JOTTINGS

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The indictment charges that the defendants participated in the crimes charged in Counts I, II, III and V of the indictment through the instrumentality of Farben and otherwise. The charge, therefore, fairly comprehends acts performed by defendants in their capacity as individuals and seeks, in addition, to charge them with criminal responsibility for the sum total of the alleged criminal activities said to have been engaged in by the instrumentality, I. G. Farben. In determining the responsibility of each defendant, if any, a wide variety of circumstances running the whole gamut of the evidence must be considered.

To require the defendants to go forward with their proof on the counts of the indictment now under attack, it is not necessary that each of evidence should establish guilt beyond a reasonable doubt but merely that the sum total of the evidence must establish in the mind of the trier of the facts that there is guilt beyond reasonable doubt after consideration of all the evidence.

Defendants held high positions in the financial, industrial and economic life of Germany as these terms are used in Control Council Law No. 10. This is not conclusive as to guilt but is certainly a highly relevant factor to take into consideration. I so interpret Control Council Law No. 10.

Nineteen of the defendants (all except Duerrfeld, Gattineau, von der Heyde and Kugler) were members of the Vorstand of Farben - the managing Board of Directors. Krauch became chairman of the Aufsichstrat of Farben in 1940 after the death of Bosch. The Vorstand was responsible for the direction of Farben under German corporate law. It was a policy making body responsible for the far-reaching activities of Farben during a period of activity army n N}-- one expert witness has characterized as comparable only to the magnitude of the rearmament of the United States after Pear(l) Harbor. We must say again that criminal responsibility does not automatically attatch to membership in the Vorstand even assuming the criminality of Farben's actions as a corporate enterprise. On the otherhand one may not achieve immunity from criminal responsibility for acts which he (^directs^), counsils (els), aids, orders, or abets through employing the corporate entity as cloak. Even a corporation (^constituting a chemical empire^) as large as the I. G. Farben does not function in a vacuum in some strange mystical which means in essence that as it is everybody's business it is nobody's business. Society can not tolerate such a large area of irresponsibity (evan) as a matter ot(f) international (^or municipal^) law. When applied to the international crimes with which this Tribunal is (^now^) dealing (concerned,) irresponsibility predicated upon the theory or corporate acts for which individuals are not responsible (^,) becomes a legal luxury which the society of nations can ill afford. Some one was responsible for what Farben did. If members of the responsible (its managing) board of

directors (^or Vorstand^) are not to be held responsible (^in some measure^) under the circumstances of this case the(n) (a) perfect blueprint has been provided for future aggressors. They may well understand (^In the important work of arming for aggressive war^) immunity may be achieved (^merely by^) creating confusion as (to) degress (degrees) of participation and knowledge by spreading activities though the ramifications of a huge corporation which must (may) achieve the objective of arming for (^aggressive^) war without (^entailing any^) responsibility (^there of^). They must merely follow the blueprint of(^This is essentially what is urged when the defendants claimed that^) "de-centralized centralization" (^meant that the Vorstand is blameless as a matter of law.^) I cannot accept the thesis (view) that membership in the Vorstand of Farben was (^such^) an empty honor, (^devoid of real responsibility^) for which huge salaries were paid to persons (members) who attended (^brief^) meetings (^which generally adjourned for^) largely designed as social gatherings (^so that the members were^) without knowledge of what was being done in other parts of the organization. I cannot (Neither can I) accept the view that these were all "technical meetings" participated in solely out of a passion for science and imbued with a pervading and benevolent interest (for) betterment of humand-kind. The outcome of these meetings was production of materials designed to prevent countless millions from enjoying such benefits.(^To our sorrow^) This is recorded now in the pages of history.

But I would not apply a blanket rule of responsibility to membership in the Vorstand. The same rule of liability of corporate officers under Anglo-American law with its reasonable limitations should be adapted for application to the facts of this case and to the acts of these defendants. It is commonly understood that a corporate officer is criminally liable when he is actual, present and efficient actor behind the corporate act which is criminal. On the otherhand, the officer is generally held not liable unless he participates in the unlawful act either directly or as an aider, abettor or accessory. The Control Council Law which we must apply would add those who take a consenting part in the commission of the crime as wit in the requisite sphere of criminal complicity. We have pointed out that the crime against peace requires participation with guilty knowledge. Here again, I would apply this principle:

> "The general rule is that were the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission."

