of the Court, may I now consider the various cases of so-called spoliation from these points of view on the basis of the Hague regulations for land warfare:

The different cases were dealt with by various defense counsel in the presentation of the evidence. In order to facilitate the survey for the Court and for the other participants in the trial, the Defense decided to amalgamate the documentary presentation of the different cases and the evaluation of the evidence and accordingly to hand in a joint closing brief containing all the cases of spoliation, to which I should like to add the following remarks:

So far as I have given in my statements a description of facts, these represent the assertions which are likewise contained, though more fully, in the closing brief, and therein will be found the different exhibits which support these assertions. I therefore beg the Court to regard my plea concerning spoliation together with the closing brief of the Defense on spoliation as a joint work, as each complements the other in point of facts and law. This division in plea and closing brief appeared to be practical, so as not to burden the plea with too many tiresome details.

10. 1. The Berndorfer Metallwarenfabrik Arthur Krupp A.G.

was founded in Austria in 1843 by the brothers Alfred and Hermann Krupp and Alexander Schoeller. After the retirement of Schoeller and the death of Hermann Krupp, it passed into the possession of his son, Arthur Krupp. After the first world war, the factory got into economic difficulties. The parent house of Krupp in Essen, on account of the close family connections, participated in the reorganisation up to 1928. In the later reorganisations in the thirties, however, this was no longer possible, because of the difficulties of foreign exchange.

In the course of the reorganisations, the influence of the former sole owner, Arthur Krupp, declined more and more, and he was obliged to surrender the bulk of his shares to the Oesterreichische Kreditanstalt Bankverein, and he remained only as president of the Board of Administration.

In view of their close family and business connections and in view also of the fact that the factory marketed its products under the name of Krupp-Berndorf, the Krupp firm in Essen was naturally interested in acquiring the ownership of the original sister company. This desire was first frustrated owing to the foreign exchange difficulties. After the Anschluss of Austria to the German Reich in 1938, negotiations were again taken up with the Oesterreichische Kreditanstalt, with a view to acquiring the shares, since the foreign exchange obstruction no longer existed. Based on official taxation, the Krupp firm made its offer on an estimated value of the undertaking of 5.3 million Reichsmark. The Oesterreichische Kreditanstalt, however, took a higher view of its value, which it placed at 12.2 million and finally as the result of a compromise by the Krupp firm in July 1938, an agreement was reached on the basis of 11.1 million marks.

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It is quite incomprehensible how this incident can represent spoliation within the meaning of the Hague Rules of Land Warfare. That this legal charge cannot be upheld is shown in the following:

a) The necessary condition for application of the Hague Rules of Land Warfare is that enemy territory was occupied in the course of war time operations. The Prosecution will not be able to deny this necessary condition, as they emphasized this point when I discussed with them whether or not the Hague Rules of Land Warfare were applicable in occupied Germany; they were of the opinion that the Hague Rules of Land Warfare were not applicable in Germany, because Germany was not occupied by a power at war with Germany, but in connection with unconditional surrender. I shall refer to this argument later; at present I am only mentioning it to prove that the Prosecution know perfectly well that the Hague Rules of Land Warfare presuppose the belligerent occupation of an enemy country. It would be superfluous to state that this condition was not fulfilled at the Anschluss of Austria. I should also like to refer to the International Military Tribunal which - based on the London Statutes - was of the same opinion. This law was not even changed by the Control Council Law, because the Control Council Law refers to the Hague Rules of Land Warfare. The American Military Tribunal in the Flick case (Case V) has come to the same conclusion and states:

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"We look in vain for language (reference is made to the fundamental legislation, namely the Control Council Law, the Moscow Declaration of 1943 and the London Agreement of 1945) evincing any other purpose. Crimes committed before the war and having no connection therewith were not in contemplation."

The American Military Tribunal made the same decision in the I.G. Farben trial (Case VI) on 22 April 1948 and dropped from the indictment those actions under Count II, which took place prior to 1 September 1939. The I.G. Tribunal pointed out that the statements of the Prosecution were not sufficient.

"to constitute a war crime, since they describe incidents in territory not under the belligerent occupation of Germany."

b) But even if this viewpoint were not sound, there would not be a violation of the Hague Rules of Land Warfare, let alone a war crime. The case in question is the purchase of shares on the basis of an agreement with an Austrian bank. But there is no passage whatsoever in the Hague Rules of Land Warfare which forbids an industrialist to conduct economic negotiations with members of the occupied territory and to conclude economic agreements. Such agreements therefore cannot violate the laws of war, because neither in the letter nor in the spirit do such laws exist. Apparently the Prosecution feel themselves to be in a weak position, as they mentioned the alleged case of spoliation at Berndorf only very briefly in a notation (Page 26) in their Trial Brief, as against their earlier statements. Merely in order to make this statement complete it should be added that the Prosecution were also unable to prove that the shares were bought by applying coercion. If the firm of Krupp had done this they would not have doubled their offer of purchase at the request of the selling bank.

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This doubling of the offer led to their buying the shares at approx. 200 %, while they were noted at the stock exchange only at 110 %. A rate of 200 % can be regarded as extremely high, if one considers the rates of the best German shares in 1938, for instance Hoesch 114 %, AEG 118 %, and I.G. Farben 156 %.

- 11) 2) With reference to the alleged spoliation in Russia I need hardly go into the individual facts which were dealt with in the Closing Brief, as they were all similar, even practically identical, and in no way contain any violation of the Hague Rules of Land Warfare.

When German troops occupied parts of Russia during the war with the Soviet Union, the German Government faced an absolutely new situation. Pursuing the "scorched earth" policy, the Russian leaders had ruthlessly destroyed and dismantled the industrial plants; Russia herself had shown no consideration for the needs and interests of her own civilian population and the economic capacity of the occupied territory. With the destruction of the industrial plants the population of the Russian industrial areas had been deprived of the necessities of life.

In accordance with this basic principle adopted by the Russian leaders, the plants which are of interest in the Krupp case were also destroyed and dismantled, for instance, Kramatorsk, Mariupol, the Molotow Plant at Dnjepropetrowsk and Berdjansk. Details can be found in many documents submitted by the Defense and, in order to give an over-all picture, I need only quote the words of a Russian engineer:

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"The last days which the Soviet troops spent in the city meant the beginning of the barbarous destruction of the remaining plant property. What could be smashed was smashed, what could be burnt was burnt, and what could be neither smashed nor burnt was blown up."

In this situation the German occupying power was forced in their own interest and that of the civilian population to rebuild the industrial plants as much as possible, in order to provide the civilian population with a means of livelihood. The Four Year Plan was therefore extended to the occupied Eastern territories, and companies were founded by the State in order to administer the plants, which were all property of the Russian State, as for instance the Berg- und Huettenwerks-Gesellschaft Ost, the so-called BHO. In view of the enormous extent of the necessary reconstruction work these companies could carry out their tasks only with the assistance of German industrial firms. Depending on the industry concerned, German firms were approached, as for instance Krupp. The monopoly companies concluded trustee agreements with the industrial firm which was approached, through which the industrial firms were bound to administer the plants as trustees for the BHO or for the Reich. Sometimes these agreements were called trustee agreements, sometimes sponsorship agreements. In actual fact this difference was of no importance. The industrial firms received no property. All they actually received was duties. In the "Regulations for the management of sponsorship plants" laid down by the BHO it was explicitly decreed that the sponsorship plant "was neither legally nor economically part of the sponsor's plant". The plant was administered on behalf of the BHO and subject to their directives. The German industrial plant was obliged to rebuild the plant, to make all their technical knowledge and

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experimental data available to the Russian plant and to supply the Russian plant with machinery and equipment. Thousands of machines and vast quantities of tools were made available to the Russian plants for the resumption of their operations. Only a fraction of these plants or machines could be transported back to Germany on the evacuation of Russia. In order to realize that these measures were largely taken to further the economic capacity of the occupied territories, it suffices to mention from the details contained in the Closing Brief, that the firm of Krupp was to take over as a trustee, in connection with the order to repair the Dnjepr bridges which had been destroyed, the Molotov Plant at Dnjepropetrowsk which undertook bridge construction.

At Kramatorsk which, under Russian control, had formerly been an armaments plant, household items were manufactured for the Russian population, on the basis of the sponsorship agreement which had been concluded with Krupp. The necessary materials and machinery were brought from Germany, for instance for the Kramatorsk Plant 67 railroad carriages with machinery and auxiliary materials.

The Sartana Eisen- und Metall-Werk G.m.b.H. alone - a firm founded by the firm of Krupp on orders from the Reich - used 18 million Reichsmark for the supply of machinery and equipment to plants in the Ukraine.

It would be an endless task to mention all the details which were gathered from the Prosecution and Defense documents. This short survey will suffice to find the basis for the legal judgment, which is as follows:

a) Movable as well as immovables were the property of the Soviet State. According to articles 53 and 55 of the Hague Rules of Land Warfare the occupying power may confiscate the movable as well as the immovable property of the State and administer it pursuant to the rules of usufruct.

In the Ordinance of 28 May 1942 (Defense Exh. 288, Eberhardt Doc. Book II, Page 100), resulting from Hitler's decree of 17 July 1941 on the Administration of the newly occupied Eastern Territories (Defense Exh. 287, Eberhardt Doc. Book II, Page 101), paragraph 1 reads as follows:

"In the occupied Eastern territories subject to civilian administration, the entire movable and immovable property of the USSR, her memberstates, organizations, and unions, which served the economy, shall constitute a special property (special assets of the economy)."

