

## CASE No. 84

### TRIAL OF LOTHAR EISENTRAGER AND OTHERS

BEFORE A UNITED STATES MILITARY COMMISSION, SHANGHAI, CHINA

3RD OCTOBER, 1946—14TH JANUARY, 1947

#### A. OUTLINE OF THE PROCEEDINGS

##### 1. THE ACCUSED

The accused were : Lothar Eisentraeger, alias Ludwig Ehrhardt, Franz Siebert, Herbert Glietsch, Johannes Otto, Erich Heise, Oswald Ulbricht, Hanz Niemann, Ingward Rudloff, Bodo Habenicht, Hans Dethleffs, Wolf Schenke, Heinz Peerschke, Hans Mesberg, Johannes Rathje, Siegfried Fuellkrug, Walther Heissig, Jesco von Puttkamer, Alfred Romain, Ernst Woermann, Wilhelm Stoller, Elgar von Randow, Walter Richter, Hermann Jaeger, Felix Altenburg, Herbert Mueller, August Stock, and Maria Muller, all German nationals.

##### 2. THE CHARGE

The prosecution preferred one common charge against all accused. This charge alleged that they, " between the 8th May and 15th August, 1945, individually and as officials, nationals, citizens, agents or employees of Germany, while residing in China at a time when the United States of America was at war with Japan did, in China, in a theatre of military operations, knowingly, wilfully and unlawfully, violate the unconditional German surrender by engaging in and continuing military activity against the United States and its allies, to wit by furnishing, ordering, authorising, permitting and failing to stop the furnishing of aid, assistance, information, advice, intelligence, propaganda and material to the Japanese armed forces and agencies, thereby by such acts of treachery assisting Japan in waging war against the United States of America in violation of the laws and customs of war."

The charge was followed by bills of particulars against each of the accused. These bills of particulars described the accused by their functions, and may be analysed as follows :

(i) The principal accused, Ludwig Ehrhardt, was described as " head of a German intelligence agency known as ' Bureau Ehrhardt,' a unit of the German High Command." The charge against him was that he " wilfully, engaged in military activities against the United States and its allies, to wit, the collection of military intelligence concerning, *inter alia*, land, sea and air movements by the United States and its allies and transmission of it to the Japanese armed forces." He was also charged with " wilfully and unlawfully ordering, authorising and permitting his agents in Shanghai, Canton and Peiping to furnish aid and intelligence to the Japanese armed forces."

(ii) The accused Franz Siebert was described as "former German Consul-General and leader of the German community in Canton." He was charged with (a) "ordering, authorising, permitting and failing to stop continuation of German military activities . . . by persons under his command"; (b) "wilfully and unlawfully ordering and instructing representatives of German business firms . . . to submit to him lists of all essential war materials in their possession, which lists were . . . submitted by him to the Japanese armed forces, enabling them to secure control and make use of said materials"; (c) "wilfully and unlawfully ordering all German citizens and nationals in the Canton area, at a called meeting to obey his command to continue active assistance to the Japanese authorities under penalty of punishment by the Japanese."

(iii) The accused Herbert Glietsch was described as "secretary of the German Consulate at Canton and the leader of the German community there, and an agent of the German high command." He was charged with "ordering, authorising and failing to stop the continuation of German military activities, etc., by persons under his control," and with "decoding, approving and delivering . . . to the Canton chief of the 'Bureau Ehrhardt,' a German High Command Intelligence agency a telegram dated on or about 8th May, 1945, which unlawfully ordered and authorised the continuation of military activities."

(iv) The accused Jesco von Puttkamer and Alfred Romain were described as "head of the German Information Bureau at Shanghai, the military propaganda agency of the German Embassy to enemy occupied China" and "a member and employee of the German Information Bureau . . ." They were charged with wilfully and unlawfully engaging in military activity against the United States and its allies, to wit psychological warfare by designing and furnishing to the Japanese armed forces for their use propaganda material in the English language consisting of, *inter alia*, leaflets, posters and photographs designed to influence, adversely to the United States and its allies, the actions of the United States troops and civilian populations."

