LAW ON THE DEPORTATION AND EMPLOYMENT OF FOREIGN CIVILIAN WORKERS AND CONCENTRATION CAMP INMATES

It is contended that the forcible deportation of civilians from occupied territory was perfectly lawful. The argument made in this connection by the ostensible leader of defense counsel needs an answer, if for no reason other than to indicate the nature of the principal defenses upon this phase of the case.

The substance of the argument is as follows. There exists in The Hague Rules of Land Warfare no provision explicitly prohibiting the use of manpower from occupied territories for the purpose of war economy. Article 48 is certainly not conclusive...Reference to international common law is not more conclusive. For the only case in modern history, the conscription of Belgian labor during the first world war has remained a completely open question as regards its admissibility under international law."

It is, therefore, insisted that the prosecution's position with respect to wholesale deportation on a compulsory basis of members of a civilian population of occupied territories "is based on a fundamental misconception of the first rule of war, viz., that measures necessary for achieving the purpose of war are permissible unless they are expressly prohibited, and that methods required for achieving the purpose of war are determined by the development of war into total war, especially in the field of economic warfare."

In principle this is the same argument made in connection with the asserted proposition that the concept of total war operated to abrogate The Hague Rules of Land Warfare. But the reference to the deportation of Belgian labor to Germany during the first world war requires an additional answer, if for no ther reason than to keep the record straight. That crime on the part of imperial Germany caused world wide indignation. (1)

The deportations began after the German Supreme Command had issued its notorious order of October 3, 1916, "concerning restrictions of public relief." Shortly prior thereto the Reich Chancellery had declared in an expert opinion that "'under the law of nations, the intended deportation (Auschiebung) of idle (arbeitzschene) Belgians to Germany for compulsory labor can be justified if (a) idle (arbeitzschene) persons become a charge of public relief; (b) work cannot be found in Belgium; (c) forced labor is not carried on in connection with operations of war......Hence, their employment in the actual production of munitions should be avoided.'" (2)

The obvious subterfuge lies in the fact that the measure was ostensibly directed against vagrants to combat unemployment in Belgium as an economic measure. But no one was deceived by this pretense and it was soon abandoned in a manner which indicated an awareness of the illegality of the procedure.

The protests were so wide spread and vigorous that the Kaiser was forced to retreat. These protests were based upon either the general principles of international law and humanity or specifically upon The Hague Regulations. For instance, the United States Department of State protested "against this action which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of noncombatants in conquered territory." (3)

(1. Oppenheim Lauterpacht, International Law 5th Edition London, 1935, p. 353
(2. American Journal International Law, Volume 40, April, 1946, p. 309.
(3. G. H. Hackworth, Digest of International Law, Vol. VI, Wash., D. C., 1943, p. 399.

The protest of the Netherlands Government pointed out the incompatibility of the deportations with the precise stipulations of Article 52 of the Hague Regulations. It was pointed out by Professor James W. Garner, scholar and author of high repute, that if "a belligerent were allowed to deport civilians from occupied territory, in order to force them to work in his war industries and thereby to free his own workers for military service, this would make illusory the prohibition to compel enemy citizens to participate in operations of war against their own country. 'The measure must be pronounced as an act of tyranny, contrary to all notions of humanity, and one entirely without precedent in the history of civilized warfare.'" (4)

Negotiations through diplomatic and church channels to repatriate the deportees and stop the practice were partially successful. From February, 1917, Belgians were no longer deported from the Belgian "Government General" and the Kaiser promised that by June 1, 1917, deportees who would not volunteer to remain in Germany would be repatriated.

Nevertheless, long after the end of the first world war, the unsuccessful effort of the Kaiser's Government was to an extent upheld in Germany. A parliamentary Commission created by the German Constituent Assembly to investigate charges made against that nation of having violated international law during the war by a majority report submitted July 2, 1926, stating that the deportations had been in conformity with the law of nations and, more particularly, with the Hague Regulations. The report proceeded upon the theory that "' the workers in

(4. American Journal of International Law, Vol XI, Jan., 1917, p. 106, & J. W. Garner, International Law and the World War, New York, 1920, Vol. II, p. 183.

question did not find sufficient opportunity to work in Belgium and that the measure was indispensable for re-establishing or maintaining order and public life in the occupied territory.'" (5) The Belgian Minister of Foreign Affairs expressed the sentiment of the civilized world when he declared that his country had erred in its belief "'that at least on this point, the war policy of the Kaiser's Government would no longer find defenders.'"(6) And it should be noted in this connection that even a minority of the German parliamentary commission above mentioned found no justification for the practice and upon the other hand, squarely condemned it.