I would not hold any defendant liable for criminal acts performed by Farben or by other officers or agents of the corporation unless the acts were done with his knowledge and under the authority of the accused. See discussion Fletcher, Cyclopedia Corporations, Vol:. 3 (1931 Rev. Ed), §. 1349.

Matters of a criminal nature reported to the Vorstand of Farben and in this manner brought to the knowledge of its members under circumstances implying assent and authority from its membership to proceed with the criminal act can make a member of the Vorstand responsible. A dissenting member would not be responsible if his position was made known. But the record is barren of any such dissent from any of these defendants who were members of the Vorstand. They clearly took a consenting part in many of the criminal acts which Farben and other agents and officers of the corporation carried out.

For example: (Give many examples from the record) Not only does the record establish participation in the intial formulation of policies of Farben but subsequent consent, approval and ratification are shown by numerous reports as to which no dissent was expressed.

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The magnitude of the preparations in which the defendants were engaged make it difficult to believe that they did not know these preparations were for war; for aggressive war because they knew that the policy of the German Government was one of aggression backed by the threat of force. The defendants all take the position that the evidence does not show that they knew there would be war. What the IMT said with reference to Raeder seems a complete answer to this position:

> "The defendant Raeder testified that neither he, nor von Fitisch, nor von Blomberg, believed that Hitler actually meant war, a conviction which the defendant Raeder claims that he held up to 22 August 1939. The basis of this conviction was his hope that Hitler would obtain a 'political solution' of
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> Germany's problems. But all that this means, when examined, is the belief that Germany's position would be so good, and Germany's armed might so overwhelming that the territory desired could be obtained without fighting for it." (IMT Judgment p. 191)

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If the Charter and judgment of the International Military Tribunal mean anything at all as a contribution to international law they certainly mean that the community of nations sanctions the effort

through legal processes to get to the basic problem of the evil inherent in launching (^and waging aggressive^) war and to hold criminally responsible all of those who' in a substantial way contributed to the (^intention?^) planning and (or) preparation for the waging of aggressive war and invasions of other countries. There is no immunity to be found in the fact that the defendant is a private citizen.

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The view that the law had not adequately developed at the time of the acts for which the defnedants are sought to be charged to apprise them of their guilt is merely a restatement, in a different application, of the basis(c) objection which has often been made that there was no law for the offense of aggressive war. To say that the law in inadequate as applied to these defendants in effect states that there is no law for the offense as applied to them. But there always has to be a first case and this Tribunal does not have before it any (more) difficult a problem than that which confronted the International Military Tribunal which was intrusted with the task of first applying the concept of aggressive war judicially to the conduct of individuals. Is there any difference between the conduct of a military man who, pursuing his profession, commits the crime against peace pursuant to superior orders and at a time when the nation is under compulsion and the position of the private business man who similarly participates through the production of materials without which the war could not be waged? The ranking Field Marshal or under far greater compulsion to accept the principle "my country right or wrong- but still my country". A much wider range of action is open to the private citizen and particularly is this true in those fields of armament production in which exceptional technological skill and initiative are to be required. If the military man refuses to fight because in his opinion the war is an unjust or aggressive war for which his country is criminally responsible in the moral judgment of civilized nations, his position off peril and the limited nature of the choice open to him is much more apparent than in the case of the chemical engineer who merely fails to exercise that unusual degree of technical ingenuity which as a matter of history was always exercised to such perfection in Germany as to make them capable of waging a long and costly war wit-.out resort to the raw materials formerly imported.

