and socially-minded businessman. The fact that I succeeded in this endeavor is, I think, proved both by the course of my own life and by the course of this trial. Nobody of the large circle of persons who know my fellow defendants and myself, will be willing to believe that we committed crimes against humanity, and nothing will convince us that we are war criminals.

PRESIDING JUDGE SEARS: The other defendants waive the right to address the Court, not under oath.

There is nothing further before the Tribunal this afternoon. We will now stand in recess, subject to the call of the Tribunal. I will say for the Tribunal, however, that we shall not expect to come back at least during the next 2 weeks, unless some emergency occurs which requires a session; but when the final session of the Court and the delivery of the judgment will be made, is impossible to say this afternoon.

The Tribunal stands in recess.

XI. OPINION AND JUDGMENT *

PRESIDING JUDGE SEARS: Before proceeding with our decision and judgment the Tribunal wishes to put on record its appreciation of the services rendered by counsel for both the prosecution and the defense in this case. In our American system of forensic jurisprudence, counsel are officers of the Court representing their clients, of course, but also assisting the Court in finding the truth and upholding the integrity of the law. We have so considered the counsel one and all who have appeared before us here. The counsel for prosecution and defense have all performed their professional duties with earnestness, diligence, and ability. They have been of great service to the Tribunal and in no instance has any one of them failed in the loyalest duty or overstepped the limits of honorable service. For the help they have rendered the Tribunal they have our thanks.

I will now read the decision on the motions.

At the close of the proceedings on 8 November, the defendants jointly and severally made a series of motions, among other things attacking the jurisdiction of this Tribunal and asking for the dismissal of the various counts of the indictment as to the defendants charged therein, and seeking to strike from the record hearsay testimony and affidavits on various grounds, and on 12 November defendant Flick moved to strike documents offered by prosecution on rebuttal, and on 14 November defendant Steinbrinck made a further motion.

We have examined all of these motions with care and hereby deny them all except the motion to dismiss the third count which

* Tr. pp. 10974-11026, 22 December 1947.

we will determine in that part of the judgment itself which relates to that count. We find the motions otherwise fully and conclusively answered in the brief interposed by the prosecution in objection to the motion.

In order to avoid any misunderstanding, however, we make these summary statements.

As to the Tribunal, its nature, and competence: The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany *(Control Council Law No. 10, 20 Dec. 1945)*. The judges were legally appointed by the Military Governor and the later act of the President of the United States in respect to this was nothing more than a confirmation of the appointments by the Military Governor. The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States.

Some safeguards written in the Constitution and statutes of the United States as to persons charged with crime, among others such as the presumption of innocence, the rule that conviction is dependent upon proof of the crime charged beyond a reasonable doubt, and the right of the accused to be advised and defended by counsel, are recognized as binding on the Tribunal, as they were recognized by the International Military Tribunal (IMT). This is not because of their inclusion in the Constitution and statutes of the United States but because they are deeply ingrained in our Anglo-American system of jurisprudence as principles of a fair trial. In committing to the occupying authorities of the various zones the duty to try war criminals, it is implicit therein that persons charged with crime are to be given a fair trial according to the jurisprudence prevalent in the courts of the power conducting the trials.

As to hearsay evidence and affidavits.—A fair trial does not necessarily exclude hearsay testimony and *ex parte* affidavits, and exclusion and acceptance of such matters relate to procedure and procedure is regulated for the Tribunal by Article VII of Ordinance 7 issued by order of the Military Government and effective 18 October 1946. By this Article, the Tribunal is freed from the restraints of the common law rules of evidence and given wide power to receive relevant hearsay and *ex parte* affidavits as such evidence was received by IMT. The Tribunal has followed that practice here.

As to counsel and witnesses.—The defendants have not been

denied the right to be advised and defended by counsel of their own choice. Defendants have not been denied the right to call any witness to give relevant testimony nor has the production of any available relevant document been denied by the Court.

As to the law administered.—The Tribunal is giving no *ex post facto* application to Control Council Law No. 10. It is administering that law as a statement of international law which previously was at least partly uncodified. Codification is not essential to the validity of law in our Anglo-American system. No act is adjudged criminal by the Tribunal which was not criminal under international law as it existed when the act was committed.

Now I will read the opinion and judgment as to Case 5.

Facing this Tribunal are private citizens of a conquered state being tried for alleged international crimes. Their judges are citizens of one of the victor states selected by its war department. There may well be misgivings as to the fairness of such a trial. These considerations have made the judges of the Tribunal keenly aware of their grave responsibility and of the danger to the cause of justice if the conduct of the trial and the conclusions reached should even seem to justify these misgivings. To err is human, but if error must occur it is right that the error must not be prejudicial to the defendants. That, we think, is the spirit of the law of civilized nations. It finds expression in the following principles well-known to students of Anglo-American criminal law.

1. There can be no conviction without proof of personal guilt.

2. Such guilt must be proved beyond a reasonable doubt.

3. The presumption of innocence follows each defendant throughout the trial.

4. The burden of proof is at all times upon the prosecution.

5. If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken.

We cannot imagine that German law contains concepts more favorable to defendants. Any less favorable, we, as American judges trained in Anglo-American criminal jurisprudence, would be reluctant to apply even though this is not an American court but a special tribunal constituted pursuant to a four-power agreement administering public international law.

To the extent required by article 10 of Military Government Ordinance No. 7 the Tribunal is bound by the judgment of the International Military Tribunal (hereinafter referred to as IMT) in Case 1 against Goering *et al,* but we shall indulge no implications therefrom to the prejudice of the defendants against whom the judgment would not be *res judicata* except for this article.

There is no similar mandate either as to findings of fact or conclusions of law contained in judgments of coordinate Tribunals. The Tribunal will take judicial notice of the judgments but will treat them as advisory only.

The indictment is in five counts. The first charges all six defendants, but in different capacities, with participation in the slave-labor program of the Third Reich and the use of prisoners of war in armament production. The second accuses all defendants except Terberger of spoliation of public and private property in occupied territories. In count three, Flick, Steinbrinck, and Kaletsch are accused of crimes against humanity in compelling by means of anti-Semitic economic pressure the owners of certain industrial properties to part with title thereto. The fourth count alleges that Flick and Steinbrinck, as members of the Keppler Circle or Friends of Himmler, with knowledge of its criminal activities, contributed large sums to the financing of Die Schutzstaffen der Nationalsozialistischen Deutschen Arbeiterpartei (hereinafter called the SS). In the last count Steinbrinck's membership in the SS is claimed to incriminate him under the ruling of IMT that it was a criminal organization. The theories upon which the several counts proceed will be elaborated as each is discussed.

Each count, except five, concludes with the averment that the acts and conducts of defendants were committed unlawfully, willfully, and knowingly, and constitute violations of various laws including Article II of Control Council Law No. 10. This article is not set out in the indictment but for convenience the portion thereof defining crimes is quoted, as follows:

"ARTICLE II

"1. Each of the following acts is recognized as a crime:

"(*a*) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

"(*b*) *War Crimes.* Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labor or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of

cities, towns or villages, or devastation not justified by military necessity.

"(*c*) *Crimes against Humanity.* Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

"(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."

It is noteworthy that defendants were not charged with planning, preparation, initiation, or waging a war of aggression or with conspiring or cooperating with anyone to that end. Except as to some of Steinbrinck's activities the defendants were not officially connected with the Nazi government but were private citizens engaged as businessmen in the heavy industry of Germany. Their counsel, and Flick in his closing unsworn statement, contended that in their persons industry itself is being persecuted. They have some shade of justification for so believing since the prosecution at the very beginning of the case made this statement—

"The defendants in this case are leading representatives of one of the two principal concentrations of power in Germany. In the final analysis, Germany's capacity for conquest derived from its heavy industry and attendant scientific techniques, and from its millions of able-bodied men, obedient, amenable to discipline, and overly susceptible to panoply and fanfare. Krupp, Flick, Thyssen, and a few others swayed the industrial group; Beck, Fritsch, Rundstedt, and other martial exemplars ruled the military clique. On the shoulders of these groups Hitler rode to power, and from power to conquest."

But the prosecution made no attempt to prove this charge and when the defendants, presenting their case, proposed to call witnesses to disprove it, upon the prosecution's objection that it was not in issue, the Tribunal excluded the testimony.

The question of the responsibility of individuals for such breaches of international law as constitute crimes has been widely discussed and is settled in part by the judgment of IMT. It cannot longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals.