Thus in the first place this paragraph says that the state property was uniformly taken and kept together in accordance with the Hague Rules of Land Warfare.

In paragraph 2, section one it has been ruled that:

"the special assets of the economy are to be administered in trusteeship".

When General Taylor in his final plea in the Flick Trial speaks of the "notorious special assets of the economy", I could not understand in which respect this point was assailable. I believe that a manufacturer whose factory is being rebuilt and administered under trusteeship as special assets of the economy will feel happier than a manufacturer whose factory is being dismantled.

This ordinance conforms with the cited articles of the Hague Rules of Land Warfare as well as the supplementary administrative regulations. According to the 1st Administrative Regulation, (Defense Exh. 289, Eberhardt Doc. Book II, Page 103) very detailed obligations are imposed on the Trustee.

b. Moreover, all measures taken in the Russian cases are sanctioned by Article 43 of the Hague Rules of Land Warfare, which had already been fundamentally dealt with by me, in accordance with which the occupying state is obliged to restore and maintain public order, public life and thus economic life in the occupied territories. After the German troops had occupied vast areas in the East in June and July 1941, Hitler's decree on the Administration of the occupied Eastern Territories was issued on 17 July 1941 (Defense Exh. 287, Eberhardt Doc. Book II, Page 94), the preamble of which literally reads as follows:

"In order to restore and maintain public order and life in the newly-occupied Eastern territories I decree that.....", thus the exact text of Article 43 of the Hague Rules on Land Warfare. This decree, however, was the basis for all measures in Russia and this became particularly apparent when on 28 May 1942 the ordinance already mentioned by me on the Russian state property, on the so-called "special assets of economy" in the occupied Eastern territories was issued, for this ordinance together with its 4 administrative regulations (Defense Exh. 2888/91, Eberhardt Doc. Book II, Pages 100/114) specifically refers to the Decree of 17 July 1941 just cited.

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The legal foundation created by the German Reich and the administration of the factories in the East, in which industry was included, was thus fully in conformity with the Hague Rules on Land Warfare. Nor can this clear situation be obscured by the Prosecution's reference to facts of spoliation, which were dealt with in the IMT verdict in connection with Goering and Rosenberg. It is sad enough that the National Socialist government abandoned the principles of human rights, especially in the East. But one should not forget that the government deceived our people in the same way as it did the foreign countries. One should never forget that many documents which were submitted as the National Socialist program by the Prosecution, remained just as unknown to industry as to foreign countries. Private industries only saw what was publicly released and could not know that the real rulers were guided by different ideas. These other ideas had no bearing on the industrial enterprises the administration of which was entrusted to German Industry by way of Contracts of trusteeship and sponsorship. In this respect the proved and described legal principle was observed, thus a legal principle which conforms with Article 43 of the Hague Rules of Land Warfare.

In this case too for the sake of completeness it need only be added that industry as a whole and thus also Krupp derived no advantages and no profit whatsoever from the operation of industrial enterprises in Russia, on the contrary they only suffered losses on account of the fact that machines and material had to a great extent be placed at the disposal of the Soviet plants and later on could not or could only in part be brought back to Germany.

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Machines and factory equipment, which originally were Russian property, were not removed on the occasion of evacuation. This allegation by the Prosecution is wrong for the simple reason that as a result of the measures taken by Russian troops, Russian machines and equipment were no longer available.

To conclude the subject of Russia I may point out that this subject had already been dealt with thoroughly in the Flick Trial. In conformity with the ideas explained by the Defense, American Military Tribunal IV had decided:

"that state owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy."

(Flick transcript of 22 December 1947, Engl. Page 11005, German Page 10750.)

Whether the occupying power itself took care of the administration and usufruct or left them to a trustee is also unimportant in the opinion of the same American Tribunal, for the verdict says:

"Property which the government itself could have operated for its benefit could also legally be operated by a trustee."

12. 3. The charges by the Prosecution relating to Yugoslavia are split up in 2 parts viz. actual and juridical ones:

The operation of chromium pits in the Yugoslavian state territory by Krupp is regarded as a war crime and the acquisition of the shares of Chromasseo, the Yugoslavian Mining Corporation, as a crime against humanity. The first charge has been wrongly made according to the Hague Rules of Land Warfare and the second one pursuant to the Control Council Law in connection with the sentence passed by the American Military Tribunal in the Flick Case.

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a. Before the war Krupp had already been engaged in the mining of Yugoslavian chromium ore in order to ensure the basis of their raw material supply. The richest chromium ore deposits of Yugoslavia were in the possession of the British Allatini Company. Besides these deposits there were "practically no other important chromium ore pits in Yugoslavia" according to the Prosecution witness Duerriegel, former commercial manager of Allatini. Therefore, only 3 minor, poor chromium ore pits were available to Krupp and the attempt had to be made by the processing of these poorer ores and by special technical plants to achieve a success. This work of Krupp's was welcomed by the Yugoslavian state on account of the economic revival it entailed.

After the outbreak of the war the former chromium ore import came to a standstill owing to the blockade. The chromium ore supply, however, was of extraordinary importance for the German war economy, so that the Reich Ministry of Economics and the Four Year Planning Board were interested in the production of alloy ores from Yugoslavia for steel production, and therefore, induced Krupp to increase their efforts in this field. For this purpose the Yugo-Chrom A.G. was founded in Yugoslavia by Krupp in cooperation with Reichswerke Hermann Goering. These efforts did not cease until in April 1941 war broke out between Germany and Yugoslavia. Private industry was excluded and the Wehrmacht took the matter into their own hands, confiscated the chromium ore pits in the occupied territory for reasons of war economy and tried with the aid of military mining units to resume production in the mines, which were deserted by nearly all their owners. The Wehrmacht put the former commercial manager of the British Allatini pits,

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Herr Duerriegel, in charge of the "provisional administration of all pits that had been confiscated by the Wehrmacht". In the first place the pits of the British Allatini Company belonged to them and also those of the smaller Yugoslavian company: Chromasseo.

As the Army itself was unable to fulfil the mining tasks which devolved upon it, various German firms were put in charge, viz. Krupp of the mining of chromium ore, other firms of the mining of lead, antimony, and manganese. In order to fulfil this commission Krupp in November 1941 made a lease-contract with the above named provisional administrator and took over the operation management of the Jeserina pit, which was the property of Chromasseo. In the opinion of the expert, Prosecution witness Duerriegel, the Jeserina pit as well as the other pits of Chromasseo were unimportant, which explains why previously, from the aspect of private economy, Krupp had not shown any interest in these pits. The exigencies of war, however, forced the Wehrmacht and consequently also the Krupp firm which it had commissioned, to operate these pits in spite of the fact that the proceeds for the ore produced were considerably less than the expenditure, which was exceedingly high owing to the extension of the mining plants, for instance a cable-car line, 3 kilometres long, a narrow-gauge field railway, 32 kilometres long, and a perfectly modern floating plant. These excessive costs led to the formation of the "Gemeinschaft fuer den Legierungs-Erzbergbau" (Association of alloy oremines), in which besides other firms, Krupp had a share of 35%. Apart from the mining plants, further considerable expenditure had to be made for the workers for lodgings on the plant premises, canteens, water supply lines etc. on welfare grounds. By 30 August 1943 Krupp had already spent more

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than 13 million Reich Marks for the ore pits operated by them, according to the Prosecution's own documents.

This brief outline of the facts shows that there is no question of spoliation as understood in the Hague Rules of Land Warfare and no war crimes as understood in the Control Council Law. Apart from the fact that Krupp acted only on the orders of state or military authorities and not for private economic interests, the condition demanded in the IMT-verdict is not fulfilled, i.e. that the economy of Yugoslavia was exploited "for the German war potential in a merciless way without consideration for the local economy". The operation of the chromium ore pits at an expense which from a private economic point of view was in no way justified, was attributable exclusively to the "exigencies of war" as understood in the Hague Rules on Land Warfare and beyond that complied, in the way it was carried out, with the international protective regulations, especially with Article 43, for the management not only maintained production in these poor ore pits, but also considerably improved it, so that the economy of the occupied territory and the civilian population profited. Nor was the economy of the country endangered by the use of the ore produced for the benefit of the German war economy, as Yugoslavia was already exporting chromium ore before the war in view of the fact that she owns no suitable processing industry and moreover the matter in hand concerns an additional chromium ore production which had been brought about by special efforts.

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In this connection it would also appear significant that Yugoslavia reappointed a plant manager of KRUPP's who had worked there during the war, to his old position in August 1947.