(v) The bills of particulars against the remaining accused may be grouped under two headings: (a) *engaging*<sup>(1)</sup> in military activities after surrender. The accused in this category were described as "members, agents or employees of the 'Bureau Ehrhardt' an intelligence agency of the High Command," and they were charged with "wilfully and unlawfully engaging in military activities against the United States and its allies, to wit the collection, compilation, of military intelligence concerning, *inter alia*, land, sea and air movements by the United States and its allies and rendering of other aid, assistance, and advice to the Bureau Ehrhardt knowing it was for the use and benefit of and furnished to the Japanese armed forces";

(b) "*ordering, permitting and failing to stop others to engage in military activities.*"<sup>(1)</sup>

(vi) The accused Ernst Woermann, German Ambassador in enemy occupied China, and the accused Elgar von Randow, Counsellor of the

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(1) Italics inserted.

Shanghai office of the German Embassy, were described as "superiors of Lothar Eisentraeger" and charged in similar terms with "ordering and failing to stop" his activities.

All the accused pleaded not guilty.

### 3. THE EVIDENCE

During the years 1940 and 1941, before a state of war existed between China and the United States on the one side and Germany and Japan on the other, Germany established intelligence and propaganda agencies in China, covering the Far East. During this period a propaganda section was constituted as part of the German Embassy in Canton, and its head enjoyed diplomatic status. The heads of the various agencies in other towns had consular status and the whole organisation was directly responsible to the German High Command. After the severance of diplomatic relations between China and Germany, Germany established an Embassy with the Chinese puppet government at Nanking and with the approval of this government and the Japanese authorities, set up branch offices of its intelligence organisation at Shanghai, Canton and Peiping, which took over propaganda and intelligence activities from the Embassy.

The accused were all German nationals and can be grouped according to their positions within the German organisation in China, under three heads :

- (1) the members of the Bureau Ehrhardt and the press intelligence group (both military intelligence organisations) ;
- (2) the members of the German Information Bureau (a propaganda agency) ;
- (3) those German diplomats and functionaries who were not members of these two organisations but were alleged to have controlled their activities.

The prosecution alleged that the intelligence agency known as Bureau Ehrhardt functioned under the auspices of the German Embassy. The agency was named after its chief, the accused Lothar Eisentraeger, alias Ludwig Ehrhardt. It had its main office in Shanghai, and branch offices in Canton and Peiping. The accused Rudloff, Habenicht, Dethleffs, Schenke, Peerschke, Mesberg, Rathje, Richter and Jaeger were members of the Shanghai office ; the accused Heise, Ulbricht, Niemann, members of the Canton office, and the accused Fuellkrug, Heissig, Stock and Maria Muller of the Peiping office.

The German Information Bureau was part of the Shanghai branch office of the German Embassy. The accused Puttkamer and Romain were members of this organisation and the accused Herbert Mueller was an agent of the German News and Propaganda Agency working in close connection with the Information Bureau.

Those accused who were not members of these two organisations were Woermann, the German Ambassador in Nanking, Stoller the head of the Shanghai branch office of the German Embassy and his deputy, von Randow, Siebert and Glietsch who were Consul General and Consular Secretary in Canton respectively, the accused Otto who was head of the Nazi party in South China and the accused Altenburg who was the head of the branch

office in Peiping. The chain of command, as alleged by the prosecution led from both the Bureau Ehrhardt and the Information Bureau to the head of the German Embassy office in Shanghai and from him through the German Ambassador in Nanking to the German Foreign Office and the German General Staff in Berlin.

The case for the prosecution was that these organisations which engaged in military activities against the United States and its allies during the war between the United States and Germany, continued their activities after Germany's surrender on the 8th May, 1945, in co-operation with or under the direction of the Japanese military authorities, until 15th August, 1945, when Japan too surrendered to the allies.

The evidence preferred by the prosecution showed that on 8th May, 1945, a telegram was sent by the accused Ehrhardt through the German Embassy to all agencies and sub-offices of the Bureau Ehrhardt in Canton, and Peiping. This telegram was signed by Ehrhardt and stated that the Bureau Ehrhardt was demobilising. The text of the telegram contained three main points :

- (1) that the organisation ceased to exist and its members were to be demobilised ;
- (2) that equipment should be turned over to the Japanese authorities who were to be instructed how to use it ;
- (3) that the question of continuing work in co-operation with the Japanese was left to the discretion of every individual member of the organisation.