"That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized. In

the recent case of *ex parte Quirin* (1942, 317 U.S. 1, 63 S Ct. 2, 87 L. Ed. 3), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

" 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribed for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals'."*

But IMT was dealing with officials and agencies of the State, and it is urged that individuals holding no public offices and not representing the State, do not, and should not come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty. (See The Nuernberg Trial and Aggressive War by Sheldon Glueck, ch. V, pp. 60–67, incl., and cases there cited.) There is no justification for a limitation of responsibility to public officials.

As background for all of the counts, the following brief history of the Flick organization with its personnel will suffice. The industrial career of defendant Flick had small beginnings. His first employment was as Prokurist or confidential clerk in a foundry. His first major capital acquisition was in the Charlottenhuette, a steel rolling mill, in 1915. Since then steel has been his principal interest, though he extended his organization to include iron and coal mining companies as foundation for steel production. Incidentally plants have been acquired for the further fabrication of the steel. His genius for corporate organization enabled him to obtain voting control of numerous companies in which he did not have a majority capital interest. At the height of his career, through the Friedrich Flick Kommanditgesellschaft, the top holding company, he had voting control of a dozen companies employing at least 120,000 persons engaged in mining coal and iron, making steel and building machinery and other products which required steel as raw material.

He has always been an advocate of individual enterprise and

* Trials of the Major War Criminals, op cit., volume I, page 223.

concerned in maintaining as his own against socialization the industries so acquired. As companies came under his voting domination, it was his policy to leave in charge the management which had proved itself and until the end of the war the Vorstaende (managing boards) of the different companies were in a large degree autonomous. There were no central buying, selling, or accounting agencies. Each company was administered by its own Vorstand. He was not a member of the Vorstand of any of the companies but confined his activities to the Aufsichtsraete (supervisory boards) which dealt chiefly with financial questions. As chairman of the Aufsichtsrat of several companies, he had a voice beyond that of the ordinary member in the selection of members of the Vorstand. These companies were scattered over Germany. For the purpose of coordinating the companies into one system, he established offices in Berlin where he spent most of his time. The total office force did not exceed 100 persons including secretaries, statisticians, file clerks, drivers, and messengers.

Until 1940 defendant Steinbrinck was Flick's chief assistant with defendants Burkart and Kaletsch having lesser roles but not necessarily subordinate to Steinbrinck. When Steinbrinck resigned in December 1939 defendant Weiss, who is a nephew of Flick, was called to the Berlin office as Flick's assistant but with permission to devote about one-fourth of his time to his own company, Siegener Maschinenbau A.G. (Siemag), in the Siegerland with about 2000 employees. Thereafter Weiss, Burkart, and Kaletsch, each in his own field, acted as assistants to Flick in the Berlin office. Weiss supervised the hard [soft] coal mining companies and finishing plants; Burkart the soft [brown] coal mining companies and steel plants, while Kaletsch acted as financial expert. Defendant Terberger was not in the Berlin office but was a part of a local administration as a member of the Vorstand of Eisenwerk Gesellschaft Maximilianshuette, A.G., commonly called Maxhuette, an important subsidiary operating plant in Bavaria and through stock ownership controlling other plants in Thuringia and south Germany.

The record comprises 10,343 pages. Not included therein are those portions of documents which were admitted without reading. The Court sat 5 days a week for 6 full months exclusive of recesses. Objection to evidence was rare until the prosecution was engaged in rebuttal. It is not too much to say that practically all the substantial evidence was received without objection.

Few of the legal questions in this case were suggested, much less argued and briefed, until the evidence had all been received. Arguments occupied the whole of the last week of November.

Only since then has the Tribunal been able to obtain a comprehensive view of the evidence in the light of the legal principles sought to be applied by counsel. In reaching its conclusions, therefore, the Tribunal has been compelled to rely upon authority presented in the arguments and briefs, supplemented by such independent research as is possible with very inadequate library facilities. All of these Tribunals, no doubt, have suffered from the same handicap. This recital will serve to explain, if not to excuse, the lack of cited authority and the general summarization of the evidence.

PRESIDING JUDGE SEARS: Judge Christianson will continue reading the judgment.

COUNT ONE

JUDGE CHRISTIANSON: The allegations in this count are substantially as follows: between September 1939 and May 1945 all the defendants committed war crimes and crimes against humanity as defined by Article II [paragraph 2] of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with, enslavement and deportation to slave labor on a gigantic scale of members of the civilian populations of countries and territories under the belligerent occupation of or otherwise controlled by Germany. This charge also involved the enslavement of concentration camp inmates, including German nationals, and the use of prisoners of war in war operations and work having a direct relation to war operations. More specifically, it is alleged that between the dates above-mentioned the defendants sought and utilized such slave labor program [by using] tens of thousands of slave laborers, including concentration camp inmates and prisoners of war, in the industrial enterprises and establishments owned, controlled, or influenced by them.

It is asserted that defendant Flick, as a member of the Praesidium of the Reichsvereinigung Eisen, commonly referred to as RVE (May 1942–45), and of the Praesidium of the Reichsvereinigung Kohle, commonly referred to as RVK (Mar. 1941–Apr. 1945), and as a member of the Beirat (advisory council) of the Wirtschaftsgruppe Eisenschaffende Industrie (Economic Group of the Iron Producing Industry) (Sept. 1939 to Apr. 1945), participated in the formulation and execution of such slave-labor program. It is further alleged that Flick's influence and control over policies and actions of these organizations were extended

through officials of his companies who also held positions in RVE and RVK.

It is further claimed that defendant Steinbrinck also was a member of the Praesidium of RVE (1941-45) and in that capacity exerted extensive influence upon the formulation and administration of the slave-labor program and that between September 1939 and April 1945 defendant Steinbrinck held the position of Beauftragter Kohle-West, also known as Bekowest (Plenipotentiary for Coal in the Occupied Western Territories) of France, Holland, Belgium, and Luxembourg and the position of Generalbeauftragter fuer die Stahlindustrie (Plenipotentiary General for the Steel Industry) in northern France, Belgium, and Luxembourg, and that by virtue of these positions, he exercised wide authority over the procurement, use, treatment, allocation, and transportation of thousands of slave laborers and prisoners of war.

It is further alleged that between September 1939 and May 1945, in the utilization of tens of thousands of slave laborers and prisoners of war in the industrial enterprises and establishments owned, controlled, and influenced by them, the defendants exploited such laborers under inhumane conditions with respect to their personal liberty, shelter, food, pay, hours of work, and health, and that the defendants used prisoners of war in work having a direct relation with war operations, including the manufacture and transportation of armament and munitions. It must here be noted that the defendants Flick, Burkart, Kaletsch, and Weiss are charged with the inhumane and repressive acts referred to in this paragraph with respect to the plants generally making up what is called the Flick Concern and that defendant Terberger is charged with such acts only insofar as they relate to one company in the Flick Concern known as Eisenwerk Gesellschaft Maximiliansshuette A.G., commonly referred to as Maxhuette. The defendant Weiss is further charged with such acts as they relate to Siegener Maschinenbau A.G., commonly referred to as Siemag, a concern owned and controlled by him.

Count one then concludes,

"7. The acts and conduct of the defendants set forth in this count were committed unlawfully, wilfully, and knowingly and constitute violations of international conventions, particularly of Articles 3–7, 14, 18, 23, 43, 46, and 52 of the Hague Regulations, 1907, and of Articles 2–4, 6, 9–15, 23, 25, 27–34, 46–48, 50, 51, 54, 56, 57, 60, 62, 63, 65-68, and 76 of the Prisoners of War Convention (Geneva, 1929), of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal

laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

A great deal of oral and documentary evidence was adduced by both the prosecution and defense with respect to the charges in this count. Although all of this evidence has had the Tribunal's close scrutiny and consideration, it is neither practicable nor necessary that a detailed discussion of this great mass of evidence be included in this opinion. We will make only such general references to the evidence as may be necessary to explain and justify the conclusions reached by the Tribunal.

It is not necessary that we dwell at length upon the origin and extent of the notorious slave-labor program, as it is treated fully in the judgment of IMT. It is important to note, however, that on the basis of the proof submitted, it is clear that the slave-labor program had its origin in Reich governmental circles and was a governmental program, and that the defendants had no part in creating or launching this program. It should be observed also that for a considerable period of time prior to the institution of the slave-labor program here under consideration, the employment of labor in German industry had been directed and implemented by the Reich government.