It is apparent, therefore, that learned counsel's contention that "the conscription of Belgian labor during the first world war has remained a completely open question as regards its admissibility under international law," is based upon the fact that a majority of a committee appointed by the parliamentary body of Republican Germany found it to be in accord with the law of nations. We think it must be conceded that this is at least rather thin ground upon which to establish a negation of international customary law. However this may be, it is certain that this action by the majority of the committee of the German body did not operate to repeal the applicable Hague Rules of Land Warfare, particularly Article 52, which in the present case was shown beyond doubt to have been violated. Deportees were not only used in armament production in the Krupp enterprise, but

(5. American Journal International Law, Vol. 40, April, 1946, p.312.
(6. Belgian Chamber of Representatives, session July 14, 1927. Documents Legislatifs, Chambre des Representants, No. 336. Passelecq, pp. 416-433.

in the latter years of the war the production of armament on a substantial scale reached could not have been carried on without their labor.

This was not only a violation of the Hague Rule of Land Warfare but was directly contrary to the expert opinion of the Reich Chancellery hereinabove referred to which preceded the order of the German Supreme Command of October 3, 1916, for the deportation of Belgians. As above indicated, that opinion, though providing a subterfuge for the illegal conduct, did annex as one of the conditions "that forced labor is not carried on in connection with operations of war... Hence their employment in the actual production of munitions should be avoided."

The law with respect to the deportation from occupied territory is dealt with by Judge Phillips in his concurring opinion in the United States of America vs. Milch decided by Tribunal No. II. We regard Judge Phillips' statement of the applicable law as sound and accordingly adopt it. It is as follows:

"Displacement of groups of persons from one country to another is the proper concern of international law in as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime. If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. The rationale of this rule lies in the supposition that the occupying power has temporarily prevented the rightful sovereign from exercising its power

over its citizens. Article 43, 46, 49, 52, 55 and 56, Hague regulations which limit the rights of the belligerent occupant, do not expressly specify as crime the deportation of civilians from an occupied territory. Article 52 states the following provisions and conditions under which services may be demanded from the inhabitants of occupied countries.
(1) They must be for the needs of the army of occupation.
(2) They must be in proportion to the resources of the country.
(3) They must be of such a nature as not to involve the inhabitants in the obligation to take part in military operations against their own country.

"Insofar as this section limits the conscription of labor to that required for the needs of the army of occupation, it is manifestly clear that the use of labor from occupied territories outside of the area of occupation is forbidden by The Hague Regulation.

"The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country.

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"The third and final condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods.

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"Article II (1) (c) of Control Council Law No. 10 specifies certain crimes against humanity. Among these is listed the deportation of any civilian population. The general language of this subjection as applied to deportation indicates that Control Council Law No. 10 has unconditionally contended as a crime against humanity every instance of the deportation of civilians. Article II (1) (b) names deportation to slave labor as a war crime. Article II (1) (c) states that the enslavement of any civilian population is a crime against humanity. This Law No. 10 treats as separate crimes and different types of crime 'deportation to slave labor' and 'enslavement.' The Tribunal holds that the deportation, the transportation, the retention, the unlawful use and the inhumane treatment of civilian populations by an occupying power are crimes against humanity."

In connection with the subject of deportation of civilians from occupied territory, it is interesting to note that as shown by a document introduced by the defense, General Thoenissen was dismissed from the service by the High Command during World War II because of his "refusal to violate" the laws of war and to deport French workers to Germany.

The deportation of Belgians to Germany also was over the vigorous protests of the military commander in Belgium, General von Falkenhausen. With reference to Sauckel's order introducing a compulsory labor service for the Belgians, he deposed that "this was done against my explicit and constant protest for I had various objections against a compulsory labor allocation and considered it more important to keep the indigenous economy in motion."

That the employment of concentration camp inmates under the circumstances disclosed by the record was a crime there can be no doubt. The conclusion is inescapable that they were mostly Jews uprooted from their homes in occupied territories and no less deportees than many of the other foreign workers who were forcibly brought to Germany. The only difference was that they had to go through all of the horrors of a concentration camp under the supervision of the SS before they finally landed at the firm of Krupp. That these persecutees had been arrested and confined without trial for no reason other than that they were Jews is common knowledge and in fact not controverted. The subject is dealt with exhaustively by the judgment of the IMT and there is no need to add anything to what is there said to show the unspeakable horrors to which these unfortunate people were subjected. However, in the present connection, one or two excerpts from the judgment are pertinent. It is there recited that "the Nazi persecution of Jews in Germany before the war, severe and repressive as it was, can not compare, however, with the policy pursued during the war in the occupied territories."