The prosecution maintained that the telegram was so worded as to suggest that co-operation with the Japanese was desirable, or even ordered, whereas the defence argued that the telegram was meant to be taken at its face value. The accused Heise who was the deputy head of the Peiping office of the organisation, testified that he took the telegram order of the 8th May to mean that he should continue to co-operate with the Japanese in the collecting of military intelligence. This telegram order was read out by the heads of the branch offices to their subordinates. Thereafter, a number of contracts with the Japanese authorities for service of a military nature, mainly the collecting of intelligence, were signed by the accused members of the Bureau Ehrhardt in Shanghai, Peiping and Canton, and by members of the German Information Bureau in Shanghai. As a result of these contracts, members continued to carry on their full activities after the German surrender. On 20th May an intelligence officer of the Japanese High Command at Nanking visited the Bureau Ehrhardt on orders from the Japanese Supreme Command at Tokio to convey to them the wish of the Japanese government to use the Bureau Ehrhardt to the greatest extent possible. He also told them that its intelligence concerning radio call signs and wave lengths was very valuable to the Japanese. After this date the Supreme Command at Nanking received intelligence reports including the data on wave lengths, call signs, time sheets and wireless messages intercepted from United States transports and ships once or twice weekly, from the Bureau Ehrhardt who had collected this information from its various agencies. This information was passed on to the headquarters of the Japanese armed forces at Nanking. During the latter part of June, the Japanese asked for the services of the Bureau Ehrhardt to be continued and improved. The

post-surrender services of the Bureau Ehrhardt or individual members thereof were performed voluntarily and a Japanese staff officer testified that he asked them to sign an agreement so that there could be no question of compulsory co-operation. Money was sent to the Bureau Ehrhardt by the Japanese authorities on two occasions and distributed amongst its members, but in many cases the remuneration consisted of food provided by the Japanese for the members of the German organisation. The evidence further showed that the accused were aware of the fact that the intelligence collected by the Bureau Ehrhardt was transmitted to the headquarters of the Japanese armed forces and in case of the propaganda section, that their propaganda material was intended ultimately to reach American troops.

The main defence of those accused who were charged with "having ordered or failed to prevent their subordinates from co-operating with the Japanese" was that after the surrender they had no longer any power to give valid orders to their staff and that whatever the members of their staff did after that date was not done on their instructions or orders. The accused Siebert who was German Consul-General in Canton added to this general defence that all Germans in China were subject to Chinese law as they had no extra-territorial rights and that therefore German officials had no control over their compatriots since the diplomatic and consular powers had ceased with the surrender.

The main defence of those accused who were in subordinate positions and who were charged with engaging in military activity was two-fold: they pleaded that they took the telegram and the messages sent out by the Bureau Ehrhardt after the surrender as orders to continue co-operation with the Japanese and also that they were at the mercy of the Japanese authorities because they could only obtain money and food by working for them.

The following paragraphs set out further details relating to the individual accused:

(a) *Bureau Ehrhardt, Shanghai*: (Ehrhardt, Habenicht, Mosberg, Peerschke, Richter, Dethleffs, Jaeger, Rathje and Rudloff).

All above named accused had actual knowledge of the unconditional surrender of Germany. Ehrhardt admitted that the meaning of unconditional surrender was known to him and that the German military surrender applied to his activities. All these accused signed an agreement to continue the work for the Japanese and none were forced to do so. Ehrhardt stated that Rathje was his immediate subordinate, Mosberg served under Rathje, Richter was a wireless operator, Peerschke a micro-photograph expert and Habenicht a code man. Dethleffs and Rathje also did code work and Jaeger functioned as a general clerk. Ehrhardt testified that the arrangements for the operations were made with the Japanese Chief of Staff at Tokio and the Japanese Supreme Command at Nanking. At the time of the German surrender the Japanese Supreme Command received instructions to secure Ehrhardt's services. A major of the General Staff was sent to Shanghai to discuss the ways and means of effecting the Bureau Ehrhardt's co-operation. This staff officer testified that shortly after the German surrender he discussed with other Japanese staff officers the desirability of having Ehrhardt's continued co-operation and it was suggested as proof of the voluntary nature

of their service that the Germans should be requested to sign an agreement to continue work. Accordingly at a meeting on the 20th May, 1945, at the Bureau Ehrhardt, Ehrhardt promised that he would do what he could in the matter of co-operation and that he would pass on the request to his subordinates. A few days later an agreement signed by various members of the Bureau Ehrhardt was sent to the Japanese High Command and filed there. The office of the Bureau Ehrhardt continued to function and all above-named accused continued to go there regularly.