The evidence with respect to this count clearly establishes that laborers procured under Reich regulations, including voluntary and involuntary foreign civilian workers, prisoners of war and concentration camp inmates, were employed in some of the plants of the Flick Concern and similarly some foreign workers and a few prisoners of war in Siemag. It further appears that in some of the Flick enterprises prisoners of war were engaged in work bearing a direct relation to war operations.

The evidence indicates that the defendants had no actual control of the administration of such program even where it affected their own plants. On the contrary, the evidence shows that the program thus created by the State was rigorously detailed and supervised by the State, its supervision even extending into prisoner-of-war labor camps and concentration camp inmate labor camps, established and maintained near the plants to which such prisoners of war and concentration camp inmates had been allocated. Such prisoner-of-war camps were in charge of the Wehrmacht [Armed Forces], and the concentration camp inmate labor camps were under the control and supervision of the SS. Foreign civilian labor camps were under camp guards appointed by the plant management subject to the approval of State Police officials. The evidence shows that the managers of the plants here involved did not have free access to the prisoner-of-war labor camps or the concentration

labor camps connected with their plants, but were allowed to visit them only at the pleasure of those in charge.

The evacuation by the SS of sick concentration camp laborers from the concentration labor camp at the Groeditz plant for the purpose of "liquidating" them was done despite the efforts of the plant manager to frustrate the perpetration of the atrocity and illustrates all too graphically the extent and supremacy of the control and supervision vested in and exercised by the SS over concentration labor camps and their inmates.

With the specific exception hereinafter referred to and discussed, the following appears to have been the procedure with respect to the procurement and allocation of workers. Workers were allocated to the plants needing labor through the governmental labor offices. No plant management could effectively object to such allocation. Quotas for production were set for industry by the Reich authorities. Without labor, quotas could not be filled. Penalties were provided for those who failed to meet such quotas. Notification by the plant management to the effect that labor was needed resulted in the allocation of workers to such plant by the governmental authorities. This was the only way workers could be procured.

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. It further appears, however, that they were conscious of the fact that it was both futile and dangerous to object to the allocation of such labor. It was known that any act that could be construed as tending to hinder or retard the war economy programs of the Reich would be construed as sabotage and would be treated with summary and severe penalties, sometimes resulting in the imposition of death sentences. Numerous proclamations and decrees of the Reich kept such threats and penalties before the people. There were frequent examples of severe punishment imposed for infractions. Of this, all of the defendants were ever conscious. Moreover, the prosecution admits that the defendants were justified in their fear that the Reich authorities would take drastic action against anyone who might refuse to submit to the slave-labor program, for, in its final brief on this phase of the case, the prosecution states,

> "It is undoubtedly true that if Flick had suddenly said in so many words, 'I will shut down all my plants immediately because I don't like this idea of using forced foreign labor', the result would at least have been that management of his plants would have been taken away from him, and there was a possibility that he might even have been sent to a concentration camp."

Under such compulsion, despite the misgivings which it appears were entertained by some of the defendants with respect to the matter, they submitted to the program and, as a result, foreign workers, prisoners of war, or concentration camp inmates became employed in some of the plants of the Flick Concern and in Siemag. Such written reports and other documents as from time to time may have been signed or initialed by the defendants in connection with the employment of foreign slave labor and prisoners of war in their plants were for the most part obligatory and necessary to a compliance with the rigid and harsh Reich regulations relative to the administration of its program.

The exception to the foregoing, to which exception we have hereinbefore alluded, was the active participation of defendant Weiss, with the knowledge and approval of defendant Flick, in the solicitation of increased freight car production quota for the Linke-Hofmann Werke, a plant in the Flick Concern. This indisputably appears from the evidence. It likewise appears that Weiss took an active and leading part in securing an allocation of Russian prisoners of war for use in the work of manufacturing such increased quotas. It appears that in both efforts the defendants were successful.

The proof fails to show that defendant Flick, as a member of the Praesidiums of RVE and RVK or as a member of the Beirat of the Economic Group of the Iron Producing Industry, exerted any influence or took any part in the formation, administration or furtherance of the slave-labor program. The same may be said with respect to defendant Steinbrinck's membership on the Praesidium of RVK. With respect to defendant Steinbrinck's activities and participation in the slave-labor program as Bekowest and as Plenipotentiary General or Commissioner for the Steel Industry in northern France, Belgium, and Luxembourg, it must be borne in mind that he entered these positions long after the slave-labor program had been created and put in operation by the Reich. His duties and activities in these positions insofar as they involved the slave-labor program were obligatory. His only alternative to complying was to refuse to carry out the policies and programs of the government in the course of his duties, which, as hereinbefore indicated, would have been a desperately hazardous choice. It appears, however, that his actions in these positions as they affected labor were characterized by a distinctly humane attitude.

The charges in this count to the effect that the laborers thus employed in the defendants' plants were exploited by the defendants under inhuman conditions with respect to their personal liberty, shelter, food, pay, hours of work, and health are not

sustained by the proof. The evidence offered in support of these charges was sketchy and far outweighed by the substantial and impressive evidence submitted by the defendants to the contrary. We must conclude that the cruel and atrocious practices which are known to have characterized the slave labor program in many places where it was employed did not prevail in the plants and establishments under the control of the defendants. Isolated instances of ill treatment or neglect shown by the evidence were not the result of a policy of the plants' managements, but were in direct opposition to it.

This is true even though, as hereinbefore indicated, the defendants did not have actual control and supervision over the labor camps connected with their plants. It clearly appears that the duties of defendants as members of the governing boards of various companies in the Flick Concern required their presence most of the time in the general offices of the Concern at Berlin. Thus they were generally quite far removed from day to day administration and conduct of such plants and labor conditions therein. It is equally clear, however, that the defendants authorized and caused to be carried out measures conducive to humane treatment and good working conditions for all laborers in their plants. This is strongly evidenced by the fact that it was the policy and practice of the managers of the plants with which defendants were associated to do what was within their power to provide healthful housing for such laborers, to provide them with not only better but more food than permitted by governmental regulations, to give them adequate medical care and necessary recreation and amusement. That such efforts generally bore fruit is clear from the evidence.

Following the collapse of Germany and the liberation of the slave laborers within the plants here under consideration, there were a number of striking demonstrations of gratitude by them toward the management of such plants for the humane treatment accorded while they were there employed. It thus appears that the charges of exploitation and mistreatment of the laborers allocated to the plants with which defendants were associated are not sustained by the proof.

Recognizing the criminality of the Reich labor program as such, the only question remaining for our decision with respect to this count is whether the defendants are guilty of having employed conscripted foreign workers, concentration camp inmates or prisoners of war allocated to them through the slave-labor program of the Reich under the circumstances of compulsion under which such employment came about. The circumstances have hereinbefore been discussed. The prosecution has called attention to the fact that defendants Walther Funk and Albert

Speer were convicted by IMT because of their participation in the slave-labor program. It is clear, however, that relation of Speer and Funk to such program differs substantially from the nature of the participation in such program by the defendants in this case. Speer and Funk were numbered among the group of top public officials responsible for the slave-labor program.

We are not unmindful of the provision of paragraph 2 of Article II of Control Council Law No. 10 which states that—

> "2. Any person without regard to the nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission * * *."

Nor have we overlooked the provision in paragraph 4(*b*) of Article II of such Control Council Law No. 10 which states—

> "(*b*) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

In our opinion, it is not intended that these provisions are to be employed to deprive a defendant of the defense of necessity under such circumstances as obtained in this case with respect to defendants Steinbrinck, Burkart, Kaletsch, and Terberger. This Tribunal might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognized elsewhere.

Wharton's Criminal Law, volume I, chapter III, subdivision VII, paragraph 126 contains the following statement with respect to the defense of necessity citing cases in support thereof:

> "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."

A note under paragraph 384 in chapter XIII, Wharton's Criminal Law, volume I, gives the underlying principle of the defense of necessity as follows:

> "Necessity forcing a 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. Lord Mansfield in Stratton's Case, 21 How. St. Tr. (Eng.) 1046–1223."

The prosecution, on final argument, contended that the defendants are barred from interposing the defense of necessity. In the course of its argument, the prosecution referred to paragraph 4 (*b*), of Article II of Control Council Law No. 10 and stated:

"This principle has been most frequently applied and interpreted in military cases * * *."