13. b. The acquisition of shares of the Yugoslav company Chromasseo is not based on KRUPP's private initiative and has still less to do with the intention of spoliation. After the occupation of Yugoslavia the country was divided into several occupation zones between Germany, Italy and Bulgaria. Bulgaria treated the newly acquired territory as her own state territory, established a Bulgarian administration and declared by decree of 2 September 1942 that all mining enterprises were state property with the exception of the mines ^{run} by the German Wehrmacht. The boundaries established between Bulgaria and Italy led to arguments, owing to the Italian interest in the mineral wealth of Skoplje. In order to strengthen the German position with regard to Italy as far as the ores from this area were concerned in case a frontier should be established in Italy's favor, the German authorities set value on the fact that the ownership of these mines should be

transferred to Germans by way of contracts. Thus the Deutsch-Bulgarische Chromerz Bergbau A.G. which had succeeded the Jugo - Chrom A.G. mentioned previously and was owned by KRUPP and the Reichswerke to the extent of 50% each, came under consideration for the purchase of the Chromasseo shares. The witness Dr. UFER therefore received the order from the Military Economic Staffs/Southeast and the German Envoy in Bulgaria and the General Plenipotentiary for Economy in Serbia to negotiate with the stock owners of the Chromasseo on behalf of the Chromag. The initiative belonged therefore exclusively

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to the government authorities. This is also the reason why Dr. UFER did not inform the firm KRUPP until afterwards. The efforts met with very little success. It turned out that the Italian company Ammi had already acquired the majority of the shares, viz. 5/8 from the former Yugoslav owners of the Chromassee. Dr. UFER was therefore able to acquire only 2/8 of the total stocks by way of free negotiation from the Swiss citizen VOEGELI and besides this a third eighth which legally still belonged to a Jewish owner, but economically also to the Swiss VOEGELI to whom this property in the stocks was pledged for a loan already due. This third eighth was bought from the officially appointed administrator of Jewish property at an appropriate price with VOEGELI's consent. It is impossible to understand how the Prosecution can consider this state of affairs a crime against humanity. Even the Prosecution cannot object to the purchase from the Swiss national which took place on the basis of a free contract. But the purchase of the third eighth cannot be estimated differently, because the economic property already belonged to the Swiss national as a result of the pledge due. But apart from this any punishable act is out of the question, because a crime against humanity is always an act of violence or crime against person or life according to the Control Council Law and not an offense against property. This legal interpretation follows necessarily from the wording of the Control Council Law, paragraph II, sub section 1 c, The tenability of this argument was also confirmed by the American Military Tribunal ⁱⁿ case V against FLICK where it states literally:

"Compulsory taking of industrial property, however reprehensible, is not in that category."

FLICK Transcript of 22 December 1947, Engl. page 11013, German page 10758.

Moreover it was not a seizure by violence on KRUPP's part, as my explanations prove, and the acquisition of the shares was not aimed at the Jewish Yugoslavian owner at all, but against the Italians, owing to the particular political situation. Apart from all that, however, the acquisition of a minority share in these poor chromium ore mines does not constitute a private interest for the KRUPP firm.

It may be mentioned merely to avoid misunderstanding that the Prosecution has failed to give evidence of any action by one of the defendants in this field and even to prove that one of the defendants had any knowledge of this acquisition of stocks.

14. 4. I now turn to Holland. The charges in question against the defendants are the so-called Depot Project (Lageraktion) of 1942/43 and the so-called Ruhr Aid Project of the end of 1944/45.

In both cases government measures are concerned which resulted in raw materials or equipment being brought to Germany from Holland.

a. In view of the great importance of iron and steel for war production there existed in Germany during the war an extensive government control for these products. The same applied correspondingly to the stocks of iron and steel. After foreign territories had been occupied by German troops and consequently formed, as I have already described in detail, a uniform economic area together with Germany, the government control of iron and steel had necessarily to be extended to the occupied territories as well and therefore also to Holland. This was equally

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favorable to Dutch industry, to which raw materials were made available and quotas given, and unfavorable to some industrial plants, the stores of which were seized, if they were not indispensable or were more important to another war plant. It follows from this that Holland received regular iron quotas from Germany after 1940, as she ^{iron} needed/for her industry and could no longer import from abroad. In this way Holland received a total of 1 128 738 tons from 1940 to 1944. On the other hand, another consequence of the uniform economic territory was that, in Holland just as in Germany, it was no longer possible to dispose freely of the stocks. Therefore a decree on the duty to turn in reports, a prohibition against disposal of material and a government authorization to confiscate iron and steel material were issued for the occupied Dutch territories on 8 October 1942. They constitute the so-called Iron Adjustment decree.

All these were measures which are permissible in the sense of my general argument on the uniform economic area and the requirements of war according to the Hague Rules of Land Warfare in the interests of the occupation power and in the interests of the occupied territory; for a free economy in part of a uniform economic area, e.g. in Holland, would have been an economic impossibility, if the same products were controlled by the State in the rest of the same economic area.

In the spring of 1943 it became necessary within the program for specific war production to make a special quota of 100 000 tons available to the iron producing industry or the mining industry. Therefore the Reich Ministry for Economics as the supreme authority for the control of iron, together with Wehrmacht authorities, issued the decree

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of 27 March 1943, by which these 100 000 tons were to be procured. Taking the government controlled stocks as a basis, it was ordered that 1/3 of them, viz. 30 000 tons, should be covered by the stocks ^{which} had already been requisitioned in Holland. The other 2/3, viz. 70 000 tons, were to be covered by German stocks. These stocks were distributed by government measures, and for practical reasons the Reich Association Iron (Reichsvereinigung Eisen) and (Reich Association Coal (Reichsvereinigung Kohle) which cooperated in this project merely as liaison offices, were also to participate. The commercial transactions involved in the import of 30 000 tons from Holland were handled by the Reich Association Iron, which commissioned to this end 2 trading firms namely the firm of KRUPP Eisenhandel, Duesseldorf, and the firm KLOECKNER & Co., Duisburg. Thus KLOECKNER and KRUPP were involved only as delegates of the Reich Ministry of Economics.

According to my general argument it is impossible to understand what charge should be deduced from this depot project, as it concerned a very dear consequence of the exigencies of war and affected German and Dutch factories similarly. Moreover this depot project gave consideration to the resources of the occupied territory, as is shown by the fact that the small quantity of 30 000 tons was only a minor part of the tremendous Dutch stocks which in any case originated from Germany. (Defense Exhibit 340, HOUDREMONT Doc. Book I, page 1/7). The Prosecution, which represented this depot project as particularly grave in the indictment and in the opening statement, obviously recognized this in the meanwhile, for this case recedes in the Trial Brief on Spoliation and the Prosecution itself concedes on page 81 that the removals were

"balanced against the needs of Dutch industrial economy".

Moreover, KRUPP itself did not benefit at all by this project which concerned industry as a whole, for the KRUPP Firm received only the small quantity of 5 300 tons.

15. At the close of 1944 a second project was carried out by the government authorities, the so-called Ruhr Aid Project. The name sounds like that of an economic project, but the measure in question is actually a government measure, based on purely military interests as understood in the Hague Rules of Land Warfare. This is demonstrated even by the words of the Prosecution in the Trial Brief on Spoliation, where, without impartiality, it attempts to introduce these facts by saying:

"After the Allied invasion of Europe, the removal of machinery as well as of industrial materials was commenced, and the pace of removal was accelerated with the advance of the Allied armies."

Thus the Prosecution admits indirectly that the measures in question were purely military and caused by the invasion and the rapid advance of the Allied armies. Holland was on the point of being won by the Allies, and the Supreme Command of the Armed Forces (Oberkommando der Wehrmacht) foresaw the fact that Dutch industry would be occupied by Allied troops within a short while. Thus the general order of the Supreme Command of the ^{Wehrmacht} of 6 September 1944 was brought into being (Defense Exh. 343, HOUDREMONT Doc. Book I, page 23), in which the ARLZ measures were ordered in the case of impending occupation by enemy troops, i.e. measures for decentralization, evacuation, crippling and destruction. It goes without saying that industries in the occupied territory had nothing whatsoever to do with the ordering and execution of such measures in the occupied territories, but on the basis of the OKW order the Commander-in-Chief of the Army Group or the Reich Commissioner in the Netherlands and the

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Reich Minister of Armament and War Production, SPEER, were responsible. The latter was responsible, properly speaking, for the machines and raw materials which are of interests here. Since March 1942 dictatorial powers had been given to SPEER himself, (Exh. 341, HOUDREMONT Document Book I, page 16), which had enabled him in October 1943 to set up the Ruhr Staff SPEER "in order to achieve uniform execution of all economic tasks connected with armament and war production, as well as to ascertain and to repair damage to war economy caused by air attacks" (Defense Exhibit 342, HOUDREMONT Doc. Book I, page 18).

On the approach of the Allied troops SPEER ordered through this Ruhr Staff -- this happened in November 1944 -- that machines and raw materials be brought from Holland to the Ruhr district for reasons of war economy, both as a protective measure against the approaching armies and as a substitute for bomb damage in the Ruhr district. These machines and materials had already been requisitioned by the Wehrmacht and declared to be so-called Wehrmacht booty. The material in question was, therefore, so-called war material which was to be withdrawn according to the ARLZ-order mentioned above from enemy troops, or destroyed of this should no longer be possible.

All this shows that industry, and KRUPP in particular, had nothing whatsoever to do with these measures until this time. The KRUPP Firm, like all other firms, was concerned with the affair only in so far as they received the order from SPEER to make engineers available for collaboration as experts in the state's military measures. No further explanations are needed in order to understand that an industrial firm could not resist such an order when military interests of the highest importance were involved. Moreover it had no cause to

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resist, since it had no personal interest in the whole project. It is necessary to take into consideration in this regard that the engineers made available by industry, in this case therefore by KRUPP, did not work for KRUPP in Holland, but exclusively on behalf of the Ruhr Staff SPEER. As a consequence of this, the objects requisitioned by the Wehrmacht in Holland were not made available to industrial firms but to this same Ruhr Staff. This is the reason why no machines from this project were made available to the KRUPP firm itself. (Defense Exh. 345, HOUDREMONT Doc. Book I, page 31).

The order to make engineers available, which was issued in November 1944, was giving by the Deputy of the Military Area in Essen (Defense Exh. 346, HOUDREMONT Doc. Book I, page 33).