(b) *Bureau Ehrhardt, Canton, and Consular General, Canton*: (Heise, Ulbricht, Niemann and Siebert).

The above-named accused, as members of the Bureau Ehrhardt, continued working for the Japanese after the surrender. Heise testified that shortly before the surrender a telegram was received in German Embassy Code from Ehrhardt suggesting that work be continued with the Japanese and a later telegram received through the Japanese to the effect that the Bureau Ehrhardt in Shanghai was co-operating on an individual basis, confirming his opinion that co-operation was a necessity, especially as he received successive monthly salaries in May and June. He testified that they intercepted messages concerning the warning net employed by the United States forces during the battle on the island of Okinawa. Ulbricht and Niemann monitored United States wireless communications in morse code and the material was turned over to the Japanese agencies. Siebert continued to act as official German Consul General at Canton for a month after the surrender and even went to the Japanese authorities to ask what should be done with the Branch office of the Bureau Ehrhardt in Canton. He knew of Ehrhardt's operations and did nothing to stop them by way of orders or advice. On the contrary, when asked for advice by the accused Ulbrecht, he said that in his opinion the only alternative was to continue working with the Japanese. Even after the Consulate was formally closed, Siebert continued to exercise consular prerogatives and functions and as late as July threatened a German national in Canton that he was still Consul-General and would not hesitate to use all the powers at his disposal to prevent any undermining of his authority. In June, 1945, he submitted to the Japanese detailed lists regarding offers of important war materials by German firms in Canton. These goods included aeroplane propellers and wheels, field telephones, radio equipment, various precision instruments, etc. Siebert admitted that he was never threatened by the Japanese to comply with their instructions, but had done so because he considered it his duty.

(c) *Bureau Ehrhardt, Peiping, and Press Intelligence Group at Peiping*: (Füllkrug, Heissig, Stock and Maria Müller).

The evidence showed that the accused Maria Müller, Stock, Heissig and Fuellkrug rendered intelligence aid to the Japanese at private conferences and weekly intelligence meetings presided over by a Colonel on the Japanese General Staff. It is also clear from the evidence that Fuellkrug and Heissig ordered their subordinates Stock and Maria Muller to carry on working with the Japanese. Although the accused attempted to minimise the importance of their participation in these meetings and press conferences, the evidence as a whole shows that they took an active part in them and that the Japanese representatives at these conferences relied on the information supplied by

the accused. The evidence also showed that the accused Altenburg not only issued no orders to the Germans to cease their activities after the surrender, but that he actually called a meeting in which he advised all Germans who could be of service to the Japanese to co-operate with them in every possible way.

(d) *German Information Bureau, German News Service*: (Puttkamer, Romain, Altenburg and Müller).

The accused Puttkamer and Romain continued their work on propaganda leaflets after the surrender. Some of the pamphlets they turned out explained to the readers the uselessness and horrors of war and invited them to lay down their arms. They were written in English and obviously intended to reach the United States troops. The writers signed themselves "Organisation of American Soldiers serving Overseas." About 5 or 6 different types of anti-allied propaganda pamphlets were supplied to the Japanese between the material dates of the charge and about 150,000 to 20,000 of each type were printed. The accused Altenburg and Herbert Müller provided a news agency for the Japanese forces in China and continued their work until these forces surrendered.

#### 4. FINDINGS AND SENTENCES

The following 21 accused were found guilty and sentenced to the terms of imprisonment set out against their names.