After referring to the fact that in the summer of 1941, however, plans were made for the "final solution" of the Jewish question in all Europe, the judgment continues: "Part of the 'final solution' was the gathering of Jews from all German-occupied Europe in concentration camps. Their physical condition was the test of life and death. All who were fit to work were used as slave laborers in the concentration camps." The "final solution" meant extermination.

Under the facts of this case it is obvious from what has been said as to the law that the employment of these concentration camp inmates was also a violation of international law in several different particulars.

In this connection it is argued that the defendants had scant knowledge of the persecution of the Jews by Nazi leaders. This can be justly characterized as no more than a gesture.

The fact was common knowledge not only in Germany but throughout the civilized world. Whether this was true in all the horrifying and gruesome details is immaterial to the legal question.

Moreover, apart from the fact that the Krupp activities at Auschwitz hereinabove detailed gave ample opportunity to know the true situation, there is evidence introduced by the defendants which directly refutes the contention that the officials of the firm lacked knowledge of the persecution of the Jews on racial grounds. Among other items is the affidavit of Mickenschrieber. It was offered along with other documents to show that the officials of the firm were not in accord with the attitude of the Nazi regime toward Jews. But it shows also that without doubt they knew of that abominable policy as early as 1936. The affidavit shows this so conclusively that it is worthwhile to quote from at some length.

After deposing that one Robert Waller had been in the service of the firm as an electrical engineer for twenty years, the affiant continues:

> "From 1936 on his working associates brought pressure to bear on the Firm, because of his non-A_yan descent (Herr Waller is a Jewish), with the aim of having Waller dismissed. Herr Ihn did not yield to the demands of the employees, however. At his behest Herr Waller was given protection by designated persons, who always intervened on his behalf, shielded him in the campaign of persecution against him, and later provided him with a special place of work, apart from the other workers. Furthermore, thorough-going efforts were made to find a position abroad for him. On 9 November 1938, the day of the general persecution of the Jews in Germany, the employees as well as the Vertrauensrat (Confidential Council) at the time categorically demanded the immediate dismissal without notice of Herr Waller. According to this there was no longer any possibility of retaining Herr Waller. However, without the persons in power knowing of it, by order of Herr Ihn, Herr Waller was paid a lump sum, corresponding to his salary, which he would have received had he been given regular notice (about 8 month's salary), in order to enable him to emigrate, as he was contemplating doing. Moreover, after the war the personnel manager made amends to Herr Waller, in a manner which met his satisfaction, for the wrong done to him at the instigation of working associates."

NECESSITY AS A DEFENSE

The real defense in this case particularly as to Count III, is that known as necessity. It is contended that this arose primarily from the fact that production quotas were fixed by the Speer Ministry; that it was obligatory to meet the quotas and that in order to do so it was necessary to employ prisoners of war, forced labor and concentration camp inmates made available by government agencies because no other labor was available in sufficient quantities and, that had the defendants refused to do so, they would have suffered dire consequences at the hands of the government authorities who exercised rigid supervision over their activities in every respect.

The defense of necessity was held partially available to the defendants in the case of the United States of America vs. Flick, et. al., decided by Tribunal IV. There, as here, the defendants were industrialists employing prisoners of war, forced labor and concentration camp inmates in the production of armament in aid of the war effort. Flick and one of his co-defendants were nevertheless found guilty on the charge presently under consideration. This was by way of an exception to the holding that the defense of necessity was applicable. The basis of this aspect of the decision appears from the following quoted from the opinion:

"The active steps taken by Weiss with the knowledge and approval of Flick to procure for the Linke-Hofmann Werke increased production quota of freight cars which constitute military equipment within the contemplation of the Hague Convention, and Weiss' part in the procurement of a large number of Russian prisoners of war for work in the manufacture of such equipment deprive the defendants Flick and Weiss of the complete defense of necessity. In judging the conduct of Weiss in this transaction, we must, however, remember that obtaining more materials than necessary was forbidden by the authorities just as falling short in filling orders was forbidden. The war effort required all persons involved to use all facilities to bring the war production to its fullest capacity. The steps taken in this instance, however, were initiated not in governmental circles but in the plant management. They were not taken as a result of compulsion or fear, but admittedly for the purpose of keeping the plant as near capacity production as possible."

The defense of necessity in municipal law is variously termed as "necessity", "compulsion", "force and compulsion", and "coercion and compulsory duress". Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows:

"A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life and limb of the defendant or his relatives, which danger could not be otherwise eliminated."

