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Opinion re: Finding as to first and fourth counts

Military Tribunal No. III

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The united States of America

-- against --

Alfried Krupp von Bohlen und Halbach,
et.al.

Opinion re: Finding as to first and fourth counts.

On March 12, 1948, the defendants filed a motion entitled, "Motion of the Defense for Acquittal on the Charge of Crimes against the Peace."

In the motion, the defendants moved that the tribunal "should decide . . . that the defendants are not guilty in this respect." referring to counts one and four of the indictment.

In connection therewith, briefs were filed, the memorandum of the prosecution having been dated March 20, 1948.

During the session of April 5, 1948, the tribunal, through the President, states as follows: "Before you proceed with the other witness, Doctor, we desire to dispose of a motion that has been made. On March 12 last, the defendants filed a joint motion for an acquittal on the charges of crimes against the peace. We construe this to be a motion for a judgment of not guilty on Counts I and IV of the indictment on the ground that the evidence is insufficient as a matter of law to warrant a judgment against them on those counts.

"After a careful consideration of this motion, the prosecution's reply thereto, and the briefs and the evidence, we have come to the conclusion that the competent and relevant evidence in the case fails to show beyond a reasonable doubt that any of the defendants is guilty of the offenses charged in Counts I and IV. The motion accordingly is granted and for the reasons stated the defendants are acquitted and adjudged not guilty on Counts I and IV of the indictment. An opinion, stating in more details the reasons of our conclusion, will be filed at a later date."

This opinion has been prepared and is filed accordingly.

In count I of the indictment, all of the defendants are charged with crimes against peace. This count is frequently referred to as the "aggressive war count". In the fourth count, all of the defendants are charged with having

participated in the formulation of, and execution of a common plea and conspiracy to commit, and which is alleged to have involved the commission of crimes against peace. This latter count is often referred to as the "conspiracy count".

As stated in the judgment of the International Military Tribunal, the charge in the indictment "that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.

"To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."

Judgment of the International Military Tribunal, Volume I, page 186 of Official Documents, Trial of the Major War Criminals.

It is difficult to think of more serious charges which might be made against any individual than those contained in the two counts in question. Realizing this and the attending responsibility upon us, we have carefully weighed the evidence offered in view of what was said in the judgment of the International Military Tribunal.

Article II of the Control Council Law No. 10 provides in part as follows:

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

"(a) Crimes against Peace. Initiation of invasion 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.

"2. Any person without regard to 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 or (e) was^a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

The following articles appear in "Military Government - Germany, Ordinance No. 7, Organization and Powers of Certain Military Tribunals":

"ARTICLE IX

"The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

"ARTICLE X

"The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasion, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

In the judgment of the International Military Tribunal, the conspiracy and aggressive war counts were discussed together, and the guilt or innocence of each accused upon the counts upon which he was indicted were also covered.

A detailed review in this opinion of all of the evidence offered by the prosecution upon these two counts is not deemed essential. Assuming that all

of the evidence so presented is considered as creditable, it was upon April 5, 1948 and is now, our considered opinion that the requirements for a finding of the defendants guilty upon these two counts have not been met. We do not hold that industrialists as such, could not under any circumstances be found guilty upon such charges. Herein we state what we construe to be the necessary elements of proof for conviction upon these two counts, and have concluded that evidence of the same has not been submitted. This conclusion having been reached upon April 5, 1948, it then appeared to us that it was our duty to state it immediately, and not require the defendants to offer further evidence upon these two counts. The obvious result of not having taken this course, would have been to put the defendants, who otherwise would not know the views of the tribunal, in the position of exposing themselves to a situation which we do not deem consistent with the rights of every defendant, namely, the right to have a fair trial. One of the requirements is that the prosecution shall sustain the burden of proving each defendant guilty beyond a reasonable doubt. The tribunal, having determined that the prosecution had failed to prove each defendant guilty beyond a reasonable doubt upon the two counts in question, entertained the thought that the only possible effect of having the defendants present evidence upon these two counts would be, that in doing so, proof of facts required for conviction might then possibly be produced to the advantage of the prosecution. It is our opinion that such a course would not be in keeping with our ideas of justice. It was because of this that we announced our conclusion in the manner in which we did in open court upon April 5, 1948.