Further on in the argument, it was said:

"The defendants in this case, as they have repeatedly and plaintively told us, were not military men or government officials. None of the acts with which they are charged under any count of the indictment were committed under 'orders' of the type we have been discussing. By their own admissions, it seems to us they are in no position to claim the benefits of the doctrine of 'superior orders' even by way of mitigation."

The foregoing statement was then closely followed by another, as follows:

"The defense of 'coercion' or 'duress' has a certain application in ordinary civilian jurisprudence. But despite the most desperate efforts, the defendants have not, we believe, succeeded in bringing themselves within the purview of these concepts."

The prosecution then asserted that this defense has no application unless the defendants acted under what is described as "clear and present danger." Reference was made to certain rules and cases in support of such position.

The evidence with respect to defendants Steinbrinck, Burkart, Kaletsch, and Terberger in our opinion, however, clearly established that there was in the instant case "clear and present danger" within the contemplation of that phrase. We have already discussed the Reich reign of terror. The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always "present," ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.

In considering the application of rules to the defense of necessity, attention may well be called to the following statement:

" 'The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subject.' "

(Wharton's Criminal Law, vol. I, ch. III, subdivision VII, par. 126, and cases cited.)

In this case, in our opinion, the testimony establishes a factual situation which makes clearly applicable the defense of necessity as urged in behalf of the defendants Steinbrinck, Burkart, Kaletsch, and Terberger.

The active steps taken by Weiss with the knowledge and approval of Flick to procure for the Linke-Hofmann Works 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.

It is, accordingly, adjudged that the defendants Steinbrinck, Burkart, Kaletsch, and Terberger are not guilty on count one and that defendants Flick and Weiss are guilty on this count.

Judge Richman will continue reading the decision and judgment.

COUNT TWO

JUDGE RICHMAN: There is no necessity for detailing the averments of count two which deals with spoliation and plunder of occupied territories. It follows the pattern of count one with general recitals of facts as to the over-all Nazi program described in the IMT judgment followed by charges that defendants participated therein. Specific instances of the alleged participation are then cited. The count concludes with the accusation, in substance, that these activities were violations of the laws and customs of war, Articles 45–56 of the Hague Regulations of 1907, general principles of criminal law, internal penal laws of countries where the acts were committed and of Article II of Control Council Law No. 10.

After giving effect to the prosecution's withdrawal of certain charges, there remain the following. Flick and his assistants Weiss, Burkart and Kaletsch are accused of exploiting properties which for convenience during the trial have been called Rombach,

in Lorraine; Vairogs, in Latvia; and Dnjepr Stahl [Dnepr Steel], in the Ukraine. Steinbrinck's activities as Plenipotentiary General for the Steel Industry and Plenipotentiary for Coal in certain occupied western territories are also claimed to be criminal. Flick and Steinbrinck are accused of participating in spoliation plans and programs through connections with RVE, RVK and their predecessor and subsidiary organizations. This accusation is not sustained by the evidence. Flick alone is charged with participation in the spoliation plans and program in Russia through his position as a member of the Verwaltungsrat (supervisory board) of the Berg–und Huettenwerke Ost (BHO). His influence therein, if any, was negligible.

IMT dealt with spoliation under the title "Pillage of Public and Private Property". Much that is said therein has no application to this case. No defendant is shown by the evidence to have been responsible for any act of pillage as that word is commonly understood. There were moveables brought from Latvia and the Ukraine upon the approach of the returning Russian armies. A large part thereof had been taken there from Germany to equip industrial plants which had been stripped by the Russians in their retreat. What movables the Russians left were doubtless of little value. It is not established with any certainty that they were shipped to Germany. But of more importance is the fact that the evidence does not connect any of these defendants with responsibility for the evacuation. The ten barges that disappeared from the plant at Rombach were all found by the French owners upon their return. Some had been used and sunk or damaged in the retreat of the fleeing German Army but for this defendants cannot be held [responsible]. Steinbrinck was responsible for no such pillage but may be credited with its prevention in several instances shown by the evidence.

The important questions center in Steinbrinck's activities directing the production of coal and steel in the western territories, the Flick administration of the Rombach plant and the occupation and use of the Vairogs and Dnjepr Stahl plants in the East.

No crimes against humanity are here involved. Nor are war crimes except as they may be embodied in the Hague Regulations. The prosecution so admits in its concluding brief, saying: "Thus, the charge amounts to, and it need only be proved, that the defendants participated in the systematic plunder of property which was held to be in violation of the Hague Regulations." The words "systematic plunder" came from the IMT judgment. They are not very helpful in enabling us to point to the specific regulations which defendants' acts are supposed to violate.

In the listed Articles we find that "private property * * * must

be respected * * *" and "cannot be confiscated." (Article 46.) "Pillage is formally forbidden." (Article 47.) There is nothing pertinent in 48, 49, 50, and 51. From 52, IMT gets some of the language of its judgment. The Article reads:

> "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.
>
> "Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.
>
> "Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible."

We quote also, as bearing on the questions before us, Article 53:

> "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
>
> "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

Submarine cables, treated in 54, and properties referred to in 56 are not here involved. This leaves only 55 which reads:

> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

From Articles 48, 49, 52, 53, 55, and 56, IMT deduced that "under the rules of war, the economy of an occupied country can only be required to bear the expense(s) of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear." Following this lead the prosecution in the first paragraph of count two says that defendants' "acts bore no relation to the needs of the army of occupation and were out of all proportion to the resources of the occupied territories." A legal concept no more specific than this leaves much room for controversy when an attempt is made to apply it to a

factual situation. This becomes evident when Rombach is considered.

Prior to the First World War when Lorraine was German, a large plant was built by German capital near the town of Rombach. After that war it was expropriated by France from whom the title was acquired by a French corporation dominated by the Laurent family. The enterprise consisted in 1940 principally of blast furnaces, Thomas works, rolling mills and cement works. It furnished employment and the means of livelihood for a large indigenous population. When the German Army invaded Lorraine in 1940, the management fled but many of the workers including technicians remained. Key installations had been removed or destroyed so that the plant was inoperable until extensive repairs had been made. In the meanwhile the workers were idle except as they were employed to renovate the plant. After the occupation of western territories, the Supreme Commander of the German Army issued a "Decree concerning the orderly management and administration of enterprises and concerns in the occupied territories" dated 23 June 1940. It stated that should an orderly management or administration of enterprises, including concerns dedicated to industry, not be insured owing to the absence of the persons authorized or for other compelling reasons, public commissioners should be appointed during whose administration the powers of the property holders or owners were to be suspended. The costs of the administration were to be borne by the enterprise. The commissioner was obligated to exercise the care of a prudent business man in the conduct of the enterprise. He was "not empowered to transfer his administration to a third party." On 27 July 1940, the same commander issued a directive for compliance with the decree of 23 June 1940. We do not find this directive in the record but an affidavit states that the appointment of "administrators had to take place exclusively through the chief for the civil administration." There seem to have been other directives which also are not in evidence. In any event a public commissioner or administrator was appointed for the Rombach plant and ultimately executed a contract with the Friedrich Flick Kommanditgesellschaft called "use of enterprise conveyance agreement" dated 15 December 1942 but effective as of 1 March 1941 when the Flick group took possession. The agreement recites an order of the Plenipotentiary for the Four Year Plan to the effect that the iron foundries situated in Lorraine are "in the name of the Reich to be controlled, managed, and operated by single individuals or enterprises on their own account." However, the contract designates the Flick Kommanditgesellschaft as trustee, not grantee. Prior to taking possession the Flick group had learned through governmental agencies that a number of plants

in Lorraine were to be parceled out for administration by German firms. These firms, including Flick, had the hope of ultimately acquiring title to the respective properties and this trusteeship was sought to that end. There are provisions in the contract providing terms of purchase and also providing for remuneration for capital investment by the lessee in the event the purchase should not materialize. At no time, however, was there any definite sale commitment and of course the hope of its realization was frustrated by the fortunes of war. Charles Laurent as a witness testified that he was expelled from Lorraine in 1940 and that the Flick administration had nothing to do therewith. It does not appear that he tried to regain possession of the plant but he may have deemed futile such an attempt. A corporation called Rombacher Huettenwerke, G.m.b.H., was organized by Flick to operate the plant. Operations continued from March 1941 until the Allied invasion about 1 September 1944. All the profits were invested in repairs, improvements and new installations. As the Allied armies approached Rombach, the German military authorities gave orders to destroy the plants which were disobeyed by the officials of the trustee. When the French management returned, the plants were intact. There was conflicting testimony as to their condition in early 1941 and again in September 1944. The evidence satisfied us that the trustee left the properties in better condition than when they were taken over. Approximately one-third of the production of the blast furnaces in this district went to Germany, the rest to France, Belgium, and other countries. This general ratio of exports existed before the war. There are no separate figures for the Rombach plant.