Lothar Eisentraeger, alias Ludwig Ehrhardt,	Life imprisonment
Ingward Rudloff,	10 years "
Bodo Habenicht,	10 years "
Hans Dethleffs,	10 years "
Heinz Peerschke,	5 years "
Mans Mosberg,	20 years "
Johannes Rathje	15 years "
Walter Richter,	10 years "
Hermann Jaeger,	10 years "
Jesco von Puttkamer,	30 years "
Alfred Romain,	30 years "
	(Reduced to 20 years by the Reviewing Authorities)
Franz Siebert,	5 years "
Erich Heise,	20 years "
Oswald Ulbricht,	5 years "
Hans Niemann,	5 years "
Felix Altenburg,	8 years "
Herbert Mueller,	10 years "
Siegfried Fuellkrug,	20 years "
Walther Heissig,	20 years "
August Stock,	5 years "
	(Reduced to 2 years by the Reviewing Authorities)
Maria Muller,	5 years imprisonment
	(Reduced to 2 years by the Reviewing Authorities)

Six of the accused (Glietsch, Otto, Schenke, Woermann, Steller and Randow) were acquitted.

## B. NOTES ON THE CASE

## I. PLEA TO THE JURISDICTION OF THE COURT

A plea to the jurisdiction of the court was filed on behalf of all accused alleging in substance that the accused were German citizens and residents of China, and thus subject only to Chinese law and the jurisdiction of Chinese courts. The defence submitted: (1) that the United States jurisdiction over crimes was restricted solely to those committed within its own territory or territory occupied by its armed forces; (2) that the abrogation by treaty in 1943 of the extra-territorial privileges of the United States in China left the United States Military Commission without authority to exercise jurisdiction over the accused and that according to the criminal code of the Republic of China, which the defence alleged was the proper law to be applied to this case, the High Court of Shanghai had exclusive jurisdiction over the accused; (3) that the Military agreement between China and the United States on which the court's jurisdiction was based had never been ratified by the Legislative Assembly of the Republic of China and therefore was null and void and in any case any military agreement for the functioning of United States war crimes courts on Chinese soil was inoperative after the cessation of hostilities as the forces of the United States were not occupational forces but only an expeditionary force on allied soil.

The motion was overruled by the Commission. The main argument centred on the first submission. The prosecution quoted the case of the United States against Sawada and others where a similar argument was rejected by a United States Military Commission.<sup>(1)</sup> The argument is erroneous in its conception. The territoriality of jurisdiction in criminal cases is based on the reasonable premise that in ordinary criminal cases an offender should be judged by the law of the place where the crime was committed, but even in such cases departures are frequently made from the usual rule where practice requires, e.g., counterfeiting of domestic currency abroad, or treason committed abroad in English Criminal law. A war crime, however, is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.<sup>(2)</sup>

With regard to the third submission, the prosecution invited the court to take judicial notice of the fact that the Republic of China had invited the United States to send military forces to China in order to defeat the common enemy. In view of this, the United States army entered China as an allied expeditionary force with the rights and privileges as well as the duties which are well recognised in international law as attaching to such a force. The agreement on which the defence relied was, therefore, not more than the implementation of joint military operations. The jurisdiction of the Military Commission in this case was, thus, not dependent on this agreement but existed since the invitation of the Chinese government to the United States

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<sup>(1)</sup> See Volume V, pp. 8-10 of this series.

<sup>(2)</sup> For another example of a military court of an allied nation trying war criminals on the territory of one of its allies, see the *Almelo Trial*, Vol. I of this series, pp. 42 *et seq.*

to send troops to Chinese territory to wage war. One of the corollaries of waging war and after the Moscow Declaration of 1943, during the last war one of its declared objectives, is the punishment of those who violate the laws of war. This was held by the Supreme Court of the United States in *re Yamashita* :<sup>(1)</sup>

“ An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. . . . The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventative measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognised by the law of war. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict and to remedy, at least in ways Congress has recognised, the evils which the military operations have produced.” (*Yamashita v. Steyer*, 66 Sup. Ct. Rep.)

## 2. MOTION TO DISMISS THE CHARGES

A motion to dismiss the charges was filed by all defendants mainly on the ground that the acts charged did not constitute a war crime because (a) “ the charges did not state sufficient facts which constitute a crime under the laws and usages of war ” ; (b) “ a violation of certain terms by individuals although punishable, does not constitute a war crime unless the acts constituting the violation thereof are such as in themselves constitute a violation of the laws and customs of war ” ; (c) “ the charge did not allege that the accused had been ‘ officially ’ notified of the German surrender, though they had ‘ actual notice ’ .”

The commission denied the motion. The legal position with regard to submissions (a) and (b) is dealt with under (3) below.