It is an important point that these engineers did not cooperate in requisitioning measures, but only in the execution of military orders, by inspecting as experts the material requisitioned by the Wehrmacht and given advice as to the importance of the material for war purposes. It is further of great importance that the KRUPP firm did not show any initiative whatsoever and made no efforts at-all to be given machines for its own use. On the contrary the machines arrived unexpectedly at the factories of the KRUPP firm due to the military measures of the government authorities. They were only kept and stored away by KRUPP. It is interesting in this connection that the firm neither desired to do anything with these machines nor could do anything in this late phase of the war, a fact which allows it to be recognized particularly clearly that the measures in question were not industrial measures, but purely military ones.

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Equally significant is the fact that machines came to the KRUPP firm only from those Dutch firms whose relations with KRUPP were already good and who wanted to counterbalance the military measure of removal by themselves, suggesting that the material went to KRUPP, a measure on their part/^{which} was justified by KRUPP's esteem and resulted in their property being restored to them at the end of the war. Especially informative is Dr. THIESS' statement (Def. Exh. 351, HOUDREMONT Doc. Book I, P. 40 ff.) which reveals quite clearly that an act of seizure on the part of the Wehrmacht was concerned and that KRUPP at the time "was sharply opposed to this type of infringement by the Reich Minister for Armament and War Production on private property". The result of this attitude was that, in accordance with THIESS' statement, KRUPP made every conceivable effort to have this foreign machinery safeguarded as Dutch property and even took pains to remove this Dutch property from the clutches of the German authorities and made countless efforts and arrangements to this end in the interests of Dutch property, as THIESS describes in detail (cf also statement by the witness FANSEN, transcript P. 6139/58, especially P. 6141/3 and 6152/3a.)

All in all, it is incomprehensible why the Prosecution is trying to bring a charge against the KRUPP firm on the strength of this matter, where the measures concerned are quite clearly military ones, which the OKW and SPEER considered justified in international law on the basis of the "exigencies of war". In principle this is also correct in view of the approach of the enemy. It is not necessary, however, to settle this question in this trial, nor is it possible to settle it on the basis of the Prosecution material which has been submitted. In any case,

the KRUPP firm, like the rest of the industrial firms under the command of SPEER's Ruhr staff, could and was forced to assume that the measures in question were admissible military measures, especially in view of the fact that at this period shortly before the end of the war the industrial firms were by no means able to gain a sufficient picture of the military situation to be able to form their own judgment as to admissibility or inadmissibility on the basis of international law.

Even if the measures taken by SPEER's Ruhr Staff were inadmissible, however, there still remain the exonerating circumstances that KRUPP neither displayed personal initiative, nor took part as a firm in the measures of the State, nor revealed personal economic interest, and moreover did not itself profit in any way by this action, but on the contrary burdened itself with troublesome arrangements on behalf of Dutch property.

16. 5. The Prosecution has brought up several cases of spoliation in France. I shall begin with the case of the Elmag.

a. The Societe Alsacienne de Construction de Mechanique, abbreviated: S.A.C.M., is a French Aktiengesellschaft, whose shares are distributed in the possession of countless minor shareholders. The firm had i.a. a factory in Mulhouse, where machine tools were constructed. After the defeat of France, the German Reich in practice incorporated, in other words annexed, Alsace-Lorraine, as against the rest of the occupied territory of France. In accordance with the documents submitted by the Prosecution itself, the Chief of Civil Administration in Alsace took possession of French property there in favor of the German Reich after it had first been confiscated as enemy property. The Chief of Civil Administration appointed Commissars for the French factories in Alsace.

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The Commissars for the firm S.A.C.M. with which we are here concerned were appointed on 22 August 1940 and the name was at the same time translated into German and called Elmag A.G., all this on the strength of the decree on enemy property in Alsace issued on 16 December 1941. (Def.-Exh. 2456, EBERHARDT Doc. VII P. 63/76).

The KRUPP firm had no more to do with these events than with the Commissars, who were not connected in any way with the firm. Before the occupation by German troops, the French company had for a time been employed on the manufacture of machine tools for war materials besides the manufacture of textile machines. The Commissars of the company appointed by Germany extended the manufacture of machines for war material on the orders of the German Reich. In particular, the manufacture of anti-aircraft guns was started and the Commissars to a considerable extent supplemented the obsolete machine stocks of the French company with new supplies for this purpose. The new supplies were so extensive that after 2 1/2 years the new machines comprised more than half of the entire machine stocks of the factory.

The KRUPP firm did not come into contact with the Elmag A.G. until it had been administered for almost three years of the war by Commissars. The KRUPP motor vehicle factory in Essen was destroyed by bombing attacks on 5 and 12 March 1943. After the first attack the KRUPP firm intended to rebuild the motor vehicle factory. After the second attack, however, the Army Ordnance Office decided after a meeting in Berlin that the motor vehicle factory should be moved to another place. The KRUPP firm was

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directed to the buildings of the Elmag A.G. in Mulhouse, and in a meeting on 27 March 1943 with the Reich Minister for Armament and Munitions, the principles on which the Mulhouse factory was to operate in future were laid down. The KRUPP firm was directed to conclude a lease with Elmag A.G. and to this end founded an independent firm, namely the Elmag G.m.b.H., in the interests of a perfectly separate business. The preliminary lease came into being on 31 March 1943, the final lease, after very long and thorough negotiations, not until 5 June 1944. The negotiations were conducted for the French company, that is, for Elmag A.G., by the Commissar with the collaboration of the Frenchman, JAQUEMIN, who also appeared as a witness, who had had full powers of attorney for the French firm before the war. For the KRUPP firm negotiations were conducted by my client, Herr EBERHARDT. The KRUPP firm, through EBERHARDT, met the French firm more than half way, which was particularly evident in the case of the payment for the lease. A payment of 2 1/2 million RM per year was agreed on although the commercial adviser for KRUPP had originally held a price of 1.3 millions to be reasonable. Besides this, EBERHARDT attached special importance to various contract clauses to provide for the event of the suspension of the contract, and these were in favor of the French firm; this proves that the KRUPP firm by no means intended to take over the Mulhouse firm permanently, and was in no way pursuing private gain. The lease contract was concluded only on the basis of the military order to transfer, thus exclusively on the strength of the "exigencies of war" in consideration of the particular military importance of the motor vehicle factory

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which had been destroyed by bombing in Essen. It seems significant that it was expressly laid down in the contract that KRUPP should administer the Mulhouse plant "with the care of a good businessman, at its own expense, and should in its operation preserve to the greatest possible extent the previous stocks and structure of Elmag A.G.". The business management of the Elmag G.m.b.H., which was not in the hands of the KRUPP directorate, kept strictly to this contractual regulation, as even the French Prosecution witness JAQUEMIN had to admit; in particular it was constantly at pains to maintain as far as possible the traditional branch of textile machine production in the interests of the French firm in spite of the war. Besides this, Elmag G.m.b.H. invested considerable sums in the factory in favor of the French company.

These facts show that there was no spoliation as understood in the Hague Rules of Land Warfare. It was a question exclusively of measures declared urgently necessary by the Wehrmacht through the exigencies of war, in which the KRUPP firm was compelled to take part within the program of military economy, although its own economic interests played no part. In view of this necessity of war, the KRUPP firm could^{do}/no more than shelve its own property interests and give consideration to the economy of the occupied territory as far as possible by means of a purely temporary lease contract, thus fulfilling the demand contained in the preamble to the Hague Rules of Land Warfare, "to mitigate the sufferings of war in so far as military necessity allows" (Def. Exh. 282, EBERHARDT Doc. Book II P. 3).

Furthermore, the KRUPP firm in no way took the opportunity to enrich itself, but on the contrary expended considerable sums on

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behalf of the firm. The Defense was able to prove that in the final outcome the French firm was the richer by 12,9 million RM. There can be no clearer proof of the fact that no spoliation was intended, but merely measures demanded by the exigencies of war.

When in late Autumn 1944 the Allied troops advanced through France against Alsace, Elmag G.m.b.H. received another order to transfer, directing them to remove the motor vehicle factory to the interior of Germany, to Bamberg and Nuernberg. When the lease contract with the French firm ended in this manner and Elmag G.m.b.H. left Mulhouse, the KRUPP and Elmag G.m.b.H. firms acted once more in an absolutely correct and irreproachable manner. I will pass over the actual details, and refer here to my Closing Brief. It is sufficient to point out here that the Elmag G.m.b.H. carried out the removal of their own machines with the utmost thoroughness in order to ensure that only those machines were removed which belonged to Elmag G.m.b.H. and not to the French company and which in the main had been brought to Mulhouse from Essen at the beginning of the lease contract. Thus even in this final stage the Prosecution assertion does not reveal spoliation. On the contrary: in the rush of removal, of over 1100 machines, 59, which belonged to KRUPP, were left behind, while 9 machines belonging to the French firm were inadvertently taken away. As a result of the precise and correct inventories, however, this was easily established later, so that the articles inadvertently removed were able to be restored immediately. Thus per saldo, here too the French firm was not despoiled, but benefited to the extent of 50 machines.