The seizure of Rombach in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the exercise of some discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interests, little fault could be found with the subsequent conduct of those in possession.

But some time after the seizure, the Reich government in the person of Goering, Plenipotentiary for the Four Year Plan, manifested the intention that it should be operated as the property of the Reich. This is clearly shown by the quoted statement in the contract which Flick signed. It was, no doubt, Goering's intention to exploit it to the fullest extent for the German war effort. We do not believe that this intent was shared by Flick. Certainly

what was done by his company in the course of its management falls far short of such exploitation.

Flick was interested in extending his organization through the acquisition of additional steel plants. Lorraine was German territory before the First World War and many Germans felt that in its seizure Germany would be getting back merely what was already her own. In many respects during the occupation Germany treated Lorraine as Reich territory. Flick saw the possibilities resulting from the invasion and sought to add the Rombach property to his concern. But governmental policy was otherwise. It does not appear upon what grounds this decision was based. There may have been thought of the Hague Regulations under which private property must be respected and cannot be confiscated. But we recall no hint in the evidence that Flick or his associates gave any thought to the international law affecting the transaction. The Flick management of Rombach was conservative, not, however, with the intent of benefiting the French owners. It was suggested at one time that French management be included to which Flick did not agree. He knew that he did not have title and might never acquire it. Anticipating this possibility he inserted provisions by which he would be protected against the loss of any of his own capital that might be invested in the course of the company's operations. His expectation of ownership caused him to plow back into the physical property the profits of operation. This policy ultimately resulted to the advantage of the owners. In all of this we find no exploitation either for Flick's present personal advantage or to fulfill the aims of Goering.

Obviously the formula taken from the IMT judgment cannot apply to any part of the transaction except the distribution of the steel. There are no figures in the record showing the needs of the army of occupation. There are no Rombach statistics tending to show the effect of its production and distribution on the French economy. Therefore, criminal liability must be tested by a different rule.

While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated. Laurent, as a witness, told of his intention to claim reparations. For suggesting an element of damage of which he had not thought, he thanked one of defendants' counsel. It may be added that he agreed with counsel that the factory had not been "mismanaged or ransacked."

But there may be both civil and criminal liability growing out of the same transaction. In this case Flick's acts and con-

duct contributed to a violation of Hague Regulation 46 that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a program of "systematic plunder" conceived by the Hitler regime and for which many of the major war criminals have been punished. If they added anything to this program of spoliation, it was in a very small degree.

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 "these 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 the airplane as an instrument of war was merely a dream. The atomic bomb was beyond the realms of imagination. Concentration of industry into huge organizations transcending national boundaries had barely begun. Blockades were the principal means of "economic warfare." "Total warfare" only became a reality in the recent conflict. These developments make plain the necessity of appraising the conduct of defendants with relation to the circumstances and conditions of their environment. Guilt, or the extent thereof, may not be determined theoretically or abstractly. Reasonable and practical standards must be considered.

It was stated in the beginning that responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own state, he must be expected to ascertain and keep within applicable law. Ignorance thereof will not excuse guilt but may mitigate punishment. The Tribunal will find defendant Flick guilty in respect to the Rombach matter but will take fully into consideration in fixing his punishment all the circumstances under which he acted.

Weiss, Burkart, and Kaletsch had minor roles in this transaction. They were Flick's salaried employees without capital interest in his enterprises. They furnished him with information and advice. But the decisions were his. He alone could gain or lose by the transaction. They did not conspire with him or state officials in any plan of "systematic plunder." We cannot

see in their conduct any culpability for which they should now be punished.

Vairogs and Dnjepr Stahl have similar factual situations. The former was a railroad car and engine factory in Riga, once owned by a Flick subsidiary, sold to the Latvian State about 1936 and expropriated in 1940 as the property of the Soviet Government. Dnjepr Stahl was a large industrial group—three foundries, two tube plants, a rolling mill, and machine factory—also owned by the Russian Government. These plants had been stripped of usable movables when the Russian Army retreated eastward and further steps had been taken to render them useless to the Germans. Dnjepr Stahl particularly had been largely dismantled and immovables seriously damaged or destroyed. Over one million Reichsmarks of German funds at Vairogs and 20 million at Dnjepr Stahl were spent in reactivating the plants. They were in the possession of Flick subsidiary companies as trustees, the former for less than 2 years, beginning in October 1942, the latter for the first 8 months of 1943.

At the railway car plant the trustee not only manufactured and repaired cars and equipment for the German railway but also nails, horseshoes, locks, and some other products. The source of the raw materials is not shown except that iron and steel were bought from German firms. The evidence does not sustain the prosecution's claim that gun carriages were manufactured. At Dnjepr Stahl the plants barely got into production, which consisted of sheet steel, bar iron, structural products, light railroad rails and a small quantity of semi-finished shell products. When the German civilians departed all plants were undamaged and in the absence of evidence to the contrary we may assume so remained when the Russians returned.

The only activity of the individual defendants in respect to these industries was in negotiating the procurement of trustee contracts. Operations were solely under the direction of technicians lent to the trustees. Their salaries were paid from funds furnished by governmental agencies and they were responsible only to Reich officials. The Dnjepr Stahl contract was made with BHO which, under the direction of Goering for the Four Year Plan, assumed as trustee to take over all Soviet industrial property under a decree which declared the same to be "marshaled for the national economy and belonging to the German State." The contract for Vairogs was with a Reich commissioner, as a part of the civil administration of Latvia that was set up in the wake of the invading German Army. The capital for operation

was furnished by BHO and the commissioner whose directives were exclusive.

These activities stand on a different legal basis from those at Rombach. Both properties belonged to the Soviet Government. The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague regulations above quoted is exactly in point, but, adopting the method used by IMT, we deduce from all of them, considered as a whole, the principle that state-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime. We have already expressed our views as to the evacuation of movables from these plants. Weiss congratulated the manager of Vairogs upon his success in moving out machinery and equipment. In this we see nothing incriminating since Weiss neither had nor attempted to exercise any control of the evacuation and learned of it only after it was accomplished. We conclude, therefore, that there was no criminal offense for which any of the defendants may be punished in connection with Vairogs and Dnjepr Stahl.

Steinbrinck served as Commissioner for Steel (Luxembourg, Belgium and northern France) from May 1941 until July 1942 and as Bekowest (Holland, Belgium, Luxembourg, and northern France excepting Lorraine) from March 1942 until September 1944. In the former capacity his salary was paid by a corporation owned by the Prussian State and the salary of his small staff of assistants by German steel companies from which they came. It does not appear how he was paid as Bekowest. The two positions involved similar tasks, to get the steel plants into operation in the districts under his supervision and to bring into producton the collieries of his territory as Bekowest. As Commissioner for Steel his directives came from General von Hanneken whose authority stemmed from Goering as Plenipotentiary for the Four Year Plan. As Bekowest he was given discretionary powers by Paul Pleiger, Plenipotentiary General for Coal in Germany and the occupied territories under a harsh program formulated and directed by Goering. His liability must be

judged however, not by what Goering ordered, but by what Steinbrinck did. His policies of administration brought him into conflict with other German administrators including Roechling and led to his resignation as Commissioner for Steel 2 July 1942. In obtaining steel production he worked in cooperation with local industrialists most of whom after their first flight from the German Army returned to their tasks. There is no evidence that on Steinbrinck's orders any of them were displaced or excluded. His relations with them were cordial and their respect for his ability and conduct is shown by numerous affidavits in the record, some also from representatives of the coal industry. It must be borne in mind that in both commodities there was before the war close cooperation between the German economy, particularly that of the Ruhr, and the economy of the several neighboring states. In his administration he endeavored to disturb as little as possible the peacetime flow of coal and steel between industries in these countries. Of course the German economy benefited but not by confiscation or ruthless exploitation attributable to Steinbrinck. With respect to Belgium and Luxembourg the ratio of steel export to home consumption under his regime was not materially different from that in peacetime. There is credible evidence that the steel produced in northern France remained there either for home consumption or for processing. It is not shown that he had anything to do with the processing industries. The different companies were paid for their shipments in some cases at better prices than in peacetime.