Conspiracy or common plan - it is not necessary to find that there was a separate Farben conspiracy if there is sufficient evidence to establish that there was participation in the Hitler plan or conspiracy to wage aggressive war. Proof of this participation in such common plan or conspiracy is present according to the statement in the IMT when a defendant with knowledge of the aims of Hitler, lent him their cooperation, they then became a party to the plans which he had initiated. The

elements insofar as the crime of conspiracy are concerned are knowledge, participation in the plan with intention to cooperate and support it. The argument of the proseuction seems convincing on this score. That there was an intent to cooperate with the plans of the Nazi to wage aggressive war - not merely parallel action here lacking the requisite criminal intent to participate in the conspiracy.

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I cannot accept the conception that the war of Germany against England and France was not a war of aggression or a war in violation of in ernational treaties in the sense in which those terms are used in the Charter and in Control Council Law no. 10. It is ture that the International Military Tribunal did not find it necessary to characterize the nature of this war. But it is abhorent to any sense of justice and would certainly not be in keeping with the moral judgment of the civilized world to say that Germany was not the guilty aggressor against England' and France in the sense in which aggression must be understood as a matter of common international law. Following attempts to halt the Hitlerite aggression even to the degree of appeasement reflected in the Munich agreement, a courageous coalition of France and England courageously but firmly, after all urging and pleading had failed, officially advise Hitler that an aggressive act against Poland means war, with England and France because of solemn pacts and treaty obligations under which those countries are bound to come to the aid of Poland. Such action was courageously done with almost certain knowledge that if there was war in the air the superiority of the Luftwaffe would mean almost certain destruction of the cities of England and France as their armies took the field in the attempt to apply needed sanctions to the aggressor. It is not the initial act of declaring war which determines the aggressive character of the war and it is of little moment that England and France first declared war upon Hitler. Whether we say that the aggression against Poland was aggression against England and France who were the allies of Poland compelled to take the field if treaty obligations were to be respected, or whether we say that a way against the policing army which takes the field to apply sanctions to the aggressor is part and parcel of the initiation aggressive war, the answer is the same. Essentially there is no difference. The action of France and England was justified before the moral judgment of the world.

January 12, 1948

We will have to determine the extent of the individual participation of each defendant, based upon his individual action, in all of the activities related to the planning, preparation and waging of aggressive wars and, in that connection, consideration will be given to acts done in their personal, individual, or official capacity not performed in their capacity as officials or employees of the Farben enterprises. In addition it will be necessary to consider the extent of the participation of the alleged instrumentality Farben, in the such activities and then to asses the degree of individual responsibility, if any, for the actions of Farben, the instrumentality, and the subsidiaries of Farben. Some of the defendants acted personally and completely outside of the frame-work of Farben, while others acted solely in their capacities as officials and employees. Basically this involves these questions:

What is the responsibility of a member of the Vorstand of Farben who knew that a gigantic rearmament program was being carried out by the business enterprise of which he was a responsible director - who knew that such rearmament program was being directed by the State which was then actively engaged in an aggressive foreign policy of territorial aggandizement based primarily upon a threat of employing force if necessary for the achievement of the objectives of that foreign policy. Upon to a certain period of time, even if the defendants are to be charged with the common knowledge then prevailing in Germany, it cannot be said that up to that point of time rhere was ever any common knowledge of the intention of Hitler and the Nazi party to wage a war of aggression. Certainly the Munich pact was widely heralded as the end of the territorial demands of Hitler and created widespread hope as Chamberlain had optimisticaly expressed it that the policy of appeasement would result in the purchase of peace in our time. It cannot be denied that there was considerable fear in Germany that the policies of Hitler would lead to war. That he would become so saturated with the successes without necessity of launching a war that he would intensify his excessive demands and would overstep the limits of toleration of such policy which up to then had been suffered, albeit not without protest, by the community of nations, dedicated as they were to the high humaritarian purpose of averting the catastrophy of a second world war. The extent to which the civilized nations of the world were willing to go in this regard is well illustrated by the appeals made to Hitler by the President of the United States and the Vatican on the eve of the invasion of Poland and in a last minute effort to prevail upon Hiteler to agree to mediation of his demands, thereby avoiding the horrors which have now been written with blood in the pages of history.