17. b. The removal from the Alsthom Plant at Belfort to the Krupp firm of a bending machine for steel plates is considered by the Prosecution to constitute another punishable offence. At the beginning of 1941 the firm Krupp-Stahlbau, Rheinhausen, received an order from the High Command of the Navy to manufacture parts of pressure chambers for submarines. The Firm of Krupp, Rheinhausen, thereupon informed the High Command of the Navy that they were not in a position to bend the sheet metal required for the pressure chambers in the time laid down because they did not have the necessary bending machines. The High Command of the Navy replied that it was essential owing to the importance of the order from the point of view of the war effort that schedules be adhered to and that the Wehrmacht would therefore supply the bending machine required. The Wehrmacht then confiscated the bending machine in Belfort. The Machine was removed to Krupp's and was used there exclusively for submarine construction, while remaining the property of the French firm, as a sales contract had never been concluded, and it was returned after the war.

For perfectly logical reasons the firm of Krupp cannot alone be charged with a punishable offence in this case because we are dealing with a measure taken by the Wehrmacht. From the legal point of view we could therefore speak at the most of participation within the meaning of the control council law. But in that case the Prosecution would have to prove that the High Command of the Navy had committed a war crime in this instance. That is, however, not the case in accordance with my general line of argument because we are again dealing with an absolutely clear instance of temporary interference with private property because of military interests and of urgent military necessity. There can be no doubt that the order was in fact important from the point of view of the war effort and that

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a special machine required for submarine construction is war material. But that means that confiscation would be justified in accordance with the provisions of the Hague rules of land warfare.

But even if the tribunal should not share that opinion the firm of Krupp cannot be charged with criminal participation because the measures taken by the High Command of the Navy were bound to appear justified to the firm which cannot be considered either as entitled nor as obliged to question the propriety of such a measure taken by a military department, quite apart from the fact that it was acting in accordance with instructions issued by the highest military authorities and was not in a position to oppose such instructions, important as they were from the point of view of war economy. In addition, the firm of Krupp did not derive any material benefit from the transaction, although such benefit constitutes the necessary prerequisite for spoliation as understood in criminal law, and the economy of the occupied country did not suffer any damage, nor did the firm in Belfort, which did not while the occupation lasted receive any orders for the execution of which it would have required this machine.

18. c. Krupp has also been charged with another instance of interference on the part of the Wehrmacht with private industry, with regard to the Austin-Liancourt plant.

In the Summer of 1942 the Wehrmacht instructed the Krupp firm to expand their motor vehicle repair shops in France which were working for the German Wehrmacht; the Wehrmacht allocated to them for this purpose the Austin plant, Liancourt near Paris, as a finishing workshop.

The French firm S.A. Austin was the proprietor of this factory. But in view of the fact that 91% of the shares were in the possession of Herr Moritz Rothschild, a Yugoslav national of Jewish extraction, the French government had some time

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previously, in 1941, confiscated the plant in accordance with the laws against the Jews promulgated by the French government and had appointed a trustee for the plant. In the Summer of 1942 when the Wehrmacht claimed the factory, the Frenchman Maurice Erhard was trustee. At the instigation of the Wehrmacht the Krupp firm concluded a lease contract with the trustee on 3 September 1942 for the period of three years and also a contract of purchase for a part of the machinery. The trustee refused to sell the whole plant.

When the lease contract was concluded the factory had been out of use for some time and was in a very bad state of repair. A considerable amount of money had to be invested, in order to put the factory back into operation.

The facts do not constitute a war crime or a crime against humanity within the meaning of the control council law, for the following reasons:

aa) Contracts concluded by order of the Wehrmacht were admissible within the meaning of the Hague rules of land warfare, because they were concluded at the instigation of the Wehrmacht, which means that they were undoubtedly necessary in accordance with "the exigencies of war". The contract concluded on 3 September 1942 was moreover concluded in accordance with article 43 because the factory was out of use and its operation by Krupp was in the interests of economic recovery in the occupied country. The fact that Krupp invested money in the plant proves moreover that Krupp, so far from damaging private property, had actually enhanced its value. Not only did the work done by the factory bring about economic and financial advantages for the French company, but it also gave to French workers employment and a livelihood.

bb) The plant had not been confiscated by the Wehrmacht, but was taken over in accordance with a contract concluded with the trustee of the French company. I have already pointed out that industrialists are allowed to conclude contracts in occupied countries and do not therefore on principle fall under the prohibitions of the Hague rules of land warfare. The assertion made by the Prosecution, that we are dealing with an illegal transaction because the firm was administered by a "commissar for Jewish property" appointed by the Germans, is false. The man concerned was a trustee appointed by the French government; this follows from the lease contract concluded with Krupp and especially from the appendix attached to the lease contract which shows that the trustee derived his authority exclusively from the French government. (Pros. Exhibit 671, Vol. 20).

In the face of this fact the old Prosecution objection, that the Vichy government was a figurehead government, a "puppet government" becomes irrelevant. The Vichy government was elected constitutionally by an absolute majority of the French National Assembly on 10 July 1940. That was why no fewer than 43 nations in all entertained diplomatic relations with the Vichy government, above all the United States of America. It is hard to believe that the United States of America should have accredited an ambassador to a puppet government.

For details I would refer you to the evidence submitted by Dr. Wolf and to the plea he will make before this court. I would only like to add, that the facts in this case clearly refute the objection raised by the Prosecution; which is shown by the fact that the French trustee in agreement with the Vichy government refused to conclude a contract of purchase for the whole factory,

and by the further fact that the Vichy government refused to permit the Krupp firm to found a separate company under French law under the name of "Krupp S..., Paris"; the Krupp firm had intended to do so in order to be in a position for economic reasons to manage the plants in France from a central office.

cc) For the reasons already given we are not here dealing with a crime against humanity, because a crime against humanity in accordance with the control council law and also with the judgment, quoted above, of the American tribunal in the Flick case, concerns itself, by definition, not with property, but with persons persecuted on racial grounds.

19. d. The last instance of spoliation I would like to discuss is the Montbelleux Ore Mine.

In their Trial Brief (p.67), the Prosecution base their case on a quotation from the contract concluded by the Krupp firm in June 1943, thus, unwittingly, providing a justification under international law.

The quotation runs as follows:

"In the interest of the war economy the tungsten ore mine at Montbelleux presently closed is to be drained and pumped dry, fitted out with the necessary installations, and placed back into operation at the earliest possible date In order to insure that this task, of great importance to the war effort is carried out as smoothly and as speedily as possible, the firm Krupp will function within the framework of the O.T. and will be supported by the Organization Todt and also by the Commissioner for France of the Reich Minister for Armament and Munition as much as possible."
(Prosecution Exhibit No. 733, Vol. 23, P. 24).

These two sentences contain a justification; they prove that Krupp acted under government orders and under command of the government authorities in the interests of war economy, i.e. in obedience to the "exigencies of war"; they also prove,

that the disused ore mine was put back into operation in accordance with the obligations imposed by article 43 of the Hague rules of land warfare, that is with the obligation to restore and support the economy of an occupied country.

This general line of argument is supplemented by the detailed evaluation of evidence in the Closing Brief submitted by the Defense, from which I would like to quote a few details here:

The tungsten ore deposits at Montbelleux are not extensive and yield low quality ore. Attempts to mine ore from the mine were made in 1907 and 1910, but were discontinued after a short period of time on both occasions. The mine was not put into operation until 1916-18, during the first world war, in the interests of the French war economy: production was discontinued immediately the war ^{came} to an end. After that the mine was not used for 24 years. Equipment and buildings went to ruin, shafts and pits collapsed and the works area was neglected until the Montbelleux mine was put back into operation at the instigation of the military authorities in 1942, again in the interests of war economy. At first the mine was run by the Todt organization, until the government authorities commissioned the Krupp firm in view of its greater experience to run it under command of the government authorities. From the point of view of private business, the mine was a liability. The funds expended upon the restoration of the mine amounted to RM 3.6 million, whereas the value of the ore produced was no more than RM 230,000.--. The Krupp firm ran this completely unprofitable enterprise solely at the instigation of the State and solely on behalf of the "association for the mining of ores for alloys" (Gemeinschaft fuer den Legierungserzbergbau), of which Krupp owned no more than 20% of the shares.

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KRUPP had no economic interest whatsoever to operate the mine during the war, still less in the period after the war. In accordance with instructions issued by the authorities 90% of the ore actually mined was delivered to the firm STARCK which was also a member of the association, while the KRUPP concern received only 10%. The local economy was stimulated by the activities of the government together with KRUPP. The French owners had only advantages from it, viz. from the payment of the lease and from the valuable new plants which were left undestroyed by the plant management at the end of the war.

I believe that these facts prove convincingly that the occupied area was in no way "exploited in the most ruthless manner and without consideration of the local economy" within the meaning of the IMT judgment by the operation of the Montbelleux mine. Not even within the meaning of the indictment can the mining and removal of the ore which otherwise would not have been mined at all constitute an excessive use of the economic resources of France.

20. I can conclude with this the treatment of the individual cases of spoliation. I hope that I have made it clear that no charge can be brought against the KRUPP firm on account of its industrial activities during the war in the occupied countries and that there is not a single instance of a violation by the KRUPP firm of the Hague Rules of Land Warfare, leave alone a war crime.

May I add that spoliation presupposes that the perpetrator has derived material benefit from the act. But that is precisely what the Prosecution have failed to prove. In actual fact

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the large German industry had no intention of thus deriving benefit, nor did the KRUPP firm either. I would like to remind you of the letter from the Reich Chamber of Economics to the Reich Minister of Economics of 4 November 1943 (Defense Exh. 2909, EBERHARDT Doc. Book VIII, page 1) which I have submitted in evidence, in which the Reich Chamber of Economics together with Generaldirektor ZANGEN, the head of the Reich Group for Industry, informs the Reich Minister of Economics in accordance with a decision made by the Select Advisory Committee of the Reich Chamber of Economics that "it is not the desire of the authorized representatives of industry in the Reich Chamber of Economics that the industry should be regarded during the war as being interested in the acquisition of enemy property" and which further states:

"The leading and important undertakings of the German domestic economy, therefore, do not intend, for the reasons given, to secure for themselves in Germany's present life and death struggle a private advantage in German and international competition by competing for enemy private property."

