MILITARY TRIBUNAL NO. VI

CASE NO. 6

THE UNITED STATES OF AMERICA

-against-

CARL KRAUCH et al

DISSENTING OPINION

By JUDGE PAUL M. HEBERT

on

COUNT THREE OF THE INDICTMENT

UNITED STATES MILITARY TRIBUNAL VI P

ALACE OF JUSTICE, BURNBERG,

GERMANY Case No. 6

THE UNITED STATES OF AMARICA

-vs-

CARL KRAUCH, HERMANN SCHMITZ, GEORG VIN SCHNITZLER, FRITZ GAJEWSKI, HEINRICH HOERLEIN, AUGUST VON KNIERIEM, FRITZ TER MEER, CHRISTIAN SCHNEIDER, OTTO AMBROS, ERNST BUERGIN, HEINRICH BUETEFISCH, PAUL HAEFLIGER, MAX ILGNER, FRIEDRICH JAEHNE, HANS KUEHNE, CARL LAUTENSCHLAEGER, WILHELM MANN, HEINRICH OSTER, KARL WURSTER, WALTER DUERRFELD, HEINRICH GATTINEU, ERICH VON DER HEYDE, AND HANS KUGLER, officials of I.G. FARBENINDUSTRIE AKTIENGESELLSCHAFT

Defendants

DISSENTING OPINION

Count Three of the Indictment

This dissenting opinion is filed pursuant to reservations made at the time of the rendition of the final judgment by Military Tribunal VI in this case. Under Count Three of the indictment, all defendants are charged with having committed War Crimes and Crimes Against Humanity as defined in Article II of Control Council Law No. 10. It is alleged in the indictment that the defendants participated in the enslavement and deportation to slave labor on a gigantic scale of members of the civilian population of countries and territories under the belligerent occupation of, or otherwise controlled by Germany; that the defendants participated in the enslavement of concentration camp inmates, including German nationals; that the defendants participated in the use of prisoners of war in war operations and work having a direct relation to war operations, including the manufacture and transportation or war material and equipment; and, that the defendants participated in the mis-treatment, terrorization, torture, and murder of enslaved persons. It is alleged that all defendants committed War Crimes and Crimes Against Humanity as enumerated, 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 including

Farben, which were connected with the commission of said crimes. There are general allegations that the defendants acted through the corporate instrumentality, I.G. Farbenindustrie, A.G. in the commission of said crimes.

The Tribunal convicted the defendant Krauch, ter Meer, Ambros, Buetefisch and Duerrfeld under this count principally for initiative shown in the procurement of slave labor for the construction of Farben's Buna plant at Auschwitz. The remaining defendants were all acquitted of the charges under Count Three. Included in the group of acquitted defendants were fifteen members of the Vorstand, or principal governing corporate board of Farben. The acquitted Vorstand members included: Schmitz, von Schnitzler, Buergin, Haeflinger, Ilgner, Jaehne, Oster, Gajewski, Hoerlein, von Knieriem, Schneider, Kuehne, Lautenschlseger, Mann and Wurster. The majority opinion concedes, and, in fact, it is not seriously converted in this case, that slave labor, i.e., compulsory foreign workers, concentration camp inmates and prisoners of war were employed and utilized on a wide scale throughout numerous plants of the vast Farben organization and that such utilization was known by the defendants. The majority reached the conclusion that, except in the case of Auschwitz where initiative constituting and willing cooperation by Farben with the slave labor program was held to have been proved, no criminal responsibility resulted for participation in the utilization of slave labor. Basically, the majority opinion under Count Three concluded that, in order to meet fixed production quotas set by the Reich, "Farben yielded to the pressure of the Reich labor office and utilized involuntary foreign workers in many its plants." The majority assert that "The utilization of forced labor, unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation of that part of Article II of Control Council Law No. 10, which recognizes as war crimes and crimes against humanity the enslavement, deportation, or imprisonment of the civilian population of other countries." But the majority fully accepts the defense contention that the utilization of slave labor by Farben (except in the case of Auschwitz) was the result of the compulsory production quotas and other obligatory governmental decrees and regulations directing the use of slave labor. The asserted defense of "necessary" is held to have been sustained because of the reign of terror within the Reich and because of possible dire consequences to the defendants had they pursued any other policy than that of compliance with the slave labor system of the Third Reich.

I concur in the conviction of the five defendants found guilty by the Tribunal, but I am

of the opinion that the criminal responsibility goes much further than merely embracing the five defendants most immediately connected with the construction of Farben's Auschwitz plant. In my view all the members of the Farben Vorstand should be held guilty under Count Three of the indictment not only for the participation by Farben in the crime of enslavement at Auschwitz, but also for Farben's widespread participation and willing cooperation with the slave labor system in the other Farben plants where utilization of forced labor in violation of the well-settled principles of internation[al] law recognized in Control Council Law No. 10 has been so conclusively shown. I disagree with the conclusion that the defense of necessity is applicable to the facts proved in this case.