With regard to (c) it seems obvious that the commission held that it was sufficient proof of *mens rea* on the part of the accused if it was proved that the accused were aware of the surrender and thus must have been aware of the fact that their activities were violations of its terms. How these terms had been communicated to them is immaterial.

## 3. VIOLATIONS OF THE TERMS OF SURRENDER OR OF AN ARMISTICE

The two most common means of bringing about a cessation of hostilities between belligerents are an armistice or the surrender of one belligerent. Such surrender may be a “ stipulated ” or a “ simple ” surrender. In case of a stipulated surrender the armed forces of the two belligerents enter into a convention usually referred to as a “ capitulation,” laying down the conditions under which one belligerent is laying down his arms. If no such capitulation is entered into, but one belligerent is ready to surrender without

(1) See Vol. IV, pp. 38 *et seq.*

special conditions of surrender, then this is referred to as simple or unconditional surrender. The distinction between these modes of terminating an armed conflict is recognised by international law.<sup>(1)</sup> Their common denominator is the condition that hostilities between the belligerent parties must cease. A violation of any of these conventions entered into by the belligerents to suspend or terminate hostilities, whether such conventions be an armistice or a capitulation or terms of a simple surrender, is unlawful. Such a breach is an international delinquency if committed by a belligerent and a war crime if committed by an individual. With regard to violations of an armistice, the Hague Convention contains the following regulations :

“ *Article 40.* Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

“ *Article 41.* A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders and, if there is occasion for it, compensation for the losses sustained.”

Professor Lauterpacht<sup>(2)</sup> says :

“ Any violation of armistices is prohibited, and, if ordered by the Governments concerned, constitutes an international delinquency. In case an armistice is violated by members of the forces on their own account, the individuals concerned may be punished by the other party in case they fall into his hands. But apart from this no unanimity exists among the writers on international law as to the rights of the injured party in case of violation by the other party ; many assert that the injured may at once, without giving notice, reopen hostilities ; others maintain that he may not, but has only a right to denounce the armistice.”

As a sample of such violation, Professor Lauterpacht mentions the scuttling of German ships at Scapa Flow on 21st June, 1919, by order of Admiral von Reuter.

The Hague Convention deals with violations of capitulations in Art. 35 :

“ Capitulations agreed upon between the contracting parties must take into account the rules of military honour. Once settled, they must be scrupulously observed by both parties.”

Professor Lauterpacht says :<sup>(3)</sup>

“ That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals.

“ When there is no capitulation, but a simple surrender, it is a duty of the surrendering force to stop firing as soon as the white flag has been

(1) See Oppenheim-Lauterpacht, *International Law*, 6th Edition, Revised, Volume II, p. 430.

(2) Oppenheim-Lauterpacht, *International Law*, 6th Edition, Revised, Volume II, p. 440.

(3) *Op. cit.*, paragraph 230.

hoisted and the enemy is approaching to take possession. Those members of the surrendering force who continue to fire lose their claim to receive quarter, and may therefore be killed on the spot. Or, if taken prisoners, they may be punished as war criminals."

It can thus be said that there is no doubt that any violation of a surrender, be it a conditional or simple surrender, as well as a violation of an armistice, is an act of treachery and if committed by an individual, punishable as a war crime.

#### 4. THE INSTRUMENT AND THE TERMS OF SURRENDER OF THE GERMAN ARMED FORCES IN 1945

The surrender of all German armed forces on 8th May, 1945, was unconditional and the meaning of "unconditional surrender" is absolute. Such surrender is an undertaking by military forces based on military honour, and failure to abide by its terms is a war crime regardless of whether damage results or not.

The prosecution based their charge on the "act of military surrender" dated 8th May, 1945, and on the so-called "Berlin Declaration" of 5th June, 1945. The following portions of these documents are set out below as those parts of the terms of surrender to which the charge and particulars seem to relate :

##### *" Act of Military Surrender, 8th May, 1945*

" 1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force, and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

" 2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May, 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

" 4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to Germany and the German armed forces as a whole.

" 5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender, the Supreme Commander, Allied Expeditionary Force, and the Supreme High Command of the Red Army will take such punitive or other action as they deem appropriate."

*“ Declaration Regarding the Defeat of Germany, 5th June, 1945*

“ The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her. . . .

“ It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply. . . .