Preceding the allegations contained in count one in the indictment, the following appears:

"The persons hereinafter named were all officials of Fried. Krupp A.G., Essen (1903-1943) and its successor, Fried. Krupp, Essen. The original enterprise of Fried. Krupp was founded in 1812. It was transformed into a corporation (A.G.) in 1903, which was succeeded in December 1943 by an unincorporated firm, Fried. Krupp, Essen, in accordance with a special Hitler decree. These firms constituted successively the Family Enterprise of the Krupp family and, together with their subsidiaries and other interests, are hereinafter referred

to as 'KRUPP'. The managing body of the Fried. Krupp A.G. is hereinafter referred to as the 'Vorstand', and that of the succeeding unincorporated firm, as the 'Direktorium'.

"The persons accused as guilty of these crimes and accordingly named as defendants in this case are:

"ALEXANDER FELIX ALWIN KRUPP VON BOHLEN UND HALBACH - Sole owner, proprietor, active and directing head of Fried. Krupp, Essen, and Fuehrer der Betriebe (Leader of the Plants), from December 1943; successor to Gustav and Bertha Krupp von Bohlen und Halbach, directing head and owner respectively of Fried. Krupp A.G.; previously active head, Chairman of the Vorstand and head of the War Material and Raw Materials Departments of Fried. Krupp, A.G., Essen; Wehrwirtschaftsfuehrer (Military Economy Leader); Deputy Chairman of the Reichsvereinigung Eisen (Reich Association Iron) and member of the Presidium of the Reichsvereinigung Kohle (Reich Association Coal) (hereinafter referred to as the 'RVE' and 'RVK'); member of the Verwaltungsrat of the Berg and Huettenwerksgesellschaft Ost G.m.b.H. (hereinafter referred to as the 'BHO'); member of the Armament Commission (Ruestungsrat) in the Office of the Reich Minister for Armament and War Production (Reichsminister fuer Ruestung und Kriegsproduktion); member of the Nationalsozialistische Deutsche Arbeiter Partei (Nazi Party, hereinafter referred to as the 'NSDAP'); sponsoring member of Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiter Partei (hereinafter referred to as the 'SS'); Standartensfuehrer (Colonel) of the Nationalsozialistisches Flieger Korps (National Socialist Flying Corps, hereinafter referred to as the 'NSFK').

"WALD OSKAR LUDWIG LOESER - Member of the Vorstand and head of the Administrative and Finance Departments of Fried. Krupp A.G., until March 1943; Wehrwirtschaftsfuehrer; Krupp representative in the Kleiner Kreis (Small Circle, a group which exercised great influence over the coal, iron and steel industries) Reich trustee for Phillips Radio, Eindhoven, Netherlands, in 1944.

"EDUARD HOUDRIKONT - Member of KRUPP Direktorium and deputy member of the Vorstand, head of the Metallurgical, Steel and Machine Departments; plant leader (Fuehrer des Betriebes), Gusstahlfabrik, Essen; Wehrwirtschaftsfuehrer; Special Commissioner for Metal Substitutes (Sonderbeauftragter fuer Metallumstellung) in Reich Ministry for Armament and War Production and the Ministry of

Economics (Reichswirtschaftsministerium); advisor to the administrators of the Four Year Plan; member of the NSDAP.

"ERICH MUELLER - Member of KRUPP Vorstand and Direktorium, head of the Artillery Designing and Machine Construction Departments and coordinator of artillery construction; Wehrwirtschaftsfuehrer; armaments advisor to Hitler; advisor to the War Ministry; head of Armament Committee (Waffenausschuss) in the office of Reich Minister for Arms and Munitions; Chairman of the Weapons Development Committee (Entwicklungskommission der Waffen) of the Ministry for Armament and War Production; member of the NSDAP.

"FRIEDRICH WILHELM JANSSEN - Member of Krupp Direktorium and deputy member of the Vorstand; successor to Wald Loeser as head of the Administrative and Finance Departments; head of the Berlin office, 1937-43; Wehrwirtschaftsfuehrer; member of the NSDAP; sponsoring member of the SS.

"KARL HEINRICH PFIRSCH - Deputy member of KRUPP Direktorium and Vorstand, and head of the War Material and Machine Sales Departments; head of the Berlin office, 1943-45; Wehrwirtschaftsfuehrer; member of the NSDAP.

"MAX OTTO IHN - Deputy member of KRUPP Direktorium and Vorstand, deputy to Wald Loeser and Friedrich Janssen, concerned particularly with personnel and intelligence; Deputy plant leader, Gusstahlfabrik, Essen; member of the NSDAP.

"KARL ADOLF FERDINAND EBERHARDT - Deputy member of KRUPP Direktorium and Vorstand, and successor to Karl Pfirsch as head of the War Material and Machine Sales Departments; member of the NSDAP.