The Anglo-American rule as deduced from modern authorities has been stated in this manner:

"Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil. Homicide through necessity--i.e., when the life of one person can be saved only by the sacrifice of another--will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defense to a prosecution for illegally seizing such relief. To the same general effect speak high English and American authorities. Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree."(1)

As the prosecution says, most of the cases where this defense has been under consideration involved such situations as two shipwrecked persons endeavoring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an overloaded life boat; or the participation in crime under the immediate of present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nurnberg Trials of industrialists is novel.

The plea of necessity is one in the nature of confession and avoidance. While the burden of proof is upon the prosecution throughout, it does not have to anticipate and negative affirmative defenses. The applicable rule is that the prosecution is compelled to establish every essential element of

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(1. Wharton's Criminal Law, Vol. I, Section 126, p. 177.

the crime charged beyond a reasonable doubt in the first instance. However, if the accused's defense "is exclusively one of admission and avoidance or if he pleads some substantive or independent matter as a defense which does not constitute an element of the crime charged, the burden of proving such defense devolves upon him. As a general rule, in matters of defense mitigations, excuse or justification, the accused is required to prove such circumstances by evidence sufficient to prove only a reasonable doubt of his guilt. And if the circumstances relied upon are supported by such proof as produces a reasonable doubt as to the truth of the charge against the accused when the whole evidence is considered by the jury, there must be an acquittal.[2] The question then is whether, upon a consideration of the whole evidence, it justly can be said that there is such a doubt.

The defense of necessity is not identical with that of self-defense. The principal distinction lies in the legal principle involved. Self-defense excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right.[3]

In the view of German writers the law of necessity involves not the assertion of right against right, but of privilege against privilege. But from the standpoint of the present case, the rule of necessity and that of self-defense has, among others, one characteristic in common which is of determinative significance. This is that the question is to be determined from the standpoint of the honest belief of the particular accused in question. Thus with respect to the law

(2. Wharton's Criminal Evidence, Vol. I, Section 211.

(3. Wharton's Criminal Law, Vol. I, Section 128.

of self-defense, Mr. Wharton quotes Berner, an authoritative German jurist:

"Whether the defendant actually transcended the limits of self-defense can never be determined without reference to his individual character. An abstract and universal standard is here impracticable. The defendant should be held guiltless (of malicious homicide) if he only defended himself to the extent to which, according to his honest convictions as affected by his particular individuality, defense under the circumstances appeared to be necessary."(4)

Wharton himself says "that the danger of the attack is to be tested from the standpoint of the party attacked, not from that of the jury or the ideal person."(5)

We have no doubt that the same thing is true of the law of necessity. The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defense, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual.

The evidence of the prosecution with respect to particular defendants was sufficient to discharge the burden resting upon it in the first instance. Thereupon the burden shifted to the defendants of going forward with the evidence to show all of the essential elements of the defense of necessity to an extent sufficient to raise a reasonable doubt in the minds of the Tribunal upon a consideration of the whole of the evidence. In this respect the evidence falls short in a vital particular.

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(4. Wharton's Criminal Law, Vol. I, Section 623, p. 850.

(5. Wharton's Criminal Law, Vol. I, Section 135, p. 185.

Assuming for present purposes the existence of the tyrannical and oppressive regime of the Third Reich which, is relied upon as a basis for the application of the rule of necessity, the competent and credible evidence leaves no doubt that in committing the acts here charged as crimes, the guilty individuals were not acting under compulsion or coercion exerted by the Reich authorities within the meaning of the law of necessity.

Under the rule of necessity, the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done. Thus, as Lord Mansfield said in the case cited in the Flick Opinion as giving the underlying principle of the rule invoked:

"Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act."(6)

Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. Upon the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct. That is this case.

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(6. Stratton's Case, 21 How. St. Tr. (Eng.) 1046-1223.

Hence the Flick case is distinguishable upon the facts. For instance, a determinative factor in that case is indicated by the following from the opinion: "With the specific exception above alluded to and as hereinafter discussed, it appears that the defendants here involved were not desirous of employing foreign labor or prisoners of war."

In the present case the evidence leaves no doubt that just the contrary was true. For instance, we have hereinabove referred to a letter from the Board of Directors of Fried. Krupp, A.G., Essen, dated September 26, 1942, addressed to the Army High Command, which as noted, concludes as follows:

"As we are under the circumstances described very anxious to employ Russian prisoners of war in the very near future, we should be grateful if you would give us your opinion on this matter as soon as possible."