“ In virtue of the supreme authority and powers thus assumed by the four Governments, the Allied Representatives announce the following requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply :

*Article 1*

“ Germany, and all German military, naval and air authorities and all forces under German control shall immediately cease hostilities in all theatres of war against the forces of the United Nations on land, at sea and in the air.”

*Article 2*

“ (a) All armed forces of Germany or under German control, wherever they may be situated, including land, air, anti-aircraft and naval forces, the S.S., S.A. and Gestapo, and all other forces or auxiliary organisations equipped with weapons, shall be completely disarmed, handing over their weapons and equipment to local Allied commanders or to officers designated by the Allied Representatives.”

*Article 5*

“ (a) All or any of the following articles in the possession of the German armed forces or under German control or at German disposal will be held intact and in good condition at the disposal of the Allied Representatives for such purposes and at such times and places as they may prescribe—

(iv) All transportation and communications facilities and equipment, by land, water or air ;

*Article 8*

“ There shall be no destruction, removal, concealment, transfer or scuttling of, or damage to, any military, naval, air, shipping, port, industrial and other like property and facilities and all records and archives, wherever they may be situated, except as may be directed by the Allied Representatives.”

*Article 9*

“ Pending the institution of control by the Allied Representative over all means of communication, all radio and telecommunication

installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representatives."

*Article 10*

"The forces, nationals (sic), ships, aircraft, military equipment, and other property in Germany or in German control or service or at German disposal, of any other country at war with any of the Allies, will be subject to the provisions of this Declaration and of any proclamations, orders, ordinances, or instructions issued thereunder."

*Article 14*

"This Declaration enters into force and effect at the date and hour set forth below. In the event of failure on the part of the German authorities or people promptly and completely to fulfil their obligations hereby or hereafter imposed, the Allied Representatives will take whatever action may be deemed by them to be appropriate under the circumstances."

The Prosecution did not specify any particular articles of these documents on which they relied, but it would appear that the charges can be based on the general stipulation that "all forces under German control shall immediately cease hostilities *in all theatres of war* against forces of the United Nations (Article 1).<sup>(1)</sup>

It appears that the acts set out in the particulars of the charge were deemed "hostilities." The activities of the Bureau Ehrhardt would seem to offend particularly against Article 9. "All means of communication, all radio and telecommunication installations and other forms of wire or wireless communications, whether ashore or afloat, under German control, will cease transmission except as directed by the Allied Representative." The power to try those who break the terms of surrender as war criminals can be based—apart from the laws and usages of war as set out in (3)—on Article 5 of the Act, and Article 14 of the Berlin Declaration.

5. POST-SURRENDER HOSTILITIES OF MEMBERS OF SURRENDERED FORCES, VIEWED AS A WAR CRIME WHERE SUCH HOSTILITIES WERE COMMITTED BY ASSISTING THE FORCES OF AN ALLIED BELLIGERENT WHO HAD NOT SURRENDERED

In the "Scuttled U-Boat Case," Gerhard Grumpelt, a former Lieutenant of the German Navy who had scuttled two U-boats after the German surrender was tried by the British Military Court at Hamburg for violating the terms of surrender. In that case, reported in a previous volume,<sup>(2)</sup> the prosecution based their case on paragraph 1 of the Instrument of Surrender signed on the 4th May, 1945, which provided that "the German Command agrees to the surrender of all German armed forces . . ." The two further conventions signed by the German Command at Rheims on the 8th May and at Berlin on the 9th May, 1945, and the Berlin Declaration of the 15th June, 1945, did not enter into that case as the offence charged was committed on 6th May, 1945.

<sup>(1)</sup> Italics inserted.

<sup>(2)</sup> See Volume I of this series, p. 55.

The main novelty of the charge in this case is that the accused, as members of the German armed forces committed acts of hostilities after the surrender not in a theatre of war where general hostilities had ceased, but in a theatre of war where the general hostilities were still being carried on by forces allied to their own. The defence argued that the accused had "a perfect right" to join forces with the Japanese because the accused had not taken part in the "German war against the allies in the European theatre" but in "another war." As there is no judgment in this case, it is impossible to know the court's opinion as to what would have been in their view the correct conduct in these circumstances. It may be argued that the accused should have stayed in China claiming non-belligerent status or that they could have demanded their repatriation to Germany. The evidence showed that some members of the German armed forces were in fact repatriated between the date of the German surrender and the Japanese surrender. Though this question remains open, there can be no doubt that the law is settled on the point that members of the armed forces of a belligerent whose entire armed forces have surrendered must abstain from all hostilities wherever they may find themselves on the date of such surrender and that by co-operating with an allied belligerent and *a fortiori* by joining the forces of such belligerent, they violate the terms of surrender and thus commit a war crime.