"HEINRICH LEO KORSCHAN - Deputy member of KRUPP Vorstand; head of the Department of Steel Plants and deputy head of the Metallurgical Department; trustee and administrator of KRUPP war time enterprises in Eastern and South-eastern Europe; managing director of Krupp Bertha Werk, Breslau; member of the NSDAP.

"FRIEDRICH VON BUTLOW - An official of KRUPP, concerned particularly with confidential, intelligence, and public relations matters; head of the Berlin office, 1932-36; military and political Chief of Counter-Intelligence (Hauptabwehrbeauftragter) at KRUPP, Essen, and direct representative of Krupp with Nazi officials, the Gestapo and SS; Chief of the Works Police (Werkschutz), Gusstahlfabrik, Essen.

"WERNER WILHELM HEINRICH LEHMANN - An official of KRUPP, deputy to Max Ihn and in charge of Arbeitseinsatz "A"(Labor procurement), member of the NSDAP.

"HANS ALBERT GUSTAV KUPKE - An official of KRUPP, head of experimental firing ranges at Essen; head of the foreign workers camps (Oberlagerfuehrer); previously an official of the Army Ordnance Office (Heereswaffenamt); member of the NSDAP."

In paragraph 1 of count one of the indictment, it is alleged that all of the defendants, "with divers other persons, including Gustav Krupp von Bohlen und Halbach, Paul Goorens and Fritz Mueller, during a period of years preceding 8 May 1945, committed Crimes against Peace as defined in Article II of Control Council Law No. 10, in that they participated in the 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, and waging wars of aggression, and wars in violation of international treaties, agreements, and assurances."

In paragraph 2 of count one, it is stated that the defendants "hold high positions in the political, financial, industrial and economic life of Germany and committed Crimes against Peace 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 and groups, including KRUPP, connected with the commission of Crimes against Peace."

In paragraph 3 of the first count, it is said that the "invasions and wars referred to and the dates of their initiation were as follows: Austria, 12 March 1938; Czechoslovakia, 1 October 1938 and 15 March 1939; Poland, 1 September 1939; Denmark and Norway, 9 April 1940; Belgium, the Netherlands and Luxembourg, 10 May 1940; Yugoslavia and Greece, 6 April 1941; the USSR, 22 June 1941; and the United States of America, 11 December 1941."

It is now clear that the wars which the defendants are alleged to have participated in the initiation of were wars of aggression. However, can it be said that the defendants, in doing whatever they did do, prior to September 1, 1939, did so knowing that they were participating in, taking a consenting part in, aiding and abetting the invasions and wars set out in paragraph 3?

The International Military Tribunal required proof that each defendant had actual knowledge of the plans for at least one of the invasions or wars of aggression, in order to find him guilty. It was stated that, "Evidence from captured documents has revealed that Hitler held four secret meetings to which the tribunal proposes to make special reference because of the light they shed upon the question of the common plan and aggressive war."

Continuing on, it was stated, "These meetings took place on the 5th of November 1937, the 23d of May 1939, and the 22d of August 1939 and the 23d of November 1939."

Then the tribunal said, "At these meetings important declarations were made by Hitler as to his purposes, which are quite unmistakable in their terms."

In finding Hess guilty on the aggressive war count and on the conspiracy count, the International Military Tribunal clearly indicated that in its opinion a defendant could be found guilty even if he had not attended one of the four meetings referred to above. Likewise, we do not hold that a defendant cannot be found guilty unless he attended one of the meetings.

Schacht was indicted under counts one, conspiracy and two, waging aggressive war, and he was found not guilty by the International Military Tribunal.

"But rearmament of itself is not criminal under the charter. To be a crime against peace under Article 6 of the Charter it must be shown that Schacht carried out this rearmament as part of the Nazi plans to wage aggressive wars."

As it was necessary in the case of Schacht, it is necessary, with respect to these defendants, that it be shown that they carried out rearmament "as part of the Nazi plans to wage aggressive wars."

Speer was indicted on all four counts. He joined the Nazi Party in 1932. In 1934 he was made Hitler's architect and became a close personal confidant. Shortly thereafter he was made a department head in the German Labor Front and the official in charge of capital construction on the staff of the deputy to the Fuehrer, positions which he held through 1941. On February 15, 1942, after the death of Fritz Todt, Speer was appointed chief of the Organization Todt, and Reich Minister for Armaments and Munitions (after September 2, 1943 for armaments and war production). The positions were supplemented by his

appointments in March and April 1942 as General Plenipotentiary for Armaments and as a member of the Central Planning Board, both within the 4-year plan. He was a member of the Reichstag from 1941 until the end of the war.