While it is true that there were numerous governmental decrees under which complete control of the manpower supply was assumed by the Reich Government, existence of such controls does not, in my opinion, establish the defense of necessity even under the conditions which existed in Nazi Germany. Recognition of such a defense is, in my view, utterly inconsistent with the provisions of Control Council Law No. 10 which indicate quite clearly that Governmental compulsion is merely a matter to be considered in mitigation and does not establish a defense to the facts of guilt. Thus Section 4(b) of Article II of Control Council Law No. 10 provides:

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

Under the evidence it is clear that the defendants in utilizing slave labor which is conceded to be a war crime (in the case of non German nationals) and a crime against humanity, did not, as they assert, in fact, act exclusively because of the compulsion and coercion of the existing Governmental regulations and policies. The record does not establish by any substantial credible proof that any of the defendants were actually opposed to the Governmental solutions of the manpower problems reflected in these regulations. On the contrary, the record shows that Farben willingly cooperated and gladly utilized each new source of manpower as it developed. Disregard of basic human rights did not deter these defendants. At times they expressed concern over the inefficiency of compulsory labor but they willingly cooperated in the tyrannical system. Far from establishing that the defendants acted under "necessity" or "coercion" in this regard, I conclude from the record that Farben accepted

and frequently sought the forced workers, including compulsory foreign workers, concentration camp inmates and prisoners of war for armament work because there was no other solution to the manpower needs. Farben and these defendants wanted to meet production quotas in aid of the German war effort. In fact, the production quotas of Farben were largely fixed by Farben itself because Farben was completely integrated with the entire German program of war production. Farben's planners, led by defendant Krauch, geared Farben's potentialities to actual war needs. It is totally irrevelant [irrelevant] that the defendants might have preferred German workers. That they would have preferred not to commit a crime is no defense to its commission. The important fact is that Farben's Vorstand willingly cooperated in utilizing forced labor. They were not forced to do so. I cannot agree that there was an absence of moral choice. In utilizing slave labor within Farben the will of the actors coincided with the will of those controlling the Government and who had directed or ordered the doing of criminal acts. Under these circumstances the defense of necessity is certainly not admissible.

I am convinced that persons in the positions of power and influence of these defendants might in numberless was have avoided the widespread participation in the slave labor utilization that was prevalent throughout the Farben organization. I cannot agree with the assertion that these defendants had no other choice than to comply with the mandates of the Hitler government. Had there been any real will to resist such comprehensive participation in the crime of enslavement, the defendants, possessing superior knowledge in their respective complicated technical fields, could no doubt have avoided such participation through a variety of devices of such imperceptible nature as to avoid the drastic results now portrayed in the posing of this defense. In reality, the defense is an after-thought, the validity of which is belied by Farben's entire course of action. To assert that Hitler would have "welcomed the opportunity to make an example of a Farben leader" is, in my opinion, pure speculation and does not establish the defense of necessity on the facts here involved.

The defense of necessity as accepted by the majority would, in my opinion, lead logically to the conclusion that Hitler alone was responsible for the major was crimes and crimes against humanity committed during the Nazi regime. If the defense of superior orders or coercion, as directed in the Chapter of the IMT, was not recognized in the case of the principal defendants tried by that Tribunal as applied to defendants who were subject to strict military discipline and subject to the most severe penalties for failure to carry out the criminal

plans decreed and evolved by Hitler, it become difficult to ascertain how any such defense can be admitted in the case of the present defendants. The IMT judgment embraces no doctrinal defense of necessity by governmental coercion. That decision, it seems to me, constitutes complete negation of any such theory. Nor do I consider the precedent established by Military Tribunal No. IV in the case of the United States v. Flickm [Flick] et al (Case No. 5) persuasive in its recognition of the defense of "necessity". Such a doctrime [doctrine] constitutes, in my opinion, unbridled license for the commission of war crimes and crimes against humanity on the broadest possible scale through the simple expedience of the issuance of compulsory governmental regulations combined with the terrirism [terrorism] of the totalitarian or police state. The essence of a truly effective system of international penal law lies in its applicability to the acts of individuals who are nor privileged to disregard the over-riding commands of international law ehen [even] they come in conflict with the contrary policies or directives of a State nor desiring to abide by the principles of inter- national law. For these reasons, I have no hesitancy in rejecting the conclusions reached in the Flick case on this asserted defense and cannot agree with the majority in this application to the facts here proven.

In effect the majority opinion holds that, regardless of the extent of Farben's participation in the slave labor program, unless a particular defendant can be shown to have (a) exercised unusual initiative to bring about participation in the utilization of slave labor, no crime has been committed; or (b) unless a defendant in the course of the administration of his particular role in the slave labor program shows an initiative going beyond the requirements of the cruel regulations no crime has been committed. Under this construction Farben's complete integration into production planning, which virtually meant that it set its own production quotas, is not considered as "exercising initiative." Even the Flick case did not go so far. Action by a defendant in requesting the allocation of labor, knowing that compulsory foreign workers would be assigned, is considered by the majority to be done pursuant to and under "necessity" and does not result in criminal liability. Under the majority view a defendant who is a plant manager may willingly cooperate in the execution of cruel and inhumane regulations, such, for example, as putting into effect the required discriminations as to food and clothing in the case of the Eastern workers, or putting the miserable workers beyond barbed wair [wire] fences; this was no more than complying with the requirements of the Governmental regulations and,