The minutes of a meeting at the penal camp Dechenschule, 14 March 1944, prepared by the defendant Von Buelow, furnish another illustration. After reciting that most of the inmates to be confined in that camp would be people guilty of breach of labor contracts who had been apprehended in France by the military authorities, Von Buelow concludes, "finally I pointed out to Kriminalrat Nohles (of the State Police) that the question of labor allocation is decisive for us and that we would like to secure these valuable French workers for ourselves for this reason."

A letter of September 18, 1943, addressed to the employment office in Essen indicates the attitude of the Krupp officials toward the Reich policy of conscription of foreign labor. It is as follows:

"The one-year contracts of a great number of our French, Belgian and Dutch workers of the Gusstahlfabrik will expire within the next two months. Since these people are not prepared to renew their contracts we intend to have them conscripted. With reference to the conversation with your Herr Dieckmann we ask you to consider how the necessary formalities may be best carried out. This applies to about 200 persons."

But long before this the Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor.

In December, 1942, and prior thereto the Krupp firm maintained a labor recruiting office in Paris. Their representative was a Mr. Hennig, said to have "the best connections to all German and French departments." Learning that a new draft of about 265,000 workers was to be made in occupied France during the month of January, the defendant Lehmann made a trip to Paris with a view of seeing that the Krupp firm got a larger share of these workers than was then to be expected. He had Dr. Servatius, Oberregierungsrat of the Regional Land Office, Rhineland, go with him. In reporting the result of his efforts, Lehmann said, among other things: "With our aid, our requests were then distributed properly to the various district commanders (bezirkschefs) and field headquarters (feld kommandaturen). As much as possible, the selection of the drafted individuals is then also to be undertaken with the help of one of our representatives."

Referring to the possibility of getting skilled workers from unoccupied France, Lehmann, in the same report, stated as follows:

"Because of the new political situation in the so-far unoccupied part of France the French government agencies will from now on act energetically at the draft of workers in this region. As one of the first measures, the French railways will transfer to Germany approximately 460 skilled workers.

That will be 60% of the skilled workers who have been promised to us already for some time, but who could not be persuaded to sign the contracts and to leave. The workers will be sent during the first week in January from the various factories to Lyon, where they can be received by our representative and will be conducted to Essen.

"In the beginning of January Mr. Hennig will also try immediately to start on their way to Essen the 210 skilled workers allotted to us from the locomotive factory Fougat, Beziers. On our part we shall try to achieve that these workers will not be considered as part of our January quota, since they have been promised to us already for some time."

The willing attitude of the Krupp officials toward the employment of concentration camp inmates is indicated by the minutes of a conference held on 5 June 1944 in the office of Ihn. This conference was attended by the defendant Krupp among others. The defendant Ihn prepared the minutes. The following quotation refers to the Friedrich Alfried Huette at Geisenheim. It is as follows:

"Herr Vorwerk, F.A.H., will examine the question as to whether there is any possibility for the F.A.H. to employ any prisoners and convicts. If necessary the cast iron works will try to include this requirement in their request.

"Herren Guenther and Graefe, Geisenheim, are negotiating with the concentration camp in their zone. Although no result has been reached in these negotiations so far, Geisenheim will continue to deal with the question on their own. Only if no result is reached will the cast steel works take a hand in the matter."

A copy of the minutes was distributed to the defendants Krupp, Houdremont, Janssen, Mueller, Von Buelow and Kupke, among others.

The efforts of the Krupp concern to expand during the war years also negatives the idea that they were acting under compulsion.

The evidence already referred to in connection with the employment of concentration camp inmates demonstrates this fact. An additional incident reflects the firm's attitude. On July 17, 1943, there was a meeting of the Directorate of Elmag, then located at Mulhouse. It was attended by the defendants Eberhardt, Ihn and Janssen. Among other things, the minutes reflect the following:

"Next spring Krawa is to reach an output of 100 Zgkw tractors per month. It is said, however, that lately the Special Committee cut down the tank program and only 80 or a still lower Zgkw figure per month by Elmag is proposed. Herr Eberhardt recommends to Herr Zimmermann who is expected to be in Berlin to attend the meeting of the Special Committee on 23 July 1943, to talk to Herr Dinckelacker, with a view rather to increase the program than to cut it down.

"To assure the firm's reputation as motor manufacturer also for the future, an attempt should be made to obtain orders for motor construction. In this respect, too, Herr Zimmermann should take appropriate steps. Herr Eberhardt also points out that the allocation of additional labor is to benefit not only the prime-mover manufacture and its spare parts, but also the manufacture of spare parts in Tann."