6. ALL NATIONALS, NOT MERELY MEMBERS OF THE ARMED FORCES OF A SURRENDERED BELLIGERENT, ARE BOUND BY THE TERMS OF THE SURRENDER

All accused were civilians. They were described in the charge as "officials, nationals, citizens, agents, and employees of Germany residing in China," thus implying their civilian status. They were all charged in the bill of particulars with "willingly and unlawfully engaging in military activities against the United States. . . ." The following arguments were, in fact, put forward by the defence :

(a) That at the time of the surrender the accused were not under the "control" of the German High Command or the German Government (with reference to Articles 1 and 2 of the Act of Military Surrender, 8th May, 1945), but were civilian residents in Japanese-occupied China.

(b) That since certain of the accused were not "military men," they could not be charged with war crimes since the German surrender did not apply to them.

All members of the Bureau Ehrhardt were described in the bills of particulars as "members of the Bureau Ehrhardt, an Intelligence Agency of the German High Command and it thus became a question of evidence whether the prosecution had proved that the Bureau Ehrhardt was an agency of the High Command and its members therefore members of the German armed forces. It appears from the findings that the court considered this to have been proved. That does not, however, apply in the case of the remaining accused and it would, therefore, seem that by finding some of these remaining accused who were not members of the Bureau Ehrhardt guilty of the charge as elaborated by the bills of particulars, the court held that the terms of surrender applied to all nationals of the surrendering belligerent and not only to the armed forces and that all such nationals must wherever they may find themselves at the time of such surrender refrain from activities which

are either considered to be military activities or contrary to the terms of surrender. The court, in rejecting the motion for a finding of not guilty at the close of the prosecution case said : " A careful reading of the [surrender] instrument and consideration of its implications can lead to but one inescapable conclusion, namely that the armed forces of Germany had been overwhelmed, that Germany as a nation had been defeated and that as a nation it was surrendering unconditionally to the will of the victor. In doing so the instrument at once became binding upon all persons. This was a capitulation not of a mere fortress or a mere army or two ; it was unconditional surrender of all forces under German control and carried with it all people of the German nation."

#### 7. DIPLOMATIC STATUS OF THE ACCUSED

With the exception of the accused Schenke, all accused were members of the Diplomatic Corps or of the staff of the German Embassy in Nanking or one of its branch offices in Peiping or Shanghai. The question of their status was not raised in a special motion, but in the motion for a finding of not guilty the defence mentioned the " extra-territoriality of the defendants " and also the " diplomatic privileges " to which they were entitled. It seems that the court held by implication that their status did not protect them in any way if they were guilty of a violation of the terms of surrender.

#### 8. WHAT CONSTITUTES " MILITARY ACTIVITIES " ?

The charge against the accused was elaborated in the bills of particulars but the commission in finding the accused guilty of the charge did thereby obviously not express any opinion as to the bill of particulars. In order to ascertain which acts committed by the accused were considered by the commission as war crimes, one must examine the charge in conjunction with the evidence which the court admitted as relevant to proving or disproving the charge. The following acts, evidence of which was admitted by the commission, may be taken as an indication as to which acts of the accused were regarded as " engaging in military activity " :

- (1) passing of radio messages, reporting of call signs, wave lengths, time sheets and wireless messages ;
- (2) collecting of intelligence with respect to events relating to the allied war effort in the form of movement of troops, ships, aircraft, as well as other material information collected by them ;
- (3) writing and transmitting propaganda destined for the United States troops ;
- (4) ordering or advising persons under their command to offer their services or engage in work of a military nature with the Japanese armed forces ;
- (5) encouraging the members of the German community to co-operate with the Japanese armed forces ;
- (6) submitting to the Japanese authorities lists of raw materials and equipment in possession of members of the German community in order that the Japanese forces may seize them.