according to the majority opinion, does not result in criminal responsibility. Similarly, where the evidence establishes that a defendant was responsible for the erection of a disciplinary camp at Farben plant or participated in the initiation of disciplinary measures against unruly compulsory workers- there is no criminal responsibility, the action is protected by the defense of "necessity" as the defendant did no more than that which the cruel and inhumane regulations required. Slave laborers might be reported to the Gestapo for punishment as this was required by the regulations and the defendant is not considered responsible. It cannot be successfully contended that this was done in the Farben plants employing slave labor. I cannot concur in such results. The coercion exercised by a totalitarian police state in the form of commands to its citizens should not be permitted to operate as a complete negation of the occpsing command of international penal law which has erected standards for the protection of basic human rights. Accessories and those taking a consenting part in the crime of enslavement should not be afforded such easy means or purging themselves of the fact of guilt. On the facts proven in this record, I am convinced that the defendants who were members of the Vorstand were accessories to and took a consenting part in the commission of war crimes and crimes against humanity as alleged in Count Three of the indictment.

Conceding arguendo the admissibility of the defense of necessity, as a matter of law, it is clearly not here admissible to result in acquittal of all defendants in the light of the finding of the majority as to Farben's initiative at Auschwitz. All defendants who were members of Vorstand should share in the responsibility for the exercise of such initiative. The majority concedes such initiative to have existed at Auschwitz, as it was planned from the inception of the Farben Auschwitz Buna plant to use concentration camp labor on the project. I consider it unreasonable to conclude that these plans were not known by all Vorstand members. The majority opinion recognizes that Duerrfeld, Ambros, Krauch, ter Meer, and Buetefisch must bear responsibility for taking the initiative in the unlawful employment of forced workers at Auschwitz and that they, to some extent at least, must share the responsibility for the mistreatment of the workers with the SS and the construction contractors. The criminal responsibility so found should embrace all Vorstand members for the occurrences at Auschwitz. With regard to the numerous other plants in which slave labor was employed by Farbenm [Farben] no substantial factual distinction exists from that prevailing at Auschwitz, in the matter of Farben's cooperative attitude.

As to the employment of forced workers at Auschwitz after the Sauckel program of forced labor became effective, the majority opinion states:

> "The defendants contend that, the recruitment of labor being under direct control of the Reich, they did not know the conditions under which the recruitment took place, and since the foreign workers at first were procured on a voluntary basis, the defendants were unaware later that the method had been changed and that many of the sequent workers had been procured through a system of forced labor recruitment. This contention cannot be successfully maintained. The labor for Auschwitz was procured through the Reich Labor Office at Farben's request. Forced labor was used for a period of approximately three years, from 1942 until the end of the war. It is clear that Farben did not prefer either the employment of concentration-camp workers of those foreign nationals who had been compelled against their will to enter German labor service. On the other hand, it is equally evident that Farben accepted the situation that was presented to it through the Labor Office of the Reich and that when free workers, either German or foreigners, were unobtainable they sought the employment and utilization of people who came to them through the services of the concentration camp Auschwitz and Sauckel's forced-labor program."

The foregoing analysis of the responsibility for utilization of forced labor at Auschwitz is equally applicable to slave labor utilization at the other Farben plants where the situation identical in fact. Willing cooperation with the slave labor utilization of the Third Reich was a matter of corporate policy that permeated the whole Farben organization. The Vorstand was responsible for the policy. For this reason, criminal responsibility goes beyond the actual immediate participants at Auschwitz. It includes other Farben Vorstand plant-managers and embraces all who knowingly participated in the shaping of the corporate policy. I find on the evidence that all Vorstand members must share the responsibility for the approval of the policy despite the fact that there were varying degrees of immediate connection among various defendants. The "freedom and opportunity for initiative" found to exist at Auschwitz was, in my opinion, eually [equally] present at the other plants. I find it hard to understand why the majority can conclude that construction and production at Auschwitz was not under Reich compulsion when the Reich wanted the plant for war production and directed its erection, and production involving utilization of slave labor in other plants was "under compulsion." The

answer, it seems to me, les in fact that the freedom was as real in all the Farben plants and the similar attitude of willing cooperation was present – differing at Auschwitz only in the matter of degree. The majority opinion concludes that the defendant Krauch was a willing participant in the crime of enslavement. With that conclusion I agree, but the mere fact that Krauch was a governmental official operating at a high policy level is insufficient, in my opinion, to distinguish his willing participation is the crime of enslavement from other degrees of willing participation exhibited by the other defendants according to their respective roles within Farben.