The testimony of Flick, a competitor of the Krupp firm, also indicates that the Krupp firm was endeavoring to expand its activities. Flick was introduced as a witness of the defense. His evasive answers on cross examination leave much to be desired. But the following is clear. Properties known as Wirogg had belonged to Flick. The Krupp firm was in negotiation with the Army Ordnance to be allowed to take over and manage the property. In this connection, Flick was asked and answered as follows:

"Q. Is it not a fact that you objected violently to the attempts of the Krupp firm to expand into areas where they had never been before?

"A. Yes, in that case, whether this would have been a final expansion policy of Krupp was an open question. In my trial, I stated that for us it was a question of prestige. Wirogg had belonged to us in 1936, and we would have to relinquish it to another firm and have it managed by another firm. It was my opinion that it was an insult to us if we weren't given the task of managing this firm."

The officials of the Krupp firm well knew that any expansion of its facilities and activities would require the employment of forced labor, brought from occupied territories, prisoners of war and concentration camp inmates.

Other illustrations indicating the firms entire willingness to cooperate in the use of these several types of labor could be given but the foregoing are ample to show that the law of necessity cannot be held a good defense under the facts of this particular case.

While we regard the foregoing as conclusive, before leaving this phase of the case we deem it not inexpedient to briefly examine the nature of the evidence offered by the defendants to establish the existence of the compulsion or coercion under which they claim to have acted. They introduced several witnesses who testified in general terms that because of the attitude of the Reich authorities, the officials of the Krupp firm had "no possibility of refusing a production quota."

Whatever may have been true with respect to Flick and other industrialists the witnesses for the defense in the present case made it clear that the defendants acted not from necessity within the meaning of the rule invoked but from what they conceived to be a sense of duty. If it were permissible, as the defense seems to think, to show the subjective attitude of one person by the testimony of another, then that of the defense witness Schieber is typical. Schieber was an SS-Brigade Fuehrer and high official in the Speer Ministry, which was in charge of the allocation or the fixing of production quotas and seeing that they were met. He was examined about the nature of the coercion upon industrialists. He testified that "what is decisive is the nature in which public opinion was directed. The defamation of such a man who opposed the state. This defamation was so severe that I believe any reasonable man would have seen to it that he avoided it." Asked how "this defamation (would) express itself" he answered, "it would hardly be possible for me to list all these defamations one by one. In general, it was not defamation from above, but from in the man's neighborhood, or from the man on the street, the block leader, or the children for example. You know how difficult from 1943 on or how severe the leadership of the people and of industry in the whole state became after 1943." He further testified that "I believe that for the vast majority of German plant managers, the moral coercion, namely the duty stood in the absolute foreground." And again, "a refusal to meet production programs does not occur in an orderly state which is at war. I am further of the view that when you speak of coercion to production that you might just as well call it a self-evident duty or task to produce." Asked about the Krupp firm in particular, he stated that "it regarded it as a patriotic duty to do what it could in aid of the war effort by meeting these production schedules."

This brings forward another aspect of the rule of necessity which as applied to the facts of this case needs consideration. It will be observed that it is essential that the "act charged was done to avoid an evil both serious and irreparable," and "that the remedy was not disproportioned to the evil." What was the evil which confronted the defendants and what was the remedy that they adopted to avoid it? The evidence leaves no doubt on either score. As said, Speer was the top official in charge of the allocation of production quotas and the ultimate arbitrator concerning penalties in case they were not met. He testified as a witness for the defense in the Flick case. Although he was available he was not offered as a witness in this case. However, under the liberal rules followed in these trials, short excerpts of his testimony in the Flick trial were allowed to be introduced in evidence by the defendants. The excerpts reflect that he was examined with respect to what would have happened to an industrialist prior to the implementation of an order of 6 September 1943, giving the Main Committee the legal basis for issuing directives to industrial plants. In dealing with the question presently under consideration we need not be concerned with the possibilities after September, 1943, because many of the acts charged in the indictment were committed prior to that date, and moreover, so far as appears there were no changes in the attitude of the defendants. So far as the present question is concerned it was the same throughout.

From the excerpts introduced, it appears that Speer was asked and answered as follows:

Q. "Now, if an industrialist should have said, before the promulgation of this law: 'The Main Committee has no legal basis, I shall do what I please,' what would have happened then?

....