These words of the representatives of the German industry speak for themselves.

21. I want to discuss now as a precaution the case that the Tribunal should, contrary to my explanations and my expectation, gain the opinion that some of the facts actually do constitute a violation of the Hague Rules of Land Warfare. If this, should occur, contrary to my expectations, I would ask you to consider the following legal points:

1. An objective violation of an agreement under international law is not, as such, a punishable act, just as it is not^a punishable offence in civil commercial law. It constitutes a punishable act only, where there is personal guilt under the terms of criminal law. But there cannot be any guilt in this case, because the defendants were not in a position to judge either the legal position

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or the complicated provisions of the Hague Rules of Land Warfare. The industrialists generally understood the expressions pillage and spoliation only in their literal sense and not in their derivative sense. The idea did not even occur to an industrialist that a punishable act could be involved, in concluding lease contracts or contracts of purchase with the Wehrmacht, the State or a trustee within the limits of the requirements of the war economy. It was impossible that the idea should occur to an industrialist that a charge would be brought against him because he had served his fatherland during the war.

22. 2) The Control Council Law No. 10 speaks in paragraph 2 only of the "plunder of public or private property", consequently only of plunder within the strict meaning of the word.
23. 3) The Control Council Law describes in paragraph II, 1 b only serious offences as examples of "war crimes" such as murder, illtreatment of prisoners of war and civilians, killing of hostages, wanton destruction of cities, towns or villages or devastation not justified by military necessity. The Control Council Law lists, in all these cases, such crimes as examples which are considered serious crimes in the criminal codes of all countries. It is contrary to the idea of the Control Council Law, if the Prosecution wants to have considered as a war crime every violation, however slight, of the Hague Rules of Land Warfare.

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24. 4) As I have already pointed out in detail it must be considered as a point in favor of the defendants that the rules of international law have been codified to a small extent only and that clear definitions are found neither in the Hague Rules of Land Warfare nor in the literature concerning international law, in brief: that the legal foundations are insecure and uncertain. Even an expert on international law was unable to point out to an industrialist in time of war what is permitted in occupied territories and what is prohibited. How difficult it is to recognize these boundaries correctly is demonstrated especially by the events in Germany after the end of World War II. What happened in Germany since May 1945 violates in many respect the Hague Rules of Land Warfare. This applies to all 4 zones of occupation, no difference whether the Hague Rules of Land Warfare are interpreted in a narrow and literal sense as the Prosecution desires, or whether they are applied according to their meaning by taking into consideration modern warfare and modern economic war.

I have submitted in this connection ample evidence in 3 document books which has, however, been rejected. to a great extent by the Tribunal, because it deals with the state of affairs after 8 May 1945 and has no connection with actions with which the indictment is concerned. At the same time, however, the whole material was provided with identification numbers, and I was permitted to submit the material to be used for purposes of argument. This material demonstrates on the one hand that the Allied Occupation Powers have violated the Hague Rules of Land Warfare, on the other hand it shows how insecure is the basis of international law for even a jurist is unable to recognize from the various measures taken by the Allies in the field of dismantling and requisitioning and sequestration of private property

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what is permitted and what is prohibited. Many measures taken by the Allies against German industry observe the provisions of the Hague Rules of Land Warfare in that war supplies and military booty only are seized and removed from the factories. Just as many measures consciously disregard the Hague Rules of Land Warfare in that factories manufacturing purely peacetime products are dismantled though it is entirely clear in accordance with the Hague Rules of Land Warfare that such private property must not be touched. There exist finally dismantling decrees which endeavour to preserve the appearance of observing the Hague Rules of Land Warfare, but constitute actually or at least within the meaning of the interpretation of the Prosecution plunder of private property.

I would remind you of an instance in the British zone when a production permit was issued to a factory manufacturing machine tools (Production Permit for industrial plants,) when the dismantling, packing and shipping of the plant equipment was described as production, (Defense Identification Number 387, EBERHARDT Doc. Book III, page 113) and the validity of the permit consequently expired with the completion of dismantling.

I would remind you that scrap iron worth 5 million Reichsmark was removed from KRUPP as "booty" in the sense of the Hague Rules of Land Warfare, though scrap iron does not constitute war material in accordance with Control Council Law No. 53. But the Military Government is of a different opinion and refers to the definition given by a British Headquarters of 5 June 1946 (Defense Id. No. 314, EBERHARDT Doc. Book III, page 39). Scrap iron does not constitute "war material" in accordance with the Control Council Law (Defense Id. No. 315, EBERHARDT Doc. Book IV, page 46) because it can be used for peacetime production.

In Westphalia a comb factory was dismantled in accordance with an official order for dismantling and delivered to the British competitor firm, the owner of which was a member of the Investigation Commission in the occupied territory (Defense Identification No.313, Eberhardt Document Book IV, page 1).

A foundry in the Rhineland of at least 50 million Reichsmark value was dismantled and valued at 15 million Reichsmark by the inter-allied commission, while the dismantling cost, which had to be borne by the firm, amounted to at least 20 million marks (Def. Ident.No.316, Eberhardt Document Book IV, p. 59).

A plant for pneumatic tools was forcibly leased to the Pressluft-Werkzeuge und Maschinenbau A.G. Berlin which was American property, and that was done with the assistance of a representative of the Property Control and the director of the subsidiary of the American firm. The license for continuing production which had already been granted was transferred to the firm which was American property (Def. Ident. No.309, Eberhardt Doc.Book III, p.120).

I have submitted documents concerning the dismantling of specialized factories with a peacetime production which is absolutely necessary to keep the German industry going. I have submitted the official list of dismantled firms (Def. Ident.No. 328, Eberhardt Doc. Book IV, p. 92) which speaks for itself, and excerpts from the comprehensive work of Senator Harmsen from Bremen, which became known recently (Def.Ident.No. 2910, Eberhardt Doc.Book VIII, p.7), according to which Germany's reparations to the Allies amount to 71 million dollars up to now.

I have submitted the letter from the British Kommissar of North-Rhine Westphalia, W. Asbury, to the Oberbuergermeister of the city of Essen, in which General Robertson stated with reference to the Hague Rules of Land Warfare in occupied

German territory:

"On the basis of the supreme power conferred upon them (the allied supreme commanders) there is no limitation of their powers with the exception of the limits which they establish for themselves". (Def. Ident. No. 299, Eberhardt Doc. Book III, p. 65) .

Despite all this General Clay stated in the Senate that further dismantling of German industrial plants would probably add to the economic recovery of Western Europe (Def. Ident. No. 318, Eberhardt Doc. Book IV, p. 68).

In America German and Japanese property was sold. In Washington a statement was made that the sale was not in contradiction to international law, a standpoint, which at any rate is in contradiction to the viewpoint taken by the Prosecution in this case (Def. Ident. No. 336, Eberhardt Doc. Book IV, p. 112).

And finally I would mention Control Council Law No. 9, which was submitted by me, concerning the "confiscation and control of the capital of the I.G. Farbenindustrie" (Def. Ident. No. 295, Eberhardt Doc. Book III, p. 49) which was passed on 30 November 1945 and which contained the following argument in the preamble:

"In order to insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential "

It seems to me as if it is of particular, legal importance that this law, which contrary to the Hague Rules of Land Warfare, contains a passage concerning the confiscation of private property, was already passed before the conditions just quoted had been legally established, even before an indictment was made.

In order to prove the legal side I submitted the Morgenthau-Plan (Def. Ident. No. 292, Eberh. Doc. Book III, p. 1), which according to the

memoirs of the American Secretary of State Cordell Hull which were just published, played a large part at the historical conference at Quebec in September 1944. There it says with reference to the Ruhr area, in direct contrast to the Hague Rules of Land Warfare;

"Here lies the heart of German industrial power. This area should not only be stripped of all presently existing industries but so weakened and controlled that it cannot in the foreseeable future become an industrial area".

In the directive of the Joint Chiefs of Staff for Army General Dwight D. Eisenhower (JCS 1067) which was issued in April 1945 (Def. Ident.No. 293, Eberhardt Doc.Book III, p.8) the following was decreed:

"You will take no steps looking toward the economic rehabilitation of Germany, or designed to maintain or strengthen the German economy."

This clear instruction regarding the administration of the occupied German territories also constitutes a clear violation of Article 43 of the Hague Regulations of Land Warfare.

Legally it is of particular importance that this official directive in July 1947 was partly substituted by new regulations of the American Government for General Lucius D. Clay (Def. Ident.No.297, Eberhardt Doc.Book III, p.56) which contrary to the JCS 1067 coincide in many points with the Hague Rules of Land Warfare.

The Prosecution know very well what has taken place during the last three years in occupied Germany, and they know that the facts described by me - by taking their views as a basis - are "spoliation of private property" within the meaning of the Prosecution, and that to such an enormous extent that the acts of the defendants in the territories occupied by Germany during the war fade into complete insignificance.

German industrialists would have been thankful and happy if instead of dismantling and taking away their patents and production methods, their plants had been improved by valuable investments of foreign firms, as was done by Krupp's investments for instance at Montbelleux and at the Yugoslavian pits of the Chromasseo.