Criminal liability is not to be imputed to the officer of a corporation merely by virtue of his occupancy of his office. Generally a corporate officer is not criminally liable for the corporate acts performed by other agents or officers of a corporation. But the action of an officer of a corporation may result in criminal liability where, by virtue of the officer's individual act, by may be said to have authorized, ordered, abetted or otherwise has actually participated in a course of action which is criminal in character. The criminal intent required as a pre-requisite to guilt under the charges of war crimes, and crimes against humanity alleged in Count Three of the instant indictment is present if the corporate officer knowingly authorizes the corporate participation in action of a criminal character. On this score the evidence is more than sufficient. From the time of the participation by Farben in Auschwitz project, the corporation was actively engaged in continuing criminal offences which constituted participation in war crimes and crimes against humanity on a broad scale and under circumstances such as to make it impossible for the corporate officers not to know the character of the activities being carried on by Farben at Auschwitz. From the outset of the project it was known that slave labor including use of concentration camp inmates would be a principal source of the labor supply for the project. Utilization of such labor was approved as a matter of corporate policy. To permit the corporate instrumentality to be as a cloak to insulate the principle corporate officers who approved and authorized this course of action from any criminal responsibility which, in my opinion, is without any sound precedent under the most elementary concepts of criminal law. It represents a doctrime [doctrine] which should not be permitted to gain a foothold in the application of criminal sanctions to the acts of individuals who are charged with such serious infractions of international penal law. The law does not require the degree of personal participations in the execution of cromes [crimes] against

international law that I understand the majority opinion to require. It matters not that, under the division of labor employed by I.G. Farben, supervision of the Auschwitz project fell in the sphere of immediate activity of certain of the defendants, i.e., ter Meer, Ambros, Buetefisch, and Duerrfeld. In my view, the Auschwitz project would not have been carried out had it not have been authorized and approved by the other defendants who participated in the corporate approval of the project knowing that the concentration camp inmates and other slave labor would be employed in the construction and other work. We do not have in this case situation of complete delegation of authority to subordinate without knowledge of the criminal character of the action to be undertaken by those granting the authority for corporate action.

We do not have the situation of subordinates committing offences against criminal law on their own initiative without the knowledge of the corporate officers. Decisions in Anglo-American law which decline to impose a vicarious criminal liability in such situation are not, therefore, strictly in point. There is, however, respectable authority for the imposition of criminal responsibility where the defendant was in a position to know and should have not of the illegal action carried out by a corporation through an agent. An analogy in Anglo-American law may be found in decisions dealing with the employment of child labor. For example, in the case of Overland Cotton Mill Co. et al v. People. 32 Colorado 263, 75 Pac. 924 (1904) the conviction of an assistant plant superintendent for violation of the child labor laws was sustained by the court despite the fact that he was not shown to have personally participated in the hiring of the minor. In discussing the liability of this officer, the court said:

> "…An agent of a corporation is presumed to have that knowledge of its affairs particularly under his control and management which, by the exercise of due diligence, he would have ascertained…He (the assistant superintendent) was engaged at the mill, and, in the performance of his duties, had the authority to hire and discharge employees. It thus appears from the testimony that by reason of his relationships to the company, and the performance of his duties he either knew, or, by the exercise of due diligence upon his part, should have know, that a minor under the prohibited age was in the employ of the company. For this reason he must be held as having violated the relationship he bore to the company, to have prevented the employment. An officer of a corporation, through whose act the corporation commits an offence against the laws of the state, in himself also guilty on the same offence."

In this case offenses against international law (to which the defense of necessity in not applicable) were committed by Farben, the corporate instrumentality through which the individual defendants acted in consummating such criminal acts. The defendants who were members of the Vorstand of Farben and who were plant managers certainly knew of and were active participants in the slave labor utilization. At the very least, they took a consenting part in war crimes and crimes against humanity as defined in Control Council Law No. 10. These plant managers not only knew of the action but they participated in executing and formulating the policies within Farben under which such action was taken. There is no sound reason, under the evidence, to render a judgment of exculpation in the case of the defendants who were plant managers at Farben plants employing slave labor. The other defendants who were not plant managers but were members of the Vorstand were likewise apprised of and took a consenting part in approving and directing the policies under which Farben participated in the slave labor program on such a broad scale. They, too, should be held criminally liable. Essentially, we have action by corporate board, participated in by its members, authorizing the violation of international law by other subordinate agents of the corporation.

Under the evidence presented there can be no doubt that the Farben Vorstand was responsible for general employment policies as well as the welfare of its workers. This responsibility was recognized in the Law Regulating National Labor and by the action of the Vorstand of Farben taken under the law to discharge its responsibilities in this regard. The appointment of the defendant Schneider at the Main Plant Leader of Farben was pursuant to this responsibility of the Vorstand and was in conformity with the mentioned law. Schneider frequently reported to members of the Vorstand and its committiies [comities] on the matter of labor policy.

The evidence shows Farben's willing cooperation in the utilization of forced foreign workers, prisoners of war and concentration camp inmates as a matter of conscious corporate policy. For example, in a report made by the defendant Schmitz, as Chairman of the Vorstand, to the Augsichtsrat (Supervisory Board) on 11 July 1941, Schmitz stated:

"The factories have to make all efforts to get the necessary workers; byt [by] utilizing foreign workers and prisoners of war the demand could be generally met."