A. The industrialist would have lost his plant. He would have lost every possibility of exerting any influence on his plant. Such cases did occur, but not because of a refusal by the industrialist, but merely brought about by the fact that a plant regularly failed to achieve the production required of it. As an example I might mention the replacement of the Plant Manager of Krupp-Markstaett, whose position was filled against Krupp's wishes by a Hamburg plant manager."

In the present case, the possibility of "losing a plant" did not exist for any of the defendants except Alfried Krupp and not for him prior to December, 1943, when he became owner of the enterprise. None of them had any property interest in the business. The most that any of them had at stake was a job.

So accepting Speer's testimony, the question from the standpoint of the individual defendants resolves itself into this proposition: To avoid losing my job or the control of my property, I am warranted in employing thousands of civilian deportees, prisoners of war, and concentration camp inmates, keeping them in a state of involuntary servitude; exposing them daily to death or great bodily harm, under conditions which did in fact result in the deaths of many of them; and working them in an undernourished condition in the production of armament intended for use against the people who would liberate them and indeed even against the people of their homelands.

If we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was not disproportioned to the evil. In this connection it should be pointed out that there is a very respectable authority for the view that the fear of the loss of property will not make the defense of duress available.(7)

But the extreme possibility hinted at was that Gustav Krupp and his officials would not only have lost control of the plant but would have been put in a concentration camp had they refused to adopt the illegal measures necessary to meet the production quotas. Considering Gustav Krupp's influence and friendship with Hitler and the influence in Germany of the firm in general, it is difficult to conceive of this possibility. The fate of minor industrialists hardly can be regarded as evidence of what would have happened to the officials of the Krupp firm in similar circumstances. Rohland, a witness for the defense, correctly described the situation. He was an industrialist whom Speer made deputy chairman of the Reich Association Iron, one of the most important nationwide economic groups in the war economy of Germany. He became involved in a serious controversy with Sauckel and Ley and the latter threatened him with dire consequences. But he testified that "Speer covered for me completely", and that whether "one who was in serious opposition with the Reich authorities was sent to a concentration camp as a consequence depended very much on the person and on the question of whether the person concerned was directly in touch with someone like Speer."

The firm of Krupp was even better protected than Rohland. It was not only a vital factor in the war effort, but the head of it, Gustav Krupp, was a personal friend of Hitler. Gustav

(7. Wharton's Criminal Law, Vol. 1, Section 384, Note 1, p. 515

Krupp, not only had contributed large sums of money to the Nazi Party in the campaign which resulted in their rise to power, but played a leading part in bringing to Hitler's support other influential industrialists. Throughout the war years he and the Krupp firm continued to be regarded by Hitler with high favor. If nothing else appeared, this is conclusively shown by the "LEX KRUPP", a special decree of Hitler whereby of all industrial firms in Nazi Germany that of Krupp alone was enabled to continue as a family enterprise free from the manifold burdens of a corporate structure. All of the officials of the firm were important in industrial life in Germany and far from lacking influential friends.

Moreover, in all fairness it must be said that in any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death and great bodily harm from starvation and the relentless air raids upon the armament plants to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the number of the actual and potential victims is also thought provoking.

This phase of the case must not be left without reference to the fact that there is a flat contradiction running throughout the defense of necessity. Upon the one hand it is said that the acts of omission and commission were required by the multitude of directives issued by state authorities which the defendants were bound to obey under penalty of grievous injury. Upon the other hand, it is said that they risked grave danger by violating such directives and even defying the Gestapo in order to mitigate the plight of the victims. There are numerous examples of this for which there is neither time nor space. The record speaks for itself. Three instances, however, may be referred to. The Gestapo issued an order that pregnancy of Eastern workers should be interfered with. This was contrary to the law and the ethics of the medical profession. The Krupp doctor did not want to obey the directive, but was afraid to take a stand without the backing of the officials of the firm. The defense claims that he was given this backing unqualifiedly, notwithstanding that throughout this case the power and influence of the Gestapo is held out as being one of the factors which hung over the heads of the defendants.

As a preface to the second instance, we quote from the final plea made by counsel for defendants Krupp and Ihn. After referring to the establishment of the Central Planning Board, and the so-called "tapeworm decree", he states: "There is only one sentence which is quite clear in this decree. Only one man has the sole responsibility of meeting the requirements of war production, and that man is SPEER. And he is also the man who issues very clear instructions prohibiting any considerations of private economy in industry.

"It is self-evident that no factory is any longer authorized to engage in peace-time production. But even any planning for peace-time conditions is strictly prohibited. Ruthless action is taken against any managers who disregard this prohibition, the conversion to exclusive war production is enforced by very robust methods."