25. During the debates on international law which I had in the Flick, I.G. and Krupp trials with the Prosecution on the subject of spoliation, the Hague Rules of Land Warfare, and the attitude of the Allies in occupied Germany, the Prosecution took the view that the dismantling of German factories ^{cannot} be regarded as a parallel case, because the Allied occupying powers in occupied Germany are ^{not} bound to the Hague Rules of Land Warfare. In order to prove my different view I feel obliged also to deal with this subject. Summing up the different arguments of the representatives of the Prosecution, the following train of thought emerges:

In contrast to Poland, Russia, and France, Germany surrendered unconditionally, there is no Government in Germany, not even an exiled Government, as for instance in Poland. Germany was not occupied by a "belligerent" occupying power, and there is no longer a German Wehrmacht in the field, and as a last argument, Germany could not refer to the Hague Rules of Land Warfare, because she waged aggressive wars, thereby herself having violated the Hague Rules of Land Warfare too often; this last standpoint was also once taken by General Clay at a press-conference (Def. Ident. No. 296, Eberhardt Doc. Book III, p. 62). These last objections I should like to confute as follows:

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a) The unconditional surrender referred strictly to the military sphere and therefore cannot have any effect on the civilian population. Doenitz, who ordered that the unconditional surrender be proclaimed, did not intend to forgo by this capitulation to the disadvantage of Germany the rights from the Hague Rules of Land Warfare. But the legal basis for a renunciation is the will for renunciation and the explicit statement as to the renunciation. Neither is given.

b) The fact that there is no centralized German Government any longer is due to the one-sided act of the victorious powers. The one-sided act cannot do away with an agreement, because an agreement, in civil law as much as in international law, can only be given up through a two-sided act or through giving notice, which clause must be provided for in the agreement. Such notice was not given, definitely not in the form laid down in the Hague Rules of Land Warfare. Should it be permitted that an occupying power through a one-sided act, namely, by arresting or dismissing the Government, free herself from the duties imposed by the Hague Rules of Land Warfare, the door would be left wide open for the evasion of the Hague Rules of Land Warfare.

I also make reference to the IMT Judgment and the international law of custom which was explicitly recognized by the IMT Judgment. Even if the Hague Rules of Land Warfare as an agreement do not exist any longer, their basic principles are still valid as international and moral law of custom. This was explicitly determined in the IMT Judgment, and several times quoted by the Prosecution in the trial before the IMT, with the express remark, that such moral and international law of custom holds true for victors and vanquished.

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c. If the consideration of whether there is still a Government in the enemy territory is of importance from the point of view of International Law, and if the provisions of International Law are not to be applied in the absence of such a government, it is impossible to understand why it pleases the same American Prosecution to assert that Germany should have adhered to the provisions of International Law in Poland and France. For it is an established fact that there was no longer a government in Poland, and, according to the Prosecution, only a puppet government, that is, in fact, no government at all in France.

As far as Poland is concerned, Soviet Russia established in its note of 17 September 1939 (Defense Jd. No. 301, Eberhardt Document Book III, p. 74) to all accredited foreign governments in Moscow, that the Polish State and its government had ceased to exist and agreements that, in consequence, the / had become null and void. The

Soviet Union therefore adopted towards Poland the same attitude as it now adopts - and in thus far, its conduct is logical - towards Germany. In this respect, however, the attitude of the Prosecution is illogical. General Taylor once raised the objection that this was not a parallel case, as there was in existence a Polish government operating in exile. I do not consider that one can sustain this objection with a good conscience. The aim of the Hague Rules of Land Warfare is the protection of the civilian population. The existence somewhere in the world of a few men forming a government in exile which, in fact, has no importance for and no influence upon events, can make no difference to the conduct of the victorious State towards the civilian population of the conquered State. Moreover it is also impossible to discover traces of differentiation of this type in the Hague Rules of Land Warfare.

d) The additional objection that Germany is not occupied by a

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"belligerent power", is, in the first place, ^{incorrect} /purely from the point of view of the facts of the case. During the period from the end of 1944 to the beginning of May 1945, the majority of Germany was conquered in the course of an unbroken series of battles and belligerent actions. Every person taking part in this case has had the opportunity to see for himself the traces of this battle in Nuernberg, in the heart of Germany. For the rest, the Hague Rules of Land Warfare do not specify a "belligerent force" as the occupying power. In the Articles of particular interest in this connection, namely Articles 43, 48, 49, 53 and 55, it is consistently to the "occupying power" and not to the "belligerent" that reference is made. This is no mere accident: the word is used advisedly; for in other Articles of the Hague Rules of Land Warfare, reference is expressly made to the "belligerent", the articles in question being those in which the sense stipulates that war is still in progress, thus that no armistice has been agreed upon and no capitulation has taken place, e.g. Article 44. Thus the objection that the Hague Rules of Land Warfare are valid only as long as fighting forces are still in the field, is overruled.

e) The objection that Germany is not in a position to appeal to the Hague Rules of Land Warfare, because she herself conducted a war of aggression in direct contravention of the Hague Rules of Land Warfare is precisely as unsound as the above. This objection, in effect, advocates the punishment of the entire civilian population because the German government, which, in the meantime, has been overcome and deposed, violated the provisions of International Law. Apart from the fact that such punishment is not provided for by the Hague Rules of Land Warfare, it would in itself contradict the ethical principles underlying International Law. The punishment would, in the main, affect not the guilty members of the government, but the innocent civilian population who had no influence whatsoever on the actions of their government.

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Ad a - e: All five of the objections dealt with above - and this is decisive - are contrary to the text of the Hague Rules of Land Warfare. In Section 3 of the Appendix to the Hague Rules of Land Warfare are to be found the regulations governing the occupying power in occupied territory. Article 42 clearly states in what circumstances the provisions of Article 43 ff. are to be applied. The text of Article 42 is as follows:

"Territory is considered occupied when it is actually placed under the authority of the hostile army."

It is therefore abundantly clear that the Hague Rules of Land Warfare recognize one single primary condition, namely that the enemy area under consideration must, in fact, be occupied. The heading of this section, which reads as follows: "Military Authority over the Territory of the Hostile State", confirms this statement. The Hague Rules of Land Warfare therefore do not differentiate according to how the hostile territory came to be occupied, whether as a result of belligerent action, of mass invasion, by peaceful means following capitulation or partly in battle, partly following capitulation. It does not differentiate according to whether the government of the hostile state still exists or not, whether the government continues to operate in exile or not. Equally it recognizes no difference between cases in which the enemy army is still fighting and those in which it has laid down arms. ^{/On the contrary/} ~~the~~ letter and the spirit of the Hague Rules of Land Warfare are . . . clear beyond all possibility of doubt in referring exclusively to the actual occupation of enemy territory. This one condition is fulfilled precisely as satisfactorily in occupied Germany as it was during the earlier occupation of foreign countries by Germany.

At this point, I take the liberty of pointing out that the point of view adopted by the Prosecution contradicts not only the letter and the spirit of the Hague Rules of Land Warfare, but, in addition, in view

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of the principles underlying the IMT Judgment, the accepted moral principles of the law of common usage, to which the Preamble of the Hague Rules of Land Warfare expressly refers in support of its arguments. It states that in the cases which are not provided for within the scope of the Hague Rules of Land Warfare,

"the inhabitants and the 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."

Both the preamble of the Hague Rules of Land Warfare and the IMT Judgment show that the question depends on the public conscience and the principles of morality. Among the principles of morality in the field of International Law, however, are numbered the protection of the civilian population and the protection of public order, the protection of economic life, the protection of personal freedom and the protection of private property. If a State is so completely conquered that it is forced to capitulate unconditionally and that no government now exists in that State, the civilian population has far greater need of the protection provided for in International Law than would be the case if the Army of that State had not yet capitulated, and if the government were still capable of independent action. Were the opinion of the Prosecution which contradicts this to obtain recognition in International Law, this would constitute a descent on the moral plane and would presage grave danger for the future. It would signify that the councillor of a victorious government in matters of International Law would be obliged to advise his government to make its first measure in the hostile territory under occupation the dissolution of the government, so that the occupying power would no longer be under an obligation to adhere to the terms of International Law. He would even be obliged to advise his government to imprison or do away with as many of the members of that government as possible, in order to eliminate the possibility of a government in exile and thus to leave the occupying power free to confiscate private property, that is to commit its "acts of spoliation" in total disregard of International Law.

26. I think that I have shown that the Hague rules of land warfare and the customs recognised by international law must be applied to occupied Germany. But this conclusion entitles me to cite as parallels the happenings in Germany in the past three years in order to determine how the Hague rules of land warfare should be interpreted or what a victorious nation is allowed or not allowed to do in an occupied country. It is impossible to determine what are the foundations of international law, unless the behaviour of all victorious powers in the occupied countries is drawn into consideration, and not only that of Germany. It is impossible to determine international law if the behaviour of Germany is examined as it were in a vacuum without a corresponding examination of the way in which the other nations of the world have, simultaneously or at an earlier or later date, applied or interpreted the provisions of international law. "Völkerrecht" is after all international law, which applies to all nations and can therefore be understood properly only if the behaviour of all nations, and not only that of one nation, is considered.