This report was after the 1939 German decree introducing labor in Poland. The evidence shows that Farben took the initiative to obtain Polish workers and that such workers were

actually employed as early as 1940. in the light of the historical facts establishing the compulsory nature of the slave labor program of Nazi Germany, it is impossible to avoid the conclusion that the Polish workers included large numbers of enslaved persons. It is further certain that of the voluntary foreign workers originally employed many were later prohibited from leaving their employment had they chosen to do so. This also constituted enslavement. The subsequent retention of such workers in a state of servitude constituted war crimes and crimes against humanity in violation of Control Council Law No. 10.

Farben's willing cooperation with the slave labor program continued even after its inhumane character became more evident with the appointment of Sauckel as Plenipotentiary General for the Utilization of Labor. On 30 May 1942, the defendant Schmitz again reported to the Aufsichtsrat that the lack of workers had to be compensated by the employment of foreigners and prisoners of war. A credible witness, Struss, stated that practically everubody [everybody] in Germany knew that Russian workers were forced to come to Germany after the battle of Kiev. The members of Farben's Vorstand, therefore, necessary knew that such forced workers were being employed by Farben and they approved and cooperated in the execution of such a labor policy. It is highly unrealistic to say, as important as labor procurement was to the vital matter of German war production, that persons occupying the positions of influence and responsibility of a Vorstand member of Farben were not well informed concerning the policies of the compulsory labor program in which Farben participated on such a large scale. It is not necessary for the evidence to establish that each defendant was informed of all the details of each major instance of such employment and personally exercised initiative. There is an abundance of evidence from which knowledge of the widespread participation by Farben as a matter of official corporate policy, sanctioned and approved by the individual Vorstand members, is conclusively to be inferred. For example, the Vorstand and its subsidiary committees had to approve the allocation of funds for the housing of compulsory workers. This meant that members of the Vorstand had to know the extend of Farben's willing cooperation in participating in the slave labor program and had to take an individual part in furthering the program.

As to the Auschwitz Buna plant, the evidence conclusively establishes that Farben took the initiative in the selection of the Auschwitz site and that an important factor, if not the decisive one, was the knowledge of availability of concentration camp inmates of work in the

construction of the plant. As pointed out by the majority opinion, it was contemplated from the start that concentration camp labor would be used in such work. But, in my view, the individual liability for the carrying out of such plans goes further than the individual acts and actions of Krauch, Ambros, ter Meer, Buetefisch and Duerrfeld. In discussing the criminal responsibility of the defendant ter Meer, the Tribunal quite properly asserts that it would be unreasonable to conclude that conferences between the defendant Ambros and ter Meer did not include discussions of the all-important question of labor supply for the construction of the Auschwitz Buna plant and that it was consequently know to ter Meer that officials in charge of the Auschwitz plant construction were taking the initiative in planning for and availing themselves of the use of concentration-camp labor. With this conclusion, I agree but, in my opinion, it is similarly unreasonable to conclude that the reports to the Vorstand on the Auschwitz project ignored these matters. Just as ter Meer was superior of Ambros, the Vorstand was the superior of both and there is no reason to conclude that the knowledge possessed by Ambros and ter Meer was not fully reported to and discussed in the Vorstand. There is, indeed, strong positive evidence that this was done and that it must have been done is a proper influence of fact to be drawn from the very nature of the serious responsibility being undertaken by Farben in becoming involved in the slave labor utilization to the extent that it did at Auschwitz.

The defendant Gajewski, Hoerlein, Buergin, Jahne, Kuehne, Lautenschlaeger, Schneider and Wurster, in their capacities as plant leaders or managers of one or more of the important plants of Farben and as members of the Technical Committee participated in the utilization of slave labor, in plants under their jurisdiction, and actively participated in furthering the policy of slave labor utilization within the Farben enterprises. They should all the held guilty under Count Three of the indictment.

Although the dutires [duties] of the defendant Schmitz, von Schnitzler, von Knieriem, Haeflinger, Ilgner, Mann and Oster were not directly related to the management of any specific plant or project in which slave labor was employed, they did know of the policy throughout the Farben organization. As members of the Vorstand, they tacitly approved such policy. In my view, it is not necessary for them as individuals personally to take the initiative in procurement or allocation of such labor. It suffices that they knowingly approved of the policy of slave labor utilization and that is, I conclude, abundantly established by the record.

A construction project of the magnitude of Auschwitz could not have been initiated unless adequate reports were made to the Vorstand on the more important factors which influence the selection of an industrial site including the sources of and availability of labor. I am convinced that Krauch spoke the truth in his pre-trial affidavit when he stated that Farben could agree to or refuse to erect the Buna plant at Auschwitz; that the site was selected by Ambros and report was made to the Farben Vorstand of the factors considered, including labor; and that the members of the Executive Board of Farben (Vorstand) "were informed of the employment of concentration camp inmates with the I.G. Buna plant at Auschwitz and did not protest." In other words, there can be no doubt that the Farben Vorstand approved the policy of employing concentration camp inmates in the erection of the Auschwitz Buna plant and did not object as it was their duty to do.

This, in my opinion, constitutes affirmative action of approval by the members of the Vorstand and leads inescapably to their criminal complicity within the degree of participation required by Control Council Law No. 10, as constituting taking a consenting part in the action. I cannot agree with the majority that it is necessary for the evidence to show an abnormal degree of initiative on the part of each defendant in seeking such labor or in participating in negotiations to obtain it. These are matters far bellow the policy level at which many of the defendants operated. But it suffices that they knew the policy and tacitly approved. Certain of the defendants were more intimately concerned with the execution of the project than others, but that does not, in any sense, detract from the complicity of the other corporate officials, sitting on the governing boar or Vorstand of Farben, and who are shown by the evidence to have know what was in progress and who gave their consent thereto by their inaction and acquiescence and by not objecting. Corroborating evidence is found in the pre-trial affidavits of defendants Buetefisch and Schneider. Furthermore, members of the Technical Committee (TEA), including defendants ter Meer, Schneider, Buetefisch, Ambros, Lautenschlaeger, Jaehne, Hoerlein, Kuehne, Buergin, Gajewski, and von Knieriem (as guest) participated in meetings at which reports were made on the Auschwitz project and huge appropriations were made for the work. It taxes credulity to say that these important corporate officials were not informed in a general way of the major developments in the all-important matter of labor procurement. I conclude, form the evidence, that they were bound to know, as a pre-requisits

to the proper discharge of their duties, of such a major development as the Goering Order of 18 February 1941, issued at the request of the defendant Krauch and addressed to Reichsfuehrer SS. Himmler directed directing that concentration camp inmates be made available for the construction of the Buna plant at Auschwitz. There is, in my opinion, absolutely no merit to the defense that the defendants were "forced" to use concentration camp inmates, or that they were ignorant of Farben's plans being executed at Auschwitz.

The true attitude of Farben and the flimsy character of the defense of coercion and necessity asserted by the defendants is best illustrated by defendant Krauch's letter to Himmler written in July 1943 wherein Krauch write that he was

> "particularly pleased to hear that during this discussion you hinted that you may possibly aid the expansion of another synthetic factory…in a similar way as was done at Auschwitz by making available inmates of your camps, if necessary. I have also written to Minister Speer to this effect and would be grateful if you would continue sponsoring and aiding us in this matter."

I conclude that all members of the Vorstand viewed the availability of such labor and its subsequent employment at Auschwitz as an "assistance" to Farben and all defendants must share in the responsibility for its utilization. The evidence established that consistent procedures for dissemination of information among key Farben personnel were regularly followed as a matter of policy. It is certain that, through this medium, at the very minimum, knowledge came to the more important Farben officials of the extent of Farben's participation in the slave labor utilization at Auschwitz. The increase in inmates at Auschwitz from seven hundred in 1941 to more than seven thousand by the end of 1943 could nor have been unknown to the defendants who were members of Farben's Vorstand.

Having accepted a large scale participation in the utilization of concentration camp inmates at Auschwitz, and, acting through certain of its agents, having exercised initiative in negotiating with the SS to obtain more and more workers, Farben became inevitably connected with the inhumanity involved in the utilization of such labor. This majority opinion, in effect, by recognizing the defense of necessity, implies that if defendants in the operation of the slave labor program did no more that the cruel and inhuman regulations prescribed, those participating in the utilization of labor under such condition of servitude are not responsible therefore. I cannot agree. The evidence establishes that the conditions at Auschwitz were

inhumane in an extreme degree. It is no overstatement, as the prosecution asserts, to calculate that the working conditions indirectly resulted in the deaths of thousands of human beings. These defendants may not, themselves, have subjectively willed the deaths of the unfortunate victims, who were subsequently exterminated by the SS in the gas chambers, but their part in the utilization of the inmates under such conditions was a link of the entire hideous criminal enterprise and I cannot minimize in the slightest degree the heavy responsibility which Farben and its responsible concentration camp, Monowitz, in 1942. Funds for this purpose were appropriated by the TEA and the Vorstand after consideration the need – showing again the widespread knowledge within Farben of the extent of utilization of the concentration comp inmates.

The extreme cold, the inadequacy of the food, the rigorous nature of the work, the cruel treatment of the workers by their supervisors, combine to present a picture of horror which, I am convinced, has not been at all overdrawn by the prosecution and which is fully sustained by the evidence. The living and working conditions were in truth unendurable and, as these inmates were engaged in Farben's business, it was the responsibility of Farben to correct the situation. Such efforts at amelioration of conditions as were attempted to be shown, fall short of any adequate effort to meet the real responsibility imposed on Farben in this regard. It must be borne in mind that these men were misused as slaves by Farben, through Farben's own initiative and out of Farben's desire to utilize them as means of furthering the building of a plant whose immediate purpose was to be war production but was to be iftted [fitted] into the longe [long]- range plans of Farben's domination of the eastern economic area. Consequently, in view of the degree of the initiative, the duty to the workers must be regarded as a higher dity [duty]. Farben's efforts fall far short of the requirement.

Among the credible witnesses whose testimony was offered to the Tribunal were a number of British prisoners of war who described the pitiable lot of the inmates working on the Farben site at Auschwitz. There was highly credible evidence from these eye-witnesses to established – that the inmates were skinny and not physically fit for the work they were forced to do; that their appearance was such as to make it hard to believe that they were human beings; that they all suffered from malnutrition; that the so-called "buna soup" was thin and watery and inadequate; that the inmates were being starved to death. I am convinced from this evidence that Farben did not discharge the high responsibility imposed upon it in the matter of seeing that its

compulsory workers were adequately fed, and responsibility for this situation cannot be shifted by the defendants to the SS and the Farben sub-contractors.

The evidence further establishes conclusively that the working conditions on the Farben construction site at Auschwitz were inhuman. The miserable inmates were forced to work beyond their physical capacities. They were subjected to rigorous discipline in the performance of work assignments and there was a direct relationship between the requirements set by Farben and the ill-treatment accorded the inmates by the SS. The son of the defendant Jaehne has testified:

> "Of all the people employed in I.G. Auschwitz, the inmates received the worse treatment. They were beaten by the capos, who in their turn had to see to it that the amount of work prescribed them and their detachments by the I.G. foreman was carried out, because otherwise they were punished by being beaten in the evening in the Monowitz Camp. A general driving system prevailed in the I.G. construction site, so that one cannot say that the capos alone were to blame. The capos drove the inmates in their detachments exceedingly hard, in self-defense, so to speak, and did not shrink from using any means of increasing the work of the inmates, just so long as the amount of work required was done."

I am convinced that this is a true description of what actually happened at Auschwitz and from the vast amount of credible evidence introduced before the Tribunal I am further convinced that it was true, as contended by the prosecution, that is was Farben's drive for speed in theconstruction on at Auschwitz which resulted indirectly in thousands of the inmates being selected for extermination by the SS when they were rendered unfit for work. The proof establishes that fear of expermination [extermination] was used to spur the inmates to greater efforts and that they undertook tasks beyond their physical strength as a result of such fear. It is also clear from the proof that injured or ill inmates frequently refrained from seeking medical treatment out of fear of being sent for extermination to the gas chambers at Birkenau.

The defendants, members of the Vorstand, cannot, in my opinion, avoid sharing a large part of the guilt for these numberless crimes against humanity. The condition of the inmates being worked by Farben could not have been unknown to the principal corporate officials. The truth of the matter is related by the witness Frost, a British prisoner of war:

> "In addition to the I.G. foreman and other officials at Auschwitz, every once in a while

big shots from the main firm would come down to the plant. In my opinion nobody who worked at the plant or who came into the plant on business or inspections could avoid discovering the facts that the inmates were literally being worked to death. They had no color in their faces whatsoever. They were practically living corpses covered with skin and bones and completely broken in spirit. Everyone who was there knew that inmates were kept there as long as they turned out work and that when they were physically unable to continue, they were disposed of."

In summary, it is established that Farben selected the Auschwitz site with knowledge of the existence of the concentration camp and contemplated the use of concentration camp inmates in its construction; that these matters necessary had to be reported to and discussed by the Vorstand and the TEA; that Farben initiative obtained the inmates for work at Auschwitz; that the project was constantly before the members of the TEA for necessary appropriation of funds; that the TEA had to have information on the labor aspect of the project to properly perform its functions; that the condition of the concentration camp inmates was brought to the attention of the TEA and Vorstand members in various discussions and reports; that a number of the defendants were actually eye witnesses to conditions at Auschwitz because of personal visits to Auschwitz; that the defendants Krauch, von Knieriem, Schneider, Jaehne, Ambros, Buetefisch, and ter Meer were all shown to have visited the I.G. Auschwitz site during occurrences of the nature generally described above; that the conditions at Auschwitz were so horrible that it is utterly incredible to conclude that they were unknown to the defendants, the principal corporate directors, who were responsible for Farben's connection with the project.

A letter written by a Farben employee at I.G. Auschwitz to a Farben employee at Frankfurt on 30 July 1942 describes the enterprise in which these defendants must be considered a consenting part as follows:

"…You can imagine that the population is not going to behave in a friendly or even correct manner toward the Reich Germans, especially towards us I.G. people. The only thing that keeps these filthy people from becoming rebellious is the fact that armed power (the concentration camp) is in the background. The evil glances which are occasionally cast at us are not punishable. Apart from these facts, however, we are quite happy here……

"With a staff of such size, you can well imagine that the number of accommodation

barracks is constantly increasing and that large city of shacks has developed. In addition to that, there is the circumstance that some 1,000 foreign workers see to it that our food supply does not deteriorate. Thus we find Italians, Frenchmen, Croats, Belgians, Poles, and, as the ‘closest collaborators' the so-called criminal prisoners of all shades. That the Jewish race is playing a special part here you can well imagine. The diet and treatment of this sort or people is in accordance with our aim. Evidently, an increase in weight is hardly ever recorded for them. That bullets start whizzing at the slightest attempt of a‘change of air' is also certain as well as the fact that many have already disappeared as a result of a ‘sunstroke.'"

It is contended by the defense that the construction of the Farben concentration camp Monowitz was to improve the living standards of concentration camp inmates who formerly lived in the Auschwitz concentration camp. Such contention is refuted by contemporaneous documents which establish that far from any such humanitarian motive the true motive was to obtain the labor which had been interrupted due to the typhus epidemic of 1942. The defendant Krauch admitted that Ambros and Buetefisch "proposed to the executive board of the I.G. to erect the concentration camp Monowitz within the I.G. territory Auschwitz for reasons of expediency." I am convinced from the proof that the purpose in erecting the camp was to obtain the concentration camp labor and to make it more productive by eliminating the transportation to and from the main concentration camp. The food system, also pointed to by the defense, was introduced to increase the output of the workers and was administered with this as a predominant consideration. Moreover, it did not actually improve the miserable lot of majority workers. It is never a defense in criminal case to point to instances in which criminal action is not involved. The evidence does not convince me of any serious efforts by Farben to remedy the food situation at Auschwitz and I am unable to find evidence of a mitigating nature in this regard.

We have in this case the absurd contention urged that the fence around the premises of the Farben plant was erected, not for the purpose of making the servitude of the workers more secure, but for the purpose of giving the inmates more freedom and keeping the SS out of the premises. Here, again, the contemporary documents establish that the purpose of the construction of the fence was to meet suggestions of the SS that this be done to make possible assignment of more inmates under conditions requiring fewer guards.

The overwhelming weight of the evidence it to the effect that the living conditions in Farben's camp Monowitz added greatly to the misery of the workers. The quarters were overcrowded, the water, toilet, and other sanitary facilities were inadequate. The devastating effect of the cold weather upon the under-nourished and underclothed inmates has, in my opinion, been established by overwhelming credible proof. The attempt of Farben to ameliorate this situation by providing winter coats in 1944 shortly before the evacuation of Auschwitz can hardly be said to operate as exculpation for the misery and mistreatment as related in the statements on numerous eye witnesses to these conditions. The defense has introduced voluminous documents, affidavits, and some testimony in an attempt to controvert the overwhelming weight of the prosecution's evidence. I do not consider that this evidence presented by the defense is sufficiently credible to raise a reasonable doubt on the subject of mistreatment.

The contemporaneous documents introduces by the defense fall far short of detracting from the prosecution's proof. On cross-examination by the prosecution, in a sampling process, the defense affiants who were leading employees of Farben at the Auschwitz site made numerous damaging admissions seriously detracting from the weight and credibility of the previous testimony given in their affidavits. Defense affiants who were called for cross-examination by the prosecution fell into three categories – those from whom testimony corroborating the damaging evidence of the prosecution was obtained on cross-examination; those whose credibility was completely destroyed on cross-examination; and those affidavits were withdrawn by the defense, in some instances, even after appearance at Nurnberg. I conclude that very little weight, is to be attached to the affidavits introduced by the defense. Unless we are to resort to weighing the evidence by the bulk number of affidavits, the prosecution has established Farben's participation in the mistreatment of the concentration camp inmates at Auschwitz in an aggravated degree. At the very minimum it was the responsibility of defendants Schneider and the members of the Vorstand shown to have visited Auschwitz to have succeeded in correcting these conditions. This, these defendants did not do, and they should be held criminally responsible for these aggravations of the crime of enslavement, in addition to their responsibility for participation in the utilization of slave labor.

No useful purpose would be served in an analysis of the evidence in detail as applied to

each individual defendant. The guilt varies in degree with each defendant and his functions in Farben must be considered. It is untenable, however, in my opinion, to say that Schmitz, the Chairman of Farben's Vorstand, bears none of the responsibility for Farben's participation in the slave labor program, including occurrences at Auschwitz, or that Schneider, Farben's Main Plant Leader in the labor field in not responsible. International law cannot possibly be considered as operating in a complete vacuum of legal irresponsibility – in which crime on such a broad scale can be actively participated in by a corporation exercising the power and influence of Farben without those who are responsible for participating in the policies being liable therefore. What is true of Schmitz, Chairman of the Boars, is true of the other managers of Farben in variety degrees.

Auschwitz has been chosen in this summation as it is the most aggravated of Farben's many participations in the slave labor program. In such treatment of the evidence, it must be noted that the various defendants who were plant managers were, in most instances, also actively participants in the utilization of slave labor in plants under their jurisdiction, and in instances in which this was not the case the defendants knew of, acquiesced in, and were consequently responsible for the Farben policy involved in such utilization. To review the evidence in detail as to each defendant, or as to each Plant Manager, in this opinion, would lengthen the opinion beyond any reasonable bounds. With respect to the Western workers employed in Farben plants, mitigating circumstances have been shown in regard to the treatment of some of these workers. It suffices, therefore, to conclude this separate expression of views by merely stating that I am of the opinion that each defendant who is a member of the Vorstand should be held guilty under Count Three of the Indictment and that I disagree with the majority in the acquittal of defendants Schmitz, von Schnitzler, Gajewski, Hoerlein, von Knieriem, Schneider, Buergin, Haeflinger, Ilgner, Jaehne, Kuehne, Lautenschlaeger, Mann, Oster, and Wurster. These defendants are, in my opinion, guilty subject to such individual consideration of mitigating circumstances as should be considered in fixing their punishment.

[Paul M. Hebert]

Paul M. Hebert Paul M. Hebert, Judge

Military Tribunal VI