Prior to the occupation, France had been receiving annually about 20 million tons of coal from England which, of course, ceased with the German invasion. Vichelonne, a Frenchman, in charge of coal production in southern France, attempted there by maximum production to make up this shortage. His lack of success caused Steinbrinck as Bekowest to turn over to Vichelonne 68 percent of the coal produced in northern France. He also sent coal to Vichelonne from Belgium and Holland and some from Germany. The prosecution submitted few statistics in its case in chief but attempted on rebuttal to contradict figures submitted in behalf of Steinbrinck. This information at best was fragmentary. From the figures submitted we cannot determine that Steinbrinck was incorrect in this testimony that the ratio between export and home consumption did not materially differ in the period before and that of the occupation. Coal for home consumption was rationed under his administration but it is not shown that the ration per person was materially less than for peacetime consumption. He had difficult decisions to make and on occasions may have erred in his directives apportioning pro-

duction. But the record on the whole discloses a correct attitude on his part and we believe there was no intentional discrimination against local economy. He remained as Bekowest until the approach of the Allied armies. Despite the Wehrmacht's order to the contrary, he left the mines in operable condition. In this conduct we find no criminality.

In summation the Tribunal finds Flick alone guilty on count two. Steinbrinck, Weiss, Burkart, and Kaletsch each is acquitted.

COUNT THREE

Count three attempts to charge crimes against humanity. The evidence deals exclusively with four separate transactions by which the Flick interests acquired industrial property formerly owned or controlled by Jews. Three were outright sales of controlling shares in manufacturing and mining corporations. In the fourth, involving the Ignaz Petschek brown coal mines in central Germany, there was an expropriation by the Third Reich, from which afterward the Flick interests and others ultimately acquired the substance of the properties. There is no contention that the defendants in any way participated in the Nazi persecution of Jews other than in taking advantage of the so-called Aryanization program by seeking and using State economic pressure to obtain from the owners, not all of whom were Jewish, the four properties in question.

These transactions were completed prior to the war. Concerning the first three, there can be no controversy. The Ignaz Petschek property was expropriated by a general governmental decree dated 3 December 1938, pursuant to which trustees therefore were appointed 19 January 1939 and given power to sell 1 March 1939. That the written instrument of sale to a governmental holding company bears date of 8 September 1939, and that later there were sales through which Flick acquired some of the property, we do not regard as conflicting with our view that the expropriation, if not effective by the decree, certainly was completed by the appointment of the trustees.

In the IMT trial the Tribunal declined to take jurisdiction of crimes against humanity occurring before 1 September 1939, basing its ruling on the modifying phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal" found in Article 6 (a) of the Charter attached to the London Agreement of 8 August 1945. It is argued that the omission of this phrase from Control Council Law No. 10 evidences an intent to broaden the jurisdiction of this Tribunal to include such crimes. We find no support for the argument in express language of Law No. 10. To reach the desired conclusion its advocates must resolve ambiguity by a process of statutory construction. Jurisdic-

tion is not to be presumed. A court should not reach out for power beyond the clearly defined bounds of its chartering legislation.

Law No. 10 was enacted 20 December 1945, but not all of its content was written at that time. Article I expressly states:

> "The Moscow Declaration of 30 October 1943 'Concerning Responsibility of Hitlerites for Committed Atrocities' and the London Agreement of 8 August 1945 'Concerning Prosecution and Punishment of Major War Criminals of the European Axis' are made integral parts of this law. * * *"

The Charter was not merely attached to the London Agreement, but by Article 2 thereof, was incorporated therein as an "intergral part." The construction placed on the Charter by IMT can hardly be separated therefrom. These documents constitute the chartering legislation of this Tribunal. The only purpose of the London Agreement was to bring to trial "war criminals."

I am quoting the words "war criminals," found in many sections of the London Agreement.

The only purpose of the Charter was to bring to trial "major war criminals." We conceive the only purpose of this Tribunal is to bring to trial war criminals that have not already been tried. Implicit in all of this chartering legislation is the purpose to provide for punishment of crimes committed during the war or in connection with the war. We look in vain for language evincing any other purpose. Crimes committed before the war and having no connection therewith were not in contemplation.

To try war crimes is a task so large, as the numerous prosecutions prove, that there is neither necessity nor excuse for expecting this Tribunal to try persons for offenses wholly unconnected with the war. So far as we are advised no one else has been prosecuted to date in any of these courts including IMT for crimes committed before and wholly unconnected with the war. We can see no purpose nor mandate in the chartering legislation of this Tribunal requiring it to take jurisdiction of such cases.

There was no pleading questioning jurisdiction until the conclusion of the evidence. During the long trial the conduct of defendants claimed to incriminate them under count three was explored meticulously and exhaustively by prosecution and defense. Hundreds of documents and volumes of oral testimony are before the Tribunal. Under these circumstances we make the following statements on the merits relating to this count with full appreciation that statements as to the merits are pure *dicta* where a finding of lack of jurisdiction is also made.

The law existing when the defendants acted is controlling. To

the extent that Law No. 10 declares or codifies that law, and no further, is this Tribunal willing to go. Under the basic law of many states the taking of property by the sovereign, without just compensation, is forbidden, but usually it is not considered a crime. A sale compelled by pressure or duress may be questioned in a court of equity, but, so far as we are informed, such use of pressure, even on racial or religious grounds, has never been thought to be a crime against humanity. A distinction could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people. In this case, however, we are only concerned with industrial property, a large portion of which (ore and coal mines) constitutes natural resources in which the state has a peculiar interest.

Jurists and legal writers have been and are presently groping for an adequate inclusive definition of crimes against humanity. Donnedieu de Vabres recently said: "The theory of 'crimes against humanity' is dangerous: dangerous for the peoples *by the absence of precise definition,* dangerous for the States because it offers a pretext to intervention by a State in the internal affairs of weaker States." † (Our emphasis.)

† The judgment of Nuremberg and the Principle of Legality of Offenses and Penalties, Donnedieu de Vabres, published in Review of Penal Law and of Criminology in Brussels, July 1947, translated by J. Herisson, page 22.

The seventh Conference for the Unification of Penal Law held at Brussels, 10 and 11 July 1947, in which the United States of America took part, endeavored to formulate a definition. In none of the drafts presented was deprivation of property included. Eugene M. Arroneau's definition, referred to in the report of the proceedings, specified, "* * * harm done on racial, national, religious, or political grounds to *liberty or the life of a person or group of persons, etc.*" (Our emphasis.) Mentioned in the proceedings was a section from a Brazilian law decree of 18 May 1938 to the effect that it is an offense "to incite or prepare an attempt upon the life of a person or upon his goods, for doctrinaire, political or religious motives," with penalty from 2 to 5 years imprisonment. The Brazilian representative, ignoring the purport of the phrase "or upon his goods," himself submitted a definition to the conference reading: "Any act or omission which involves a serious threat of violence, moral or physical, against anyone by reason of his nationality, race, or his religion, philosophical or political opinions, is considered as a crime against humanity." A resolution was adopted evidencing agreement that—

"Any manslaughter or act which can bring about death, committed in peacetime as well as in wartime, against in-

dividuals, or groups of individuals, because of their race, nationality, religion, or opinions, constitutes a crime against humanity and must be punished as murder * * * "

But from the report of the conference proceedings this seems to have been the extent of agreement.

In the opening statement of the prosecution are listed numerous instances of foreign intervention or diplomatic representations objecting to mistreatment of a population by its own rulers. It may be that incidental to these persecutions the oppressed peoples lost their homes, household goods, and investments in industrial property but so far as we are aware the outcry by the other nations was against the personal atrocities, not the loss of possessions. We believe that the proof does not establish a crime against humanity recognized as such by the law of nations when defendants were engaged in the property transactions here under scrutiny.