From the point of view of legal criticism it is quite irrelevant, whether the actions of the various countries fell within the same period. I should like to remind you in this connexion that the Prosecution have, in the Nuernberg trials, frequently cited, as parallel cases in support of their argument, actions which did not fall within the same period either, but concerned a different period altogether. But it is unimportant from the legal point of view whether such parallels are taken from an earlier, or a later, period. It is purely accidental that the parallels should be taken from a later period, simply because the Allies had not, at the time when Germany had occupied foreign countries, occupied German territory themselves. The Prosecution are moreover inclined to forget that the Allies did occupy German territory in the

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West as well as in the East during the war, i.e. while hostilities continued, and therefore during the period of time with which the indictment is concerned, which extends to 8 May 1945.

The Prosecution have, in all the Nuernberg trials, raised again and again this objection in connexion with the date 8 May 1945 for the obvious reason that they are averse to the behaviour of their own government being subjected to legal criticism.

That the behaviour not only of Germany, but also of the allied Powers, must be considered, follows from the IMT trials. At that time, the Tribunal indicated quite clearly, that the behaviour of the Allies, too, was of importance, and that independently of the question, as to whether the actions of the Allies fell within an earlier or later period of time than those of Germany.

May I remind you of two instances:

a. In order to investigate the regulations laid down in international law, Dr. Kranzbuehler referred, in connexion with the allegations made by the Prosecution with regard to submarine warfare, to a parallel: the behaviour of the United States of America in the USA's submarine warfare against Japan. The Prosecution raised an objections at the time, because submarine warfare against Japan fell within a later period and was irrelevant to the crimes with which the IMT trial was concerned. The tribunal did not sustain the objection raised by the Prosecution; it obtained a statement from Admiral Nimitz and stated in the judgment that sentence could not be passed precisely because of this parallel.

b. In replying to the accusations made by the Prosecution in connexion with the occupation of Norway in the IMT trial

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I referred to the behaviour of the British government and the British Admiralty, as a legal parallel, and also to the behaviour of the British and French governments and of the British and French armies with regard to allied plans for Belgium and Holland and to the plan to destroy the Caucasian oil wells. The Prosecution objected on the grounds that the tribunal was not concerned with these actions. But, in spite of the objection raised by the Prosecution, the International Military Tribunal admitted most of the documents I had submitted at the time, so that I was in a position to put forward my arguments in connexion with the behaviour of the Allies.

If we would determine the foundations of international law we must therefore in this trial draw into consideration what happened in occupied Germany. The documents I have submitted and the arguments I have put forward show clearly how indefinite and imprecise are the legal foundations, under international law, on which Count II of the indictment is based; they show not only how varied are the interpretations put upon the matter by the German, Soviet, and Allied governments: they also show, as I have taken pains to point out, how much the Western military governments are at variance in this matter. An investigation of individual documents shows that the various departments of the military governments, too, have changed their views in the course of the past three years. Now, attempts have been made to abide by the provisions of the Hague rules of land warfare: now, the provisions of the Hague rules of land warfare have unwittingly been violated. But if Military Governments, which have at their disposal a multitude of legal advisers, do not interpret the law in a uniform manner, no industrialist can possibly be expected to find his way amongst these complicated and difficult legal problems, especially if his own government and army, advised as they are by experts on national and international law,

commission him to carry out tasks which are important from the point of view of the war effort, tasks which he is bound to assume are legally permissible in wartime.

On the strength of all these arguments I am firmly convinced, for legal and material reasons, that it is impossible to sentence the defendants under Count II of the indictment for alleged spoliation.

* * * * *

Your Honours,

This brings me to the end of my plea on spoliation on behalf of all the defendants. Permit me to say a few words about my defendant, Herr Eberhardt, about his personality, his career, his position in the Krupp Konzern. A comparatively short account will suffice, because Herr Eberhardt worked in the sales department as an employee of the Krupp firm and did not therefore have much to do with the business concerns of the firm. He has, nevertheless, been charged under Count II of the Indictment which deals with the employment and treatment of foreign workers, prisoners of war, and concentration camp inmates. But the evidence submitted is so slight and has so little bearing on Eberhardt's sphere of work that it would be tedious, within the scope of a final plea, to examine in detail the minutiae of the case. For that, I would, therefore, refer you to the special closing brief which I have submitted for my client.

When I consider further that, as far as Count II of the Indictment is concerned, Eberhardt is involved only in the Elmag case and in the case of the Sartana firm, which is unimportant from the point of view of criminal law, I cannot help asking myself, why Eberhardt came to be indicted at all. I think I am right in saying that

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Eberhardt has been indicted simply because he was appointed deputy member of the directorate in 1943, and because the Prosecution, true to the principles they have upheld at Nuernberg in their fanatical fight against the whole of the German industry and against Krupp in particular, would fain conjure up a picture of collective responsibility: a responsibility under the terms of criminal law which is postulated, in the last analysis, solely because of the position he held in the Krupp Konzern, and which is really based on concepts of responsibility taken from civil law, and not from criminal law.

I admire the perseverance with which the theory of collective guilt is urged time and time again, although collective guilt has been rejected in the IIT judgment and although, in the Flick case, in a trial which was directed, as is this, against the heads of a Konzern, the American Military Tribunal arrived at the same conclusion. It is easy to see through the idea behind this effort made by the Prosecution: they feel that it is impossible to prove the personal guilt of individual defendants under the terms of criminal law in this trial, and they hope to make good this deficiency by a mass attack against all members of the Vorstand and of the directorate, including their deputies. But it is precisely such behaviour which offends against the principles of criminal law, which were recognised by the International Military Tribunal and by the Flick Tribunal and on which those tribunals based their judgments, and in accordance with which this tribunal acted, when it acquitted all the defendants on the count of planning, initiating and waging wars of aggression. I believe therefore that Eberhardt would not have been indicted at all, had the Tribunal not, at the beginning, concerned itself with Count I of the Indictment. One can, with a little imagination, indict anybody under Count I of the indictment, even a business man, who was concerned only with the strictly limited work of the sales department of a Konzern, especially if the words "war materials" happen to occur

in the name of that department, words, the very sound of which strikes terror into the hearts of the Prosecution.

Eberhardt received his business training in a machine factory in Kassel, and joined the firm Friedrich Krupp A.G. as employee in an office of statistics in 1914. He succeeded through industry, conscientiousness and business talent, but always worked in a purely commercial capacity; in the course of the years he became Prokurist, head of a department, and eventually, in 1943, deputy member of the directorate in recognition of his services in business.

Ever since 1924 Eberhardt had taken a special interest as far as sales were concerned, in questions of export which he handled very successfully. In 1939, shortly before the outbreak of war, he was able to state with pride, that he had in his department export orders to the value of RM 170 millions, orders which would have kept the war materials department of the Krupp firm busy for years. Work on these varied orders was bound to interest a businessman, whereas supplies to the Wehrmacht within the scope of an economy dictatorially controlled by the State, as it was in Hitler's Reich, were not very attractive, but his sense of duty, of course, forced Eberhardt to deal with these, too, in the proper manner.

It is natural that a business man who handled, on behalf of a firm like Krupp which was respected the world over, all the orders from abroad, should have had no sympathy with National Socialism, bigotted as it was, and should be utterly opposed to the idea of Germany going to war. He knew that war was bound to destroy his export business. It therefore follows that, in view of the fact that he had conducted the international business affairs of Krupp for 15 years,

he was accustomed to respect the interests of foreign countries. In accordance with his international sympathies and with his whole character he was incapable of committing, even in war time, actions which might have prejudiced the prestige of the Krupp firm abroad.

The view held by the Prosecution, that Eberhardt had been motivated by intent to despoil and had participated in acts of spoliation, would seem to be unintelligible: it runs counter to any objective psychological assessment, it runs counter to the very character of a man like Eberhardt whose attitude during the whole of his life, as business man and as human being, has been upright and honest and who was internationally minded in his work. No personal guilt can attach to such a man, and if the Prosecution take the opposite point of view, that becomes intelligible only if one knows, and has witnessed again and again in this trial, how the Prosecution are carried away by their theory of systematic spoliation to the extent of disregarding facts, experience, and psychological arguments; no longer did they see in him the man Eberhardt, whom they had indicted, but the leading official of the Krupp Konzern which they persecute with hatred and with excessive zeal, of that Konzern which the British government did not wish to indict, but which, the Morgenthau plan demanded, m u s t be destroyed.

When I was meditating about the attitude of the Prosecution while I was drawing up my plea, I could not help thinking of a saying by the ready witted Spaniard Balthasar Gracian, who wrote the following in 1653:

"There are men of gloomy temperament, to whom every action seems a crime, viewed not in the heat of passion, but in the light of natural inclination. They pronounce sentence of condemnation upon everyone; on one, for the sake of that which he has done, on another, for the sake of that which he has left undone."

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Thus Eberhardt would seem to me to be a man whom
inexorable Fate has cast into Nuernberg jail for a crime
he has not committed.

I therefore ask the Tribunal to restore
to the Defendant Karl E b e r h a r d t
his L i b e r t y
and thus
his H o n o u r .

*

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CERTIFICATE OF TRANSLATION

25 June 1948

We,

Beryl C. BESWICK, ETC No. 2C183,
Eugene R. KUN, AGC No. D-429798,
Anne MARTIN, ETC No. 2C144,
Brigitte TURK, ETC No. 3513C,
Patricia E.C. WCCD, ETC No. 2C139,
Leonard J. LAWRENCE, ETC No. 2C138,
Alfred RABL, No. B-398C81

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 FINAL PLEA EBERHARDT.

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ETC No. 2C183,
(pages 1-9, 73-76)

Eugene R. KUN,
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(pages 1C-23)

Anne MARTIN
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