Can it be said that these defendants had knowledge of Hitler's plans to wage an aggressive war

in the absence of direct and positive proof of such knowledge brought home to either through participation on one of the important secret conferences at which he announced his aggressive intentions or through other credible proof that report of the decisions was brought home to them in some other way by persons having direct and intimate knowledge of such plans and intentions. It has been argued that this question may be answered in the affirmative and that a case for the requisite criminal knowledge to ,establish one of the essential elements of criminal guilt is to be found in a series of interences which may be legitimately drawn and applied to the activities of the defendants in this case. This amounts to piling inference upon inference and while such deductions from the chain of facts does constitute conclusions that are decidedly more in the realm of probability than in the realm of mere possibility; while the Tribunal is inclined to believe that the defendants, or some of them, may have known of the plans to aggressive war - yet notwithstanding this inclination on the part of the Tribunal, we cannot conclude from the evidence before us that the fact of knowledge is proved beyond a reasonable doubt in accordance with the standard of proof above mentioned. It is ture that the defendants occupied high positions in the industrial life of Germany and in that capacity they had much intimate knowledge which was withheld from the general public. They knew, for example, that their plans were engaged day by day in production of many materials, chemical products which could be used only for the waging of war. They knew that furthermore than they were engaged in the production of synthetic raw materials without which Germany could not wage war on a scale which could not possibly have been in keeping with not alone the peace time needs of Germany. They knew or were charged with knowledge that facility expansion for the production of these materials was far in excess of any possible peace-time estimates of the needs of Germany. They knew that secret stand-by plants for war production were being erected by them under agreements with the Reich and various agencies of the Wermacht. But all that this amounts to is an intimate knowledge of the extent of the secret rearmament of Germany unless we are prepared to say that rearmament with knowledge that such gigantic efforts are involved creates the necessary inference that they knew of the plans to wage aggressive wars, the case against the defendants must fall on the charge of planning and preparing a war of aggression.

While factual distinctions may be drawn between the activities of Schacht who was acquitted by the International Military Tribunal and the sustained activities of the Farben defendants - the pronouncement by that Tribunal that "rearmament does not constitute a crime under the Charter" cannot be overlooked or easily explained away. It is perhaps a deplorable state of affairs to be forced to

recognize that gigantic rearmament activities carried out by a group of men who were willing to do business with Hitler and who, at every stage of the hideous Nazi program, raised no voice of protest, but went along willingly in that program does not constitute a crime against peace. But the answer to that problem is one which has often been given before by courts of justice applying principles of law which this tribunal is bound to uphold. There can be no publishment for action unless the action denounced constitutes a crime. Here one of the essential elements of the crime of planning and preparing for a war I of aggression is lacking, that is the guilty knowledge. The principles of international law reflected in the Charter of the International Military Tribunal have indeed by legislative enactment and by recognition of principles of common international law after the development of the Anglo-American common law - progressed to the point at which the planning or preparation of a war of aggression is a crime against international law for which there is individual penal responsibility, but it cannot be now asserted that international law has developed to the point at which rearmament of itself was recognized as a crime against international law unless that rearmament is part and parcel of a plan to wage aggressive war known to the parties participating in the rearmament. It is fervently to be hoped that in the not too distant future the dangerous potentialities of action of the character of which these defendants were engaged will be recognized to the point of developing some means among the community of nations to deal with the problem of rearmament in violation of international treaties, a crime of itself without the necessity. Perhaps action of this character should be made without exact knowledge of the intended use of the armaments so produced.despite the difficulty of harmonizing any such rule of law with rearmament legitimately conceived for defensive purposes.

We might draw an analogy. Suppose that Mr. Truman should be advised that war with the Soviet Union is inevitable and he and a high circle of advisors determine that they will pursue a policy based upon the threat of force even to the application to force to obtain certain demands from Russia. The intention to use force to the point of war is not publicly announced, but the demands of the Government of the United States are made public and immediately there is widespread fear that the policy so announced means that war with Russia is inevitable. There is immediate intensification of the rearmament plans of the United States. Measures for economic mobilization for war are initiated; production of armament is pushed with all of the initiative and ingenuity which is characteristic of American free enterprise; Americans gird themselves and get ready for come what may. The last demand of the United States is rejected and the President and the Congress of the United States declare war on Russia under circumstances which make it inescapable that the war is a war of aggression. Can

it be said that the officials of the Dupont Company are liable for participating in the planning and preparation of a war of aggression if they knew nothing more than the common knowledge above referred to? Can it be-said that the Oak Ridge scientist who, with knowledge of the possibility that war was imminent, feverishly and with great initiative, rushes to completion the current modification of his atomic bomb, even more terrible than the first, is guilty of initiating a war of aggression, or participating in the planning and preparation for such a war? In judging facts in retrospect we must soundly consider the application of such facts to other times and other circumstances which cannot be readily distinguishable on principle. Unless rearmament with knowledge of the possibility that an aggressive war is imminent, constitutes a crimes, the defendants cannot be convicted for participation in the common plan of aggression or of initiating, planning, and preparing a war of aggression, in violation of treaties, etc.

It is no doubt considerations such as these which prompted the IMT to require, as a condition precedent to criminal complicity in the common plan that there be some detailed and intimate knowledge of specific plans to wage a war of aggression. The proseuction correctly states that it is not essential that the date and the hour be known - but the fact that a war of aggression is to be launched must be known to constitute the requisite guilty knowledge.

The judgment of the International Military Tribunal is not an isolated judicial opinion intended to stand still as the ultimate expression of the customary international law which now recognized aggressive war as a crime. Nor is the Charter or the London Agreement upon which the jurisdiction of that Tribunal was founded a codification expressing maximum development in the law of nations as of that time. These great landmarks in the development of international law should be viewed merely as a "premise for legal reasoning". In the well chosen words of the disginguished American lawyer and statesman Henry L. Stimson we should regard the law of Nuremberg, as expressed in the IMT judgment "xx for what it is, -a great new case in the book of international law." There is no reason to deny to that case the vitality as a source for the generation of law which has been traditionally accorded to the judicial opinion or the case in the common law. The genuis of the common law for development is indeed now transferred to the field of international law. If it be agreed (contended) that such a conception of the law of international crimes is abhorrent to the sense of justice in that action is being made criminal by ex post facto judicial declaration, or that control Council Law No. 10 is ex post facto legislation, it would be a sufficient answer merely to say that no act is being treated as a crime which was not criminal at the time it was committed. The fallacies in the ex post fact argument have

been exposed in the judgment of the IMT. However, because this fallacious argument is the one most commonly levelled at judicial proceedings seeking to apply the concept of crimes against peace - these additional observations are made on the subject.

What did these defendants know? They knew they were rebuilding German military might on a scale theretofore unknown in the history of the world; they knew that the materials they were synthesizing were part and parcel of a master plan of military economy; they knew that their contribution to the Wehrmacht and the production of the plants they were planning and building were essential to the waging of war; they knew that, from the very nature of the products being produced and planned that some of them had their only possible use as munitions and materials of war; they knew that those products which did have a peace-time use were being planned on such a vast scale and with such disregard of normal economic factors operating in a peace-time economy as to be consistent only with the objective of war; they knew they were participating in violating the Treaty of Versailles; they knew that, at certain definite periods, closely related to political events in which the German policy of aggression backed by threats of force was being actively pushed, they were being asked to intensify their activities to keep pace with the possible results of these policies and world-shaking events; - they knew that they were doing all of these things in a war-like atmosphere and for leaders who had made their war-like intentions manifest on many, many occasions.

It taxes credulity to say that they did not know they were taking a consenting part in the preparation of Germany to implement its policy of aggression by war if necessary.

When they now say that they did not know or believe that war would result, they merely assert main as Raeder did before the IMT, that they believed that the military might which they were building would lead to further Munichs and that the objectives of territorial expansion would be achieved by threats of force without the necessity of actually employing it. But it is not necessary to rely upon the inference of knowledge established from the nature and scope of their activities and from the positions which they held placing them in peculiarly advantageous situation to acquire knowledge. The record establishes that knowledge of plans for aggressive war in which they were participating was brought home to them in more direct fashion on a number of occasions. For example, etc.