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The Netherlands

## **The Nuremberg Military Tribunals and the origins of International Criminal Law**

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### **Citation**

Heller, K. J. (2011, June 16). *The Nuremberg Military Tribunals and the origins of International Criminal Law*. Retrieved from <https://hdl.handle.net/1887/17757>

Version: Not Applicable (or Unknown)

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## INTRODUCTION

The previous chapter ignored two modes of participation included in Article II(2) of Law No. 10: being “connected with plans or enterprises” involving the commission of a crime – enterprise liability – and abetting a crime. This chapter rectifies those omissions by discussing those modes of participation in the context of conspiracy and criminal membership, two substantive crimes that are closely related to enterprise liability. Section 1 discusses the OCC’s failed efforts to prosecute conspiracy to commit war crimes and crimes against humanity. Section 2 then explores enterprise liability, noting that the tribunals treated abetting as a form of participation in a criminal enterprise instead of as a mode of participation in its own right. Finally, Section 3 focuses on the crime of criminal membership, which is best understood as a hybrid of conspiracy and enterprise liability.

### I. CONSPIRACY TO COMMIT WAR CRIMES AND CRIMES AGAINST HUMANITY

The London Charter contained two provisions concerning conspiracy: Article 6(a) criminalized “participation in a common plan or conspiracy” to commit a crime against peace, and the final sentence of Article 6 criminalized “participating in a common plan or conspiracy to commit any of the foregoing crimes.” Those “foregoing crimes” included both war crimes and crimes against humanity; read literally, therefore, the London Charter criminalized conspiring to commit all three of the crimes listed in Article 6 of the Charter.

Despite the catch-all provision of Article 6, the IMT held that “the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war.” In its view, the catch-all provision did not “add a new and separate crime to those already listed,” but simply established “the responsibility of persons participating in a common plan.”<sup>1</sup> In other words, although conspiring to commit crimes against peace was criminal in itself, conspiring to commit war crimes or crimes against humanity was simply a mode of participation in those crimes.

Unlike the London Charter, Law No. 10 gave no indication that conspiring to commit war crimes or crimes against humanity was an independent crime – there was no equivalent to Article 6 in either Article II(1) or Article II(2). That absence, however, did not prevent the OCC from alleging such conspiracies in its first three multi-defendant cases: *Medical*, *Justice*, and *Pohl*. In the *Medical* case, for example, Count 1 of the indictment was entitled “The Common Design or Conspiracy” and alleged in Paragraph 1 that “all of the defendants herein, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, Article II.”<sup>2</sup> The other two indictments contained nearly identical language.

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<sup>1</sup> IMT JUDGMENT, 44.

<sup>2</sup> *Medical*, Indictment, para. 1, I TWC 10.

The defendants filed motions to dismiss the conspiracy charges in all three cases. Believing that it was “desirable that there be a uniform determination on the issue presented by such motions,” the Committee of Presiding Judges responded by holding a joint session on the conspiracy issue on 9 July 1947<sup>3</sup> – the first and only joint session that involved oral argument. Telford Taylor argued on behalf the OCC. Carl Haensel, who represented Joel in the *Justice* case and Loerner in the *Pohl* case, argued on behalf of the defendants.

### A. The Defense Argument

Haensel offered five arguments in support of his argument that conspiring to commit war crimes or crimes against humanity was not an independent crime under Law No. 10. The first was that such conspiracies were not mentioned in *either* the London Charter or Law No. 10. That was clearly true for Law No. 10, which mentioned conspiracy only with regard to crimes against peace, but Haensel simply ignored the catch-all provision in Article 6, which criminalized conspiring to commit any of the crimes listed in the Charter.<sup>4</sup> Haensel then distinguished Article II(2)(d)’s “connected with plans or enterprises” language by noting, accurately, that the subparagraph did not mention conspiracy and was in any case a mode of participation, not an independent crime.<sup>5</sup> Haensel also noted – his second argument – that the IMT had limited conspiracy as an independent crime to crimes against peace.<sup>6</sup>

Haensel’s third argument addressed the curious fact that although Law No. 10 did not have an equivalent to the catch-all provision in Article 6, the first article of Ordinance No. 7 specified that the NMTs would have “the power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, *including conspiracies to commit any such crimes.*”<sup>7</sup> Haensel argued that Article 1 had to be read down to exclude conspiracies to commit war crimes and crimes against humanity, because permitting the tribunals to prosecute conspiracies that were not included in Article II would undermine the “uniform legal basis in Germany” that Law No. 10 was designed to establish.<sup>8</sup> That was a good argument, given that the other Allies had adopted Article II verbatim.<sup>9</sup> Haensel could also have pointed out that Law No. 10 gave Zone Commanders the right to adopt rules of procedure that were unique to their zone, but said nothing about adopting idiosyncratic interpretations of Article II’s substantive crimes.

Haensel’s fourth argument was that the tribunals were not permitted to deviate from the substantive provisions of Law No. 10 by applying the American common law of conspiracy. Haensel claimed – explicitly invoking *debellatio* and the resulting Allied condominium – that “Germany is subject to the united occupation powers as represented in the Control Council, but not to the Russian, the English, the French, or the American law as such. The individual occupying power did not transfer the law of its own country attached to its banners into this country.”<sup>10</sup> That argument made

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<sup>3</sup> XV TWC 1060.

<sup>4</sup> Transcript of Conspiracy Oral Argument, 9 July 1947, NA-238-196-2-17, at 6.

<sup>5</sup> *Id.* at 7-8.

<sup>6</sup> *Id.* at 6-7.

<sup>7</sup> Ordinance No. 7, art. I (emphasis added).

<sup>8</sup> Transcript, 12.

<sup>9</sup> See, e.g., Rochling Appeal Judgment, XIV TWC 1099-1100.

<sup>10</sup> Transcript, 10-11.

sense – and as discussed in Chapter 5, a number of the tribunals, including Tribunal III in the *Justice* case, would later adopt it.

Haensel’s fifth and final argument was that recognizing conspiracy to commit war crimes and crimes against humanity would violate the principle of non-retroactivity, which the IMT had recognized as a principle of justice.<sup>11</sup> That argument proceeded in two steps, each questionable. Haensel first claimed that, because German law applied prior to the Allied occupation of Germany, conspiracy to commit war crimes or crimes against humanity was consistent with the principle of non-retroactivity only if “German law had known this crime previous to the occupation.” He then argued that “[t]here will hardly be one among the high judges of the Court who had met so far a German jurist who would call conspiracy to commit war crimes and crimes against humanity a recognized crime in German penal law.”<sup>12</sup>

This was the weakest of Haensel’s arguments. To begin with, the IMT had *rejected* the idea that the principle of non-retroactivity required the crimes in the London Charter to have been criminal before the war, under German law or otherwise.<sup>13</sup> But even if it had agreed with Haensel’s interpretation of the principle, his conspiracy claim would still have failed: although pre-war German criminal law did not specifically consider conspiring to commit a war crime or crime against humanity to be an independent crime, it had long accepted the idea that the mere agreement to commit certain kinds of violent acts was criminal. The Criminal Code of 1871 prohibited conspiring to commit treason and high treason “irrespective of whether the intention of the conspirators was attempted to be carried out.”<sup>14</sup> The Protection of the Republic Act, in force between 1922 and 1929, prohibited conspiring to kill government officials.<sup>15</sup> Article 49b of the Criminal Code, enacted in 1932, prohibited entering into “a combination or agreement” whose object was “the commission of major crimes against life.”<sup>16</sup> That article was then amended in 1943 to prohibit not only entering into “an agreement to commit a major crime,” but even entering “into serious negotiation to do so.”<sup>17</sup>

## **B. The Prosecution Argument**

Taylor’s presentation was not his finest moment – his arguments were disjointed, repetitive, confusing, and above all unpersuasive. He opened by attempting to explain why, if the London Charter and Law No. 10 recognized conspiracies to commit war crimes and crimes against humanity, the relevant provisions did not specifically mention such conspiracies. According to Taylor, the explanation was simple: because the common law had always accepted the idea that it was criminal to conspire to commit acts of violence, the drafters did not need to refer to conspiring to commit war crimes and crimes against humanity “any more than they felt it necessary to make express reference to the liability of accessories and accomplices or to the law of

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<sup>11</sup> Id. at 14.

<sup>12</sup> Id. at 20.

<sup>13</sup> See Chapter 5.

<sup>14</sup> Wagner, 175.

<sup>15</sup> John H.E. Fried, *Forms of Committing War Crimes and Crimes Against Humanity*, TTP-5-1-1-2, at 15.

<sup>16</sup> Wagner, 177.

<sup>17</sup> Id.

attempts. All these things adhere to such crimes automatically.”<sup>18</sup> That was a curious argument, given that the drafters of both the London Charter and Law No. 10 had, in fact, made “express reference” to “the liability of accessories and accomplices.”

They had also, of course, made express reference to conspiring to commit crimes against peace. Taylor’s second argument thus attempted to explain why, if conspiracy “automatically” adhered to crimes of violence, the drafters included that reference. In his view, the drafters had singled out such conspiracies to emphasize the collective nature of crimes against peace: “while war crimes and crimes against humanity can certainly be committed by a single individual, it is hard to think of any one man as committing the crime of waging an aggressive war as a solo venture. It is peculiarly a crime brought about by the confederation or conspiracy of a number of men acting pursuant to well-laid plans.”<sup>19</sup> That argument, however, actually cut the other way: if conspiracy “automatically” adhered to crimes of violence, why would it be necessary to specifically mention conspiracy with regard to crimes that, by their very nature, were collective endeavors? Wouldn’t it have made more sense for the drafters to emphasize that war crimes and crimes against humanity, more often the product of individual will, could also be the object of conspiracy?

Taylor’s third argument addressed perhaps his greatest obstacle: the IMT’s decision to limit conspiracy to crimes against peace. With admirable forthrightness, he claimed that the IMT “was clearly wrong, and overlooked the express language of the Charter.”<sup>20</sup> He was referring, of course, to the catch-all provision in Article 6. According to Taylor, the Tribunal had taken “the easy way out” by ignoring that provision – a result he attributed to “mistaken and misapplied suspicion of the whole concept” of conspiracy on the part of the judges.<sup>21</sup> Taylor then pointed out that Ordinance No. 7 did not make the IMT’s decisions on points of law binding on the NMTs, permitting the Committee of Presiding Judges to reach a “contrary result” for Law No. 10.<sup>22</sup>

There was, of course, a significant problem with that claim: there was no equivalent to Article 6’s catch-all provision in Law No. 10. That might well have been an oversight; as soon as the IMT released its judgment, OMGUS and the Theater Judge Advocate’s Office had both suggested amending Law No. 10 to make clear that it criminalized conspiring to commit war crimes or crimes against humanity no less than conspiring to commit crimes against peace.<sup>23</sup> The proposed amendment was never adopted, however, so Taylor was forced to explain the absence of the catch-all provision. His response was another version of his earlier “no need” argument: conspiracy to commit war crimes and crimes against humanity was “implicit” in Law No. 10, because its purpose was “to recognize the criminal liability of those who are substantially connected with the commission of a crime, even though the final criminal act is performed by someone else.”<sup>24</sup> In his view, Article II(2) was “more

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<sup>18</sup> Transcript, 7.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 11-12.

<sup>23</sup> Memo from Rockwell to Mickelwait, 12 Nov. 1946, 2.

<sup>24</sup> Transcript, 13.

than broad enough to comprehend the criminal liabilities which are held to attach to those who enter into a criminal conspiracy.”<sup>25</sup>

That argument, however, elided the critical distinction between conspiracy as an independent crime and conspiracy as a mode of participation. Taylor was supposed to be defending counts in the *Medical*, *Justice*, and *Pohl* indictments that criminalized the mere act of agreeing to commit war crimes or crimes against humanity; separate counts sought to hold the defendants responsible for being connected with plans or enterprises to commit those crimes. Yet Taylor was now implying – as he had at the beginning of his argument and would again at its end – that conspiracy was just another mode of participation under Article II(2), undermining his basic point.

Taylor’s fifth argument was perhaps his most radical: that even if conspiring to commit war crimes and crimes against humanity was not implicitly prohibited by Law No. 10, the tribunals were still free to criminalize such conspiracies. In Taylor’s view, neither the London Charter nor Law No. 10 represented “a complete, or even a nearly complete codification of international penal law.” And that was particularly true, he insisted, with regard to “the necessary degree of connection with a crime,” where the provisions in the Charter and Law No. 10 were “illustrative rather than exhaustive attempts at statutory definition.”<sup>26</sup> There was nothing inherently wrong with that argument, but it was unlikely to succeed – as we have seen, although the tribunals were willing to use conventional and customary international law to *limit* Law No. 10, they were far less willing to use such sources of law to *supplement* it. Attempt is an excellent example: although Taylor specifically invoked attempt as an inchoate crime that was not mentioned in Law No. 10 but was clearly part of international law,<sup>27</sup> the tribunals uniformly declined to criminalize attempts to commit war crimes or crimes against humanity.<sup>28</sup>

Taylor concluded his presentation by explicitly arguing that conspiracy was a mode of participation, not an independent crime. According to Taylor, “[c]onspiracy, to achieve an unlawful objective or to use unlawful means to attain an objective, is not, properly speaking, a separate crime at all; it is a test of the degree of connection with crime necessary to establish guilt.”<sup>29</sup> That claim, it is safe to say, cost Taylor the oral argument. First, as noted above, it completely undermined the conspiracy counts in the *Medical*, *Justice*, and *Pohl* indictments. And second, it did not explain why the tribunals should read conspiracy as mode of participation into Law No. 10 when Article II(2) already prohibited being “connected with plans or enterprises” involving the commission of a war crime or a crime against humanity. In the absence of such an explanation – which Taylor never provided – the Committee of Presiding Judges had no incentive to rule in Taylor’s favor.

### C. The Outcome

In fact, the Committee never ruled at all. Instead, in the ten days following the joint session, the *Medical*, *Justice*, and *Pohl* tribunals each simply dismissed the conspiracy

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<sup>25</sup> Id.

<sup>26</sup> Id. at 15.

<sup>27</sup> Id.

<sup>28</sup> See Chapter 11.

<sup>29</sup> Transcript, 15.

counts, holding that they had “no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.”<sup>30</sup>

#### **D. The OCC’s Response**

Despite the dismissal of the conspiracy counts, the OCC was not quite ready to abandon the idea that it was criminal to conspire to commit war crimes or crimes against humanity. It thus tried a new tack in four later cases, folding such accusations into counts that alleged conspiracies to commit crimes against peace. Count 5 of the *Farben* indictment, for example, alleged that the defendants had participated in “a common plan or conspiracy to commit, or which involved the commission of, crimes against peace (including the acts constituting war crimes and crimes against humanity which were committed as an integral part of such crimes against peace) as defined by Control Council Law No. 10.”<sup>31</sup> Similar language appears in the *Krupp, Ministries*, and *High Command* indictments.

Though clever, the OCC’s new approach was no more successful than its initial one. As the *High Command* tribunal pointed out when it dismissed the charges, conspiracy to commit war crimes and crimes against humanity functioned in the new omnibus count as a mode of participation, not as an independent crime, because the count alleged the actual commission of such crimes. The conspiracy allegations thus added nothing to the counts that alleged the defendants were responsible for war crimes and crimes against humanity because they were “connected with plans or enterprises” involving their commission.<sup>32</sup>

## **II. ENTERPRISE LIABILITY**

The tribunals, in short, disregarded conspiracy as an independent crime in favor of being “connected with plans or enterprises” as a mode of participation. That mode, according to the tribunals, had four elements: (1) the existence of a criminal enterprise; (2) the commission of a war crime or crime against humanity pursuant to the criminal enterprise; (3) the defendant’s knowledge of the criminal enterprise; and (4) the defendant’s participation in the criminal enterprise. As we will see, the tribunals took an exceptionally broad approach to enterprise liability’s *mens rea* and *actus reus*, making it unlikely that the failure of the conspiracy charges actually handicapped Taylor and the OCC.

### **A. The Criminal Enterprise**

#### **1. Nature**

The tribunals identified a wide variety of criminal enterprises. Some had a relatively narrow scope, such as the “campaign of persecution of the Catholic Church,” which “was a definