

trial as a basis. In this respect I shall only remind you of the viewpoints in the IMT judgment, already mentioned by me, and beyond that with regard to the judgment in the Flick case I shall recall the fact that the American tribunal in that case recognized the political and economic dictatorship prevailing in the Third Reich and consequently acknowledged the state of compulsion the German industry was subject to. The trial could be conducted easier, more speedily and affording more of a general view of the whole. In order to facilitate the trial, in spite of the adverse attitude of the prosecution, I intend to proceed from the foundation laid by the IMT judgment and the judgment in the Flick trial in important questions concerning international and penal law in the complete conviction that the tribunal will recognize the foundation laid by both these judgments since both trials have been conducted with the utmost care and accuracy.

If the trial against Krupp and I.G. does not afford a general view of the whole and if the material presented has assumed boundless proportions it is largely due to the fact that charges of planning and preparations for aggressive war have been raised in the Flick trial but have not been incorporated as a special Count in the Indictment. The prosecution in both these trials has submitted immense material in order to prove by circumstantial evidence what it cannot prove directly. The defense, in presenting its evidence, shall deal with this comprehensive material and is compelled to deal with it because the prosecution sees incriminating evidence in it in spite of the IMT judgment to the contrary, for example in re-armament in the introduction of the Mefo-bills of exchange -- a point, which has already been settled by Schacht's vindication -- and in the so-called violations against the Treaty of Versailles and also the further material with regard to the promotion of exports and the organization of sales agencies, which the prosecution also desires to regard as evidence in the preparation for aggressive warfare.

Today, however, I would like to avoid details -- no matter how enticing it might seem for example, to treat, in an ironic manner, the promotion of exports as preparation for aggressive warfare -- and limit myself to the fundamental question. It is -- I beg to be excused for speaking plainly -- a bizarre idea, that German industry and especially Krupp supposedly supported Hitler in his aggressive plans and prepared for aggressive warfare. This idea can only originate with a prosecuting body that is accustomed to the personal freedom of a democracy in America and forgets that the National Socialist State was the most extreme form of dictatorship, a fact, which must repeatedly be pointed out and which perhaps can only be understood in all its implications by someone who has lived through the Third Reich and who continually observed the development into absolute dictatorship. The prosecution believes that Hitler came into power with the aid of the heavy industry and takes this as the basis for its further arguments. It is just this basis, however, which is incorrect and frequent repetition does not make it more true. In reality Hitler, from the beginning to the end Hitler was prejudiced against the industrial and economic leaders and intellectuals in particular. This antagonistic attitude is repeatedly shown by Hitler himself and by all of his followers. Thus, for example, Hitler stated the following on 10 November 1933 on the occasion of a speech in Berlin-Siemensstadt:

"I quote now:

"It was not the intellectuals who have given me the courage to begin this gigantic work, but I have gained this courage only because I knew the German worker and the German farmer. I knew that those two would one day be the ones to uphold the new Reich."

And in 1940 Hitler said:

"The time has come to create an example and to put a German industrialist against the wall, and a prominent one at that."

The prosecution's idea appears even more bizarre, if one considers the position of my client, Herr Eberhardt. He was a business man and director of a department and became a deputy member of the directorate only well along in the war at a time when aggressive warfare had long been initiated and Germany was entirely on the defensive side. Here too, it can be seen that the prosecution has ignored the IMT-judgment. According to the IMT-judgment only those can be found guilty under the count of aggressive war who at the time when aggressive wars were prepared held a leading position in the state and, moreover, had a positive knowledge of Hitler's aggressive plans. The IMT-judgment has assumed such positive knowledge with respect to Hitler's plans only if the defendant in question had a direct close relationship to Hitler and particularly knew of Hitler's declarations contained in the so-called key-documents i.e. in the four secret speeches before the high commanders of the Wehrmacht, of 5 November 1937, 23 May, 22 August and 23 November 1939. The Prosecution has not adduced proof for this, has not even made an attempt at proving it. Never can a person, who neither knew Hitler's aggressive plans nor was in a position to know them on account of his position, be held criminally responsible on the count of planning or preparing an aggressive war. The most significant example in the IMT-judgment is perhaps the former Reichsbank President and Reich Minister of Economics, Schacht, who was acquitted by the International Tribunal, because he did not take part in the meetings referred to and therefore could not know Hitler's plans.

7. I now come to the conduct of the Krupp firm in the occupied territories, i. e. those acts which the prosecution summarises under the term "Spoliation".