The prosecution in its concluding argument contends that the contrary has been decided in the IMT judgment. We find nothing therein in conflict with our conclusion. That Tribunal mentioned economic discrimination against the Jews as one of numerous evidentiary facts from which it reached the conclusion that the Leadership Corps was a criminal organization. Similarly when dealing with the question of Flick's guilt of war crimes and crimes against humanity, it mentioned anti-Semitic laws drafted, signed and administered by Flick. These led up to his final decree placing Jews "outside the law" and handing them over to the Gestapo which was the equivalent to an order for their extermination. Likewise in the cases of Funk and Seyss-Inquart, anti-Semitic economic discrimination is cited as one of several facts from which it is concluded that he was a war criminal. But it nowhere appears in the judgment that IMT considered, much less decided, that a person becomes guilty of a crime against humanity merely by exerting anti-Semitic pressure to procure by purchase or through state expropriation industrial property owned by Jews.

Not even under a proper construction of the section of Law No. 10 relating to crimes against humanity, do the facts warrant conviction. The "atrocities and offenses" listed therein "murder, extermination," etc., are all offenses against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words "other persecutions" must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category. It may be added that the presence in this section of the words "against any civilian population," re-

cently led Tribunal III to "hold that crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority." United States vs. Altstoetter, et al., decided 4 December 1947. The transactions before us, if otherwise within the contemplation of Law No. 10 as crimes against humanity, would be excluded by this holding.

Whether we hold that we have not jurisdiction or whether we assume jurisdiction and hold that no crime against humanity has been proved, the result so far as these defendants are concerned is the same. They cannot be convicted on the fact that the evidence submitted on this count relates to subject matter not within its jurisdiction. Accordingly, count three is dismissed.

COUNTS FOUR AND FIVE

PRESIDING JUDGE SEARS: We consider together counts four and five. The latter charges Steinbrinck with membership subsequent to 1 September 1939 in the SS. The gist of count four is that as members of the Himmler Circle of Friends, Flick and Steinbrinck with knowledge of the criminal activities of the SS contributed funds and influence to its support.

The basis of liability of members of the SS, as declared by IMT, is that after 1 September 1939 they "became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes, excluding, however, those who were drafted into membership by the State in such a way as to give them no choice in the matter and who had committed no such crimes." [1] Steinbrinck was a member of the SS from 1933 to the time of the German collapse. There is no evidence that he was personally implicated in the commission of its crimes. It is not contended that he was drafted into membership in such a way as to give him no choice. His liability therefore must be predicated on the fact that he remained a member after 1 September 1939 with knowledge that "it was being used for the commission of acts declared criminal."

IMT also found "that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent * * *" [2] later described in the judgment, namely, that "the SS was utilized for purposes which were criminal under the Charter, involving the persecution and exter-

[1] Trials of the Major War Criminals, op. cit., volume I, page 273.

[2] Ibid., p. 272.

mination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave-labor program and the mistreatment and murder of prisoners of war." [1]

It seems clear that mass extermination of the Jews, mass murders in the guise of experiments in concentration camps such as described in the judgment in Case 1 [2] recently decided by Tribunal I, and other atrocities referred to generally in the above quotation from the IMT judgment, were crimes against humanity and war crimes well recognized by international law quite independent of the legislation of the four powers embodied in the Charter and Law No. 10. An organization which on a large scale is responsible for such crimes can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes. So there can be no force in the argument that when, from 1939 on, these two defendants were associated with Himmler and through him with the SS they could not be liable because there had been no statute nor judgment declaring the SS a criminal organization and incriminating those who were members or in other manner contributed to its support.

Relying upon the IMT findings above quoted the prosecution took the position that it devolved upon Steinbrinck to show that he remained a member without knowledge of such criminal activities. As we have stated in the beginning the burden was all the time upon the prosecution. But in the face of the declaration of IMT that such knowledge was widespread we cannot believe that a man of Steinbrinck's intelligence and means of acquiring information could have remained wholly ignorant of the character of the SS under the administration of Himmler. The extent of his knowledge and the part he played with such knowledge will be treated later in the opinion.

Steinbrinck became a member of the Circle in 1932 in its early days when it was known as the Keppler Circle. At the instigation of Hitler or with his approval, Keppler gathered together a few industrial leaders including Steinbrinck for their advice upon economic questions including, it seems, the problem of solving the unemployment situation. There is evidence that industrialists believed Keppler would become Hitler's chief economic adviser and they were not unwilling to meet and exchange views with a man who was likely to become a powerful State leader. Flick was not drawn into the group until three years

[1] Ibid., p. 273.

[2] Medical case, United States *vs.* Brandt, et al., judgment, section XII, Volume II, this series.

later and then more or less casually. Keppler's influence with Hitler waned and Himmler's influence grew and his ascendancy began, so that even before the beginning of the war the group came to be known as the Circle of Friends of Himmler. In its early meetings SS leaders or officers were not present in any considerable number but as the war went on more of them came to the meetings, probably on the invitation or command of Himmler.

We do not find in the meetings themselves the sinister purposes ascribed to them by the prosecution. Kranefuss, an assistant of Keppler and Himmler, throughout its history controlled the invitations, doubtless with the approval of Himmler. There was an annual dinner in connection with the Party rally at Nuernberg. Later there were more frequent meetings taking the form of dinner parties with the usual beverages. It may be questioned whether the members of the SS who attended had any reason more compelling than Himmler's invitation and the opportunity as guests to get an excellent dinner. There was no regular seating and after dinner the party broke up into small groups of congenial acquaintances. Flick and Steinbrinck naturally drifted to groups of business men. Himmler was not always present. He did not single out Flick or Steinbrinck for attention. There is no evidence that the criminal activities of the SS were discussed. As a matter of fact, it was the policy of Himmler to conceal them. As a part of the program usually there were talks and sometimes showing of films on subjects foreign to the war such as the Tibet expedition, in which Himmler was interested, to which, with one exception later discussed, no criminal significance may be ascribed. There is credible evidence that Himmler was a man of dual personality; on the one hand a gentleman with cultural interests and on the other an inhuman monster. In these meetings we have no doubt he appeared the gentleman and genial host. So far we see nothing criminal nor immoral in the defendants' attendance at these meetings. As a group (it could hardly be called an organization) it played no part in formulating any of the policies of the Third Reich.

But Himmler was Reich Leader SS. His person can hardly be separated from his organization. Of this the defendants could not be unaware. In 1936 he took members of the Circle on an inspection trip to visit Dachau concentration camp which was under his charge. They were escorted through certain buildings including the kitchen where they tasted food. They saw nothing of the infamous atrocities perhaps already there begun. But Flick who was present got the impression that it was not a pleasant place. The members of the Circle visited at his invitation other places where money was being spent under Himmler's

direction. Some of them were cultural such as archeological excavations.

SS Obergruppenfuehrer Heydrich was one of Himmler's trusted assistants. He was assassinated in Czechoslovakia in the spring of 1942. In retaliation SS troops obliterated the village of Lidice. The incident received world-wide publicity and even in the German press it was reported. We need not deal with the horrible details. The day after Heydrich's funeral there was a meeting of the Circle of Friends. It seems reasonably clear from the evidence that both Flick and Steinbrinck were present although their recollection is vague. A Tibet film was shown which they both remembered. Preliminary thereto, Kranefuss delivered a eulogy of Heydrich which he afterward sent in written form to at least one member of the Circle. It does not appear that either Steinbrinck or Flick received it. Referring to Himmler as the Reich Leader, Kranefuss said in part: *(NI-8108, Pros. Ex. 738)*

> "The Reich Leader said yesterday that he, the deceased, was feared by subhumans [Untermenschen], hated and denounced by Jews and other criminals, and at one time was misunderstood by many a German. His personality and the unusually difficult tasks assigned to him were not of a nature to make him popular in the ordinary sense of the word. He carried out many harsh measures ordered by the State and covered them with his name and person, just as the Reich Leader does every day."

We need not quote further. What was said could hardly fail to give the impression that not only Heydrich but Himmler was inhuman in his attitude and in his deeds.

After the Dachau trip members of the Circle were called upon to contribute money to Himmler. He informed them at a meeting which Flick attended that the funds were to be spent for some of his cultural hobbies and for emergencies for which he had no appropriations. Von Schroeder, a witness for the prosecution, as well as Flick and Steinbrinck, testified that they were always of the opinion that the monies they contributed were spent for these hobbies. However, the early letters requesting gifts, some of which were signed by Steinbrinck, did not mention hobbies but stated that the money was to be used for "special purposes." Of course "special purposes" might refer merely to hobbies and be so understood by the defendants. Other considerations, however, are more important.