The tribunal stated that it was of the opinion that "Speer's activities do not amount to initiating, planning, or preparing wars of aggression, or of conspiring to that end. He became the head of the armament industry well after all of the wars had been commenced and were under way. His activities in charge of German armament production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war, but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under count one or waging aggressive war as charged under count two."

If Speer's activities were found not to constitute "waging aggressive war" we most certainly cannot find these defendants guilty of it.

In the Charter of the International Military Tribunal under II, Jurisdiction and General Principles, we find the following:

"Article 6. The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes,

"The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) Crimes against peace: Namely, planning, preparation, initiation or waging of a war of aggression, or a war in 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: Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in 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: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans."

The prosecution contends that to be guilty of participation in the preparation and waging of aggressive war, under count two of the indictment in the case before the International Military Tribunal, it was not necessary that the individual be one of the small circle of conspirators around Hitler, not be informed of the decisions taken in that circle. Participation in the preparation and waging of aggressive war, it is claimed, was obviously considered a crime different from participation in the common plan to wage aggressive war.

The prosecution claims that the conclusion follows that participation in the preparation of or waging of aggressive war is a crime different from the crime of participation in the common plan conceived by Hitler to wage aggressive war; that is, to be guilty of such participation, it is not necessary to have attended the conferences at which aggressive war was planned, or to be advised as to what took place at them, and that such participation may take place even in advance of the crystallization of a conspiracy to wage aggressive war.

The prosecution further says that Control Council Law No. 10 makes not only the preparing of or waging of aggressive war criminal, but also makes criminal participation in a common plan or conspiracy, having as its objective, such preparing or waging of aggressive war. It is claimed that it follows that participation in a plan or conspiracy for the accomplishment of acts of the character adjudged by the International Military Tribunal to constitute preparing or waging aggressive war under count two of the indictment filed before that tribunal, is criminal, even though neither the conspiracy

nor the acts form part of the "Nazi Conspiracy" charged under count one. It is also contended that both law and logic support this conclusion and that if an individual can be guilty of preparing for, or waging aggressive war, even though he did not participate in the conspiracy around Hitler, there would appear to be no reason why a group of individuals should not be held responsible for collectively conspiring toward the same end. It is claimed that this is what the defendants did in this case. The claim is made that acting together, but not as part of the "Nazi Conspiracy", they took action that had as its object, first to prepare, and then to wage aggressive war and that everything that these defendants did they did in concert with one another, and that the end achieved, either legal or illegal, was accomplished through their collective action.

We cannot conclude that there were two or more separate conspiracies to accomplish the same end, one the "Nazi Conspiracy" and the other the "Krupp Conspiracy". It must be remembered at all times that in count one, it is alleged that the defendants participated in crimes against peace, the initiation of invasions of other countries and wars of aggression and, in count four that they participated in a conspiracy to commit the crimes against peace, and that the invasions and wars referred to, and the dates of their initiation were as follows: Austria, 12 March 1938; Czechoslovakia, 1 October 1938 and 15 March 1939; Poland, 1 September 1939; Denmark and Norway, 9 April 1940; Belgium, the Netherlands and Luxembourg, 10 May 1940; and the United States of America, 11 December 1941.

As the invasions and aggressive wars listed above are those set out in paragraph three of the first count of the indictment, the prosecution has the burden of proving that these specific invasions and wars of aggression were the ones in connection with which the defendants either conspired, as alleged in the fourth count of the indictment, or in which they participated, as asserted in the first count of the indictment. All of the allegations of count one are "incorporated in" count four. Consequently, the above allegation as to invasions and wars of aggression and their dates is part of count four.

For the above reasons we concluded that the prosecution failed to prove any of the defendants guilty by the requisite degree of proof on either count one or count four and that accordingly none of the defendants is guilty on counts one and four.

Done at Nurnberg, Germany

11 June, 1948

S/ EDWARD J. DALY
Edward J. Daly, Judge
Military Tribunal III

I concur in the foregoing opinion, but my approach to some of the questions involved in counts one and four of the indictment being somewhat different, I will file a concurring opinion setting forth my individual views.

S/ HU C. ANDERSON
Hu C. Anderson
Presiding Judge
Military Tribunal III

I concur in everything that has been said in the above opinion, but reserve the right to file a special concurring opinion at the time the final judgment is filed.

S/ WILLIAM J. WILKINS
William J. Wilkins, Judge
Military Tribunal III