I should like to remark that on the basis of an agreement between the various defense counsels I have taken it upon myself to deal with the rudiments of law and international law on the subject of "Spoliation" and I shall accordingly deal with this subject in my presentation of evidence and later on in the closing brief.

The term spoliation is not defined in the Control Council Law No. 10. It is merely listed as an example in Article 2, para. 1b under the heading: "Atrocities or offences against property constituting violations of the laws or customs of war".

8. Thus spoliation from the point of view of international law involves State or private property, particularly however, private property. Alone the fact that the Control Council Law does not contain a definition, shows a certain legal uncertainty, which, as I will show, is not reduced, but increased, by its reference to the "laws or customs of war".

In this connection it is interesting to note that the basis of the Control Council Law is formed essentially by 3 fundamental concepts, i.e. "peace, property and humanity", which belong to the most important ethical and social problems of humanity. Furthermore it is interesting to note that the Control Council Law builds up its criteria of crime on these 3 fundamental conceptions, which rightfully should be protected, and accordingly bring forth the 3 most important points of the indictment i.e.: Count I of the Indictment: The crime of an aggressive war,

Count II of the Indictment: Spoliation.

Count III of the Indictment: Crimes against Humanity.

Despite the Kellogg-Briand Pact, despite the Hague rules for Land Warfare and despite the Geneva Convention concerning the treatment of prisoners of war no codified penal laws for these offences existed up to this time which would have been valid throughout the world De lege

ferenda, it is therefore surely a commendable act, if an attempt is made to create an international penal code which will be generally applicable, and this path has been entered upon by the London Statute and the Control Council. However, it appears hazardous that this attempt was not subsequently made for the entire world, but is only effective against the citizens of the defeated countries. It is questionable to create laws which are only directed against citizens of certain States; it is and uncomfortable reminded of a similar period, when the National Socialist State created laws which were directed only against members of certain races.

9. The Charter of the United Nations shows exactly just how far removed we are today from a penal code that is actually valid for all nations; in Article 53, paragraph 2, the "enemy State" is defined as a State which was an enemy of one of the signatory powers during the 2nd World War. According to Article 107, it is not permissible to refer to the Charter so far as actions are concerned which are directed against a so-called enemy State. Talleyrand in the Vienna Congress had already fought against such discrimination and against such discriminatory treatment in the interests of the French people. It is felt even by our opponent, General Taylor, that such discrimination is dangerous. Although this cannot be gathered from his speeches held in Nuernberg with respect to the indictment, it may be gathered from a lecture which he held on 28 July 1947 before the 5th International Congress on Criminal Law in Geneva. In Geneva he pleaded with the following words for the planning and the establishment of a permanent International Tribunal to enforce the international penal code:

"The creation of such a jurisdiction, with power in the Tribunal to enforce its decisions, is a task of formidable delicacy and complexity. But it must be discharged, and promptly, for the very reason that international penal law is being enforced to-day 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."

I have observed with great pleasure, that General Taylor recognized

in neutral Switzerland and in free Geneva the basic principle of equality of all people before the law, for the very reason that it is a fundamental principle of international law. It is furthermore a guiding principle of the Constitution of the United States of America and a constituent part of human rights proclaimed in the principles of the French Revolution also an inherent part of the United Nations Charter, which in article 1, paragraph 3 proclaims the respect of Human Rights as a sacred principle. It is however regrettable that the Charter violates the sacred principle in Sections 53 and 107 and that General Taylor as Chief of Council does exactly the same in Nuernberg.

There is another reason, which renders more difficult the legal reasoning in these trials. In all civilized countries there exists the principle applying to every penal law, which charges the defendant with having committed a legally defined crime.

During the 34th conference on international law in Vienna on 5-11 August 1926 a participant asked with regard to international crime committed by an individual:

"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 juridical book, I can not know that."

Whereupon Lord Phillimore answered:

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

Contrary to this principle the Prosecution has not even once made the attempt, to define the legal concepts on which the indictment is based, namely war of aggression, spoliation and crimes against humanity. Above all no precise and exact definition exists, neither in international laws nor in the Control Council Law.

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 refers to the Legislation, which Hitler issued

on 28 June 1935. 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 regards to fundamental conception." (Reich Law Gazette, page 839 and the following)

The American Military Tribunal comments on the Hitlerite working 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 and wide discretion in which Party political ideology and influence were substituted for the control of law as the guide to judicial decision. (Judgement in Case II, page 50)

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

II. Any definition concerning Count 2 of the Indictment, that means within the sphere of so-called spoliation is conspicuous by its absence. The points of reference in the Hague Convention are few and vague. As I mentioned before, no definition whatsoever is to be found in the Control Council Law and the same applies to the Indictment of the 3 Trials of the Industrialists. Based on the opinion of the Prosecution any activity of an Industrialist in occupied territory turns in fact into "spoliation", regardless of whether or not this activity was carried out in the interest of the economic potential of Germany or in the interest of the economy of the occupied country. It is significant for the confusion of the conceptions of penal law, that it is to be regarded as "spoliation" of private property in occupied territory, if the firm of Krupp in accordance with transfer orders, leased an enterprise in occupied territory and managed it as its leaseholders. Spoliation is already established as a fact, if work was carried out in this enterprise.

The fact, that Krupp left the leased enterprise, has also been regarded as spoliation. The Prosecution considers irrelevant, whether the Firm of Krupp - as in the case of Elmag in Alsace - carried along all the machines of its Essen automobile factory; or whether it - as happened in the case of Sartana in the Ukraine-accepting a credit from the German Reich brought millions worth of its own machinery on to the work shops evacuated by the Russians. It seems also irrelevant, whether the management of these factories and investments in the occupied territories created a possibility for economic existence for its population and also, whether this industrial activity would restore or maintain economic life, disrupted by war.

THE PRESIDENT: Let me interrupt you for a moment. The recess time is here. May I inquire how long it would take you to finish, to see whether we shall go on?

DR. SIEMERS: Your Honor, I believe I need 10 to 15 minutes.

THE PRESIDENT: Well, I think we can finish. It is a question of whether the sound track will run that long. I think it will. All right, proceed then.

DR. SIEMERS: Thank you, Mr. President.

With remarkable ease the charge of Spoliation has also been extended to the disposing of objects, which have never been the property of foreigners, or which in accordance with measures taken by the Wehrmacht or other authorities had long since been confiscated from foreign owners. The Prosecution has disregarded and not mentioned the fact, that in all these cases the firm of Krupp has established through contracts and agreements as legal a basis as possible. It has been alleged, without presenting the proper evidence, that it was a case of shady business deals and manipulations, which constitute a violation of the Hague Convention.

It is extremely difficult, to define clearly on the basis of the Hague Convention what the Occupation Powers may or may not do. This difficulty has presented itself already in the Flick Trial and gave rise to

22 March-A-MW-27-6-P.Stewart (Int.Jacobsohn)
COURT III, CASE X

numerous arguments and finally led to the clearcut assertion in the verdict, that the activity of an industrial trustee or lease holders cannot be regarded as spoliation. Unfortunately the Prosecution has in no way paid attention to this verdict.

12. Another difficulty is caused by the fact that it seems impossible to apply literally the rulings of the Hague Convention on land warfare of the year 1907. Every law, even international law, is dependent upon historical development, which can bring extension or restriction. Consequently, the International Military Tribunal said, as quoted with regard to international law:

"This law is not static, but adapts itself regularly to the requirements of a changing world."

And the same applies when the American Military Tribunal IV stated in the Flick judgment:

"The purpose of the Hague Convention, as disclosed in the preamble of Chapter II, was 'to revise the general laws and customs of war, either with a view to defining them with greater precision or to confine them within such limits as would mitigate their severity so far as possible'. It is also stated that 'those provisions, the wording of which has been inspired by a desire to diminish the evils of war, as far as military requirements will permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.' This explains the generality of the provisions. 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 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. 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 applied."

Thus the Hague Convention on land warfare can only be applied by analogy. However, if in agreement with the Prosecution, the Hague Convention is to be literally applied, then the numerous bombing attacks by the Allied air forces are obviously definite war crimes, for Article 25 of the Hague Convention states

"It is not permissible to attack or fire upon undefended cities, villages, dwellings or buildings with whatever means."

I am leaving it to the Prosecution to decide whether they will draw these inevitable conclusions.

13. The case of spoliation is far more complicated than that of air warfare. For here it concerns a structure of economy which has undergone an essential change since three decades ago in 1907. It concerns the fact that both world wars were of an economic nature, which had the result that the economic requirements could no longer be separated from military requirements, contrary to the experience upon which the Hague Convention is based, and which, nevertheless, owing to the wars of the past century is only aware of the "military requirements." It was only due to the economic war that the industrial enterprises of the belligerent states were drawn into the war solely because of the economic war and consequently involved in the "military requirements", to which the Hague Convention refers. In this connection, consideration must be given to the fact that the economic war originated from the blockade of Germany, which was carried on in World War I by the Allies, the fact must also be considered that for the first time in the year 1916, private property was expropriated during the war, namely, by the Allies. I would like to quote the English legal expert Sir Thomas Barclay, who wrote in October 1922 the following:

"Already in January 1916, the British government was the first to be guilty of liquidating certain enemy interests:....The result of this was that in the majority of cases, private property was expropriated without indemnification, and in others in lieu of merely a nominal indemnification. Our own government, the first to be guilty of this crime, must now therefore be the first to face the task arising from this fact. Actually it seems as if we have reverted to prehistoric conditions, to the Communism of primitive tribes, and at any rate returned to that kind of brigandage by the State, which, in spite of the efforts of a Grotius to introduce a certain moral standard with regard to the relations amongst nations, has continued into our times."

In the light of those facts I still wish to refer to another which has always caused the prosecution to submit a form of reasoning which is without legal basis. In the indictment the Prosecution refers to Articles

45-56 of the Hague Convention with regard to spoliation. Here, as in the other economic trials, they intentionally forget Article 43. It is just this article which is of particular significance. It reads as follows:

"After legal power has actually been transferred to the occupying power, the latter must adopt all precautions incumbent upon it to rehabilitate and maintain as far as possible public order and life; namely, in so far as no vital impediment exists under observance of the laws of the country."

However, public order and life in an occupied territory may only be rehabilitated or maintained if the economy of the country is functioning. This regulation as set forth in the Hague Convention therefore gives the occupying power the right and the duty to take over the economic enterprises of the country, and to administrate the country under suitable economic conditions. This fact becomes all the more clear, if one considers the example set by the numerous industrial plants which, owing to the war have either been deserted by the owners or brought to a stand-still. It seems inconsistent that the principle laid down in Article 43, frequently overlaps those set forth in Articles 52 and 53. For the prosecution desires to define the ban of taking an interest in an economic enterprise, whilst Article 43 to which the prosecution paid no attention, contains the obligation and thus the justification to intervene in the economic life of a country. It is evident that it is not easy to find the correct limitations, and it is even more evident how critical it is to demand that a private industrialist recognize and decide upon the limitations of these principles.

15. The events in Germany after the end of World War II prove how difficult it is to recognize these limitations correctly. In the course of the trial, or rather in my closing brief, I shall show that no doubt exists that the Hague Convention should be applied in occupied Germany, even though General Clay as a non-lawyer and General Taylor as a lawyer are of a different opinion. But that which has occurred in Europe since May 1945

contradicts the Hague Convention, and even if the latter is not interpreted so literally and inflexibly as the prosecution desires. In the guiding principles for the Combined Chiefs of Staff for General Dwight D. Eisenhower (JCS 1067) issued in April 1945 the following ruling is made:

"No step to be taken towards economic rehabilitation, nor that which might be intended to maintain and strengthen the German economy."

This clear instruction for the administration of the occupied German territories likewise presents an obvious violation of Article 43 of the Hague Convention just cited. The development in Germany, and I shall prove this, indicates exactly the same factor, that is to say, the violation of Article 43 and of Articles 46 - 56 of the Hague Convention. Hundreds of factories were dismantled, machines removed, regardless whether they are essential for the maintaining of the German peace economy or not. Wast numbers of Patents, inventions and manufacturing processes were taken away, and all this occurred without any approval or the indemnification of the owner.

During the same 3 years in which these events occurred, the American prosecution charged leading German industrialists with having spoliated the occupied territories during the war, although the Prosecution was quite aware that the actions of German industrialists in the occupied territories cannot be compared both in kind and extent with the actions in occupied Germany.

16. At the present time I do not wish to say anything with reference to the personality of my client Karl Eberhardt. The Tribunal will be able to form a judgment itself during the trial, and will realize that he is a man who did his duty, and can in no way be compared to a criminal, which the prosecution wishes to make of him and the other persons of the Krupp firm. According to the statements of the prosecution he is not incriminated with any matters which lay outside the sphere of his activity in the

firm Krupp. Whether, however, he committed criminal acts within the sphere of his activity in Krupp, will be shown by the presentation of evidence. At the moment I only wish to quote a sentence uttered by the prosecution, which at the beginning of the Opening Statement said:

"In our time the name of Krupp is burdened with association and prejudices."

I am afraid the prosecution belongs to that circle of people who are victims of such prejudices loyal to their principles, namely, to see a criminal in every German industrialists just because fate made him a German industrialist, who both before and during the war fulfilled his duty.

THE PRESIDENT: We will recess until tomorrow morning at nine-thirty.

(The Tribunal recessed until 0930 hours, 23 March 48)