About 40 persons were in the Circle, including bankers, industrialists, some government officials, as well as SS officers. At least half of them responded to the request for funds. There

were six donations of 100,000 Reichsmarks each and the total sum raised annually was over a million Reichsmarks. Flick and Steinbrinck each was responsible for 100,000 Reichsmarks. Apparently Flick's was paid by Mittelstahl, one of his companies, and Steinbrinck's came from Vereinigte Stahlwerke A.G., a State-owned corporation with which he was connected when the contributions began. Other officials of that corporation approved the payment. The giving began long before the war at a time when the criminal activities of the SS, if they had begun, were not generally known. The same amount was raised annually until 1944. The money went into a special fund in the Stein Bank at Cologne controlled by von Schroeder and thence, as it accumulated, into an account in the Dresdner Bank upon which Karl Wolff, Himmler's personal adjutant, drew checks. Both banks were represented in the Circle; Stein Bank, by von Schroeder who was a Brigadefuehrer SS; and the Dresdner Bank, by Dr. Meyer and Dr. Rasche. It is not shown that the defendants knew of the second account, much less, of the specific purpose of the several checks drawn thereon. Nor did the prosecution show that any part of the money was directly used for the criminal activities of the SS. It is reasonably clear that some of the funds were used purely for cultural purposes. But during the war and particularly after the beginning of the Russian campaign we cannot believe that there was much cultural activity in Germany. A hundred thousand Reichsmarks even to a wealthy man was not then a trifling but a substantial contribution. Ten times that sum annually was placed in the hands of Himmler, the Reich Leader SS, for his personal use and was continued year after year without a thought on their part, according to their testimony, that any portion of it might be used by him to maintain the organization of which he was the head. It is a strain upon credulity to believe that he needed or spent annually a million Reichsmarks solely for cultural purposes or that the members of the Circle could reasonably believe that he did.

In the beginning contributions must have been made with some thought of currying favor with a powerful State official with whom from time to time these industrialists might have to deal. Then the criminal character of the SS was not generally known. But later, after it must have been known, the contributions continued and the members regularly accepted invitations to the meetings of the Circle. It is true that a few withdrew and some of them are still living. These, however, did not enjoy the prominence of Flick and Steinbrinck. We can only guess what effect the withdrawal by prominent members of their presence and contributions would have had upon the attitude

of Himmler. When a man who for several years has contributed the same large amount to a benevolent cause withdraws or decreases his gift, such action can hardly go unnoticed. Of this, defendants were probably aware. Flick suggested in his testimony that he regarded membership in the Circle as in the nature of insurance. Steinbrinck may have had the same feeling. A hundred thousand Reichsmarks per year to a wealthy man or to one who pays from State funds is perhaps not too high a premium to insure personal safety in the fearful days of the Third Reich. This may be considered in mitigation but we are convinced that there was not any such compulsion upon their membership or contributions as we have discussed in the case of use of conscripted labor. Defendants in this count do not put their defense on the ground of fear but rather on lack of knowledge. It remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas. So we are compelled to find from the evidence that both defendants are guilty on count four.

There is considerable to be said in mitigation. Their fear of reprisals has already been mentioned. In that respect Flick was the more vulnerable. He had backed Hindenburg with large sums when in 1932 he defeated Hitler for election to the Reich presidency. This doubtless was not forgotten. To Flick's knowledge his telephone conversations were subjected to wire tapping. He had other reasons to believe his position with Party leaders, and particularly Himmler, was none too secure. Steinbrinck, however, as an outstanding naval officer of the First World War, respected and admired by the public, had a more favorable position. This very respectability was responsible for his membership in the SS. He did not seek admission. His membership was honorary. But the honor was accorded to the SS rather than to Steinbrinck. During the entire period of his membership he had but two official tasks. The first was to attend, and perhaps stimulate the attendance of the generals, at a meeting in Godesberg in 1933 when they were convened with heads of the Party, the SA, and the SS to be addressed by Hitler. The second was to escort the family of Hindenburg at his funeral. The SS uniform, doubtless worn on these occasions, was also helpful to Steinbrinck in obtaining from the Wehrmacht compliance with his directives as Bekowest. He received two promotions in rank, the second to Brigadefuehrer (brigadier general), on his fiftieth birthday in 1938. Otherwise he had no duties, no pay, and only casual connection with SS leaders. These activities

do not connect him with the criminal program of the SS. But he may be justly reproached for voluntarily lending his good reputation to an organization whose reputation was bad.

Both defendants joined the Nazi Party, Steinbrinck earlier than Flick, but after the seizure of power. Membership in it also was to them a sort of insurance. They participated in no Party activities and did not believe in its ideologies. They were not pronouncedly anti-Jewish. Each of them helped a number of Jewish friends to obtain funds with which to emigrate. They did not give up their church affiliations. Steinbrinck was in Pastor Niemoeller's congregation and interceded twice to prevent his internment. He succeeded first through Goering. When Niemoeller was again arrested Steinbrinck had an interview with Himmler, described at length in his testimony, and persuaded Himmler to ask for Niemoeller's release which was refused by Hitler.

Defendants did not approve nor do they now condone the atrocities of the SS. It is unthinkable that Steinbrinck, a U-boat commander who risked his life and those of his crew to save survivors of a ship which he had sunk, would willingly be a party to the slaughter of thousands of defenseless persons. Flick knew in advance of the plot on Hitler's life in July 1944, and sheltered one of the conspirators. These and numerous other incidents in the lives of these defendants, some of which involve strange contradictions, we must consider in fixing their punishment. They played but a small part in the criminal program of the SS, but under the evidence and in the light of the mandate of Ordinance No. 7, giving effect to the judgment of IMT, there is in our minds no doubt of guilt.

The defendants in this case have been imprisoned for various periods. Flick was arrested 13 June 1945; Steinbrinck, 30 August 1945; Kaletsch, 8 December 1945; Terberger, 3 February 1947, and each has continuously been imprisoned since the date of his arrest. Burkart was arrested 5 December 1945, released 7 September 1946, rearrested 15 March 1947, and has since been in continuous confinement. Weiss was imprisoned from 1 February until 30 September 1946, was rearrested 5 February 1947, and has since been in prison. The indictment was not served upon any of them until 10 February 1947. Prior to that time some, if not all, were held without notification of the charges for which they were detained. The Tribunal has ruled that this fact is not ground for dismissal of the case, but previous confinement may and should be taken into consideration in determining the punishment now to be inflicted upon those found guilty. Flick is 64 years old; Steinbrinck, 59; Weiss, 42.

To resume, the Tribunal finds defendant Flick guilty on counts

one, two, and four; defendant Steinbrinck guilty on counts four and five; and defendant Weiss guilty on count one. Each of the other defendants is acquitted on the counts in which they are charged, except count three which is dismissed.

(Recess)

SENTENCES

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE SEARS: The Tribunal will now impose sentence upon those defendants who have been adjudged guilty in these proceedings.

The Marshal will produce defendant Flick before the Tribunal.

FRIEDRICH FLICK, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to imprisonment for seven (7) years. The period already spent by you in confinement before and during the trial is to be credited on the term already stated and to this end the term of your imprisonment, as now adjudged, shall be deemed to begin on the 13th day of June 1945.

The Marshal will remove defendant Flick.

The Marshal will produce before the Tribunal defendant Steinbrinck.

OTTO STEINBRINCK, on the counts of the indictment on which you have been convicted, the Tribunal sentences you to imprisonment for five (5) years. The period already spent by you in confinement before and during the trial is to be credited on the term already stated, and to this end the term of your imprisonment, as now adjudged, shall be deemed to begin on the 30th day of August 1945.

The Marshal will remove defendant Steinbrinck.

The Marshal will produce before the Tribunal defendant Weiss.

BERNHARD WEISS, on the count of the indictment on which you have been convicted, the Tribunal sentences you to imprisonment for two and one-half (2½) years. The periods already spent by you in confinement before and during the trial are to be credited on the term already stated and to this end the term of your imprisonment, as now adjudged, shall be deemed to begin on the 8th day of June 1946.

The Marshal will remove the defendant Weiss.

The defendants ODILO BURKART, KONRAD KALETSCH, and HERMANN TERBERGER, and each of them, having been acquitted, shall be discharged from custody by the Marshal when the Tribunal presently adjourns.

The Tribunal is about to adjourn.

The Tribunal now adjourns without date.