Yet, the testimony of defense witness Kraus indicates that, whatever may have been true with respect to other industrialists, the officials of the Gusstahlfabrik were not intimidated by the situation described by counsel. During the war, Kraus was a "Group Chairman" and in December, 1944, was appointed a plant director in the Gusstahlfabrik. After having testified that a "considerable peace time production" was carried on during the early years of the war, he was then examined about such production during the later years. On this topic and with reference to the later years of the war, he was asked and answered as follows:

"Q. Please tell us another few branches of peacetime production.

A. Well, we had our appliances Production Nos. 1 and 2; we produced chemical containers. We even produced milk cans. Incidentally, whenever these investigation committees came they always objected to that, and we always had great arguments when we had to show what a number of different products we were manufacturing in the Gusstahlfabrik. We were even blamed for producing locomotives, and that was quite a considerable part of our total production.

Q. What about motor vehicles?

A. Yes, we made them too. I know that one of the inspecting commissions tried to close down some of the peacetime production in order to release the workers for war production."

Whatever may be said with respect to the relation to wartime production of the specific items mentioned by the witness, the fact nevertheless remains that it appears from his testimony that the Gusstahlfabrik in the later years of the war was engaged in what the witness said the "investigating committees" considered peacetime production and, so far as appears, nothing was done about it even though the "committees" objected thereto.

The third instance relates to the sale of Reich bonds by the Krupp firm. It was related by Schroeder, head of Krupp's accounting department and a witness for the defense. From his testimony it appears that in 1943 the Krupp officials became convinced that the war was lost and it was necessary to adopt a new policy looking to the post-war period. At that time, the firm had accumulated government bonds in the amount of 200 million Reichsmarks, Schroeder said that "we started to sell these gradually so that when the war was nearly over we had only 68 million Reichsmarks in bonds. We did not on purpose sell all of them because that would have been too noticeable and it would have smelled too much of defeatism; therefore, we had to retain a certain amount of bonds." The witness further testified that this was a very dangerous and hence was done with great secrecy. He justified the policy upon the theory that the firm had a responsibility towards the workers whose livelihood depended upon them.

Whatever the reason, the sale of these bonds ~~was~~ amounted to treason under the laws of the Reich for which the penalty was death. It was the very type of thing which the dread Gestapo, of which so much is said in this case, was supposed to detect and prevent.

It is true that the sale of the bonds was not openly made but if it be conceded that in the case of individuals so influential and important as the owners and officials of the Krupp firm that the risk was great, it must also be conceded that it was readily incurred whenever they thought there was involved interest of sufficient importance to justify such a course.

LAW AS TO INDIVIDUAL RESPONSIBILITY

As already said, we hold that guilt must be personal. The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:

"Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefor. So, although they are ordinarily not criminally liable for corporate acts performed by other officers of agents, and at least where the crime charged involves guilty knowledge or criminal intent, it is essential to criminal liability on his part that he actually and personally do the acts which constitute the offense or that they be done by his direction or permission. He is liable where his scienter or authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually." (1) Corpus Juris Secundum, Vol. 19, pp. 363, 364, American Law Book Co., (1940) Brooklyn, N. Y.

Under the circumstances as to the set up of the Krupp enterprise after it became a private firm in December 1943, the same principle applies. Moreover, the essential facts may be shown by circumstantial as well as direct evidence, if sufficiently strong in probative value to convince the tribunal beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis.

Upon the facts hereinabove found we conclude beyond a reasonable doubt that the defendants Krupp, Loeser, Houdremont, Mueller, Janssen, Ihn, Eberhardt, Korschan, von Buelow, Lehmann and Kupke are guilty on Count Three of the indictment. The reasons upon which these findings of guilt are based have been set forth heretofore in the discussion of the facts under Count Three.

The nature and extent of their participation was not the same in all cases and therefore these differences will be taken into consideration in the imposition of the sentences upon them. The evidence presented against the defendant Karl Pfirsch we deem insufficient to support the charges against him set out in Count Three, and we therefore acquit the defendant Karl Pfirsch on Count Three of the indictment. The defendant Karl Pfirsch having been acquitted upon all counts upon which he was charged, shall be discharged by the Marshall when the Tribunal presently adjourns.

I have signed the Judgment subject to reservations made of record in the proceedings of 31 July 1948.

EDWARD J. DALY, Judge

HU C. ANDERSON, Presiding Judge

I concur with the Judgment in all respects except as appears in my dissenting opinion which follows.

WILLIAM J. WILKINS, Judge

Dated at Nurnberg, Germany this 31st day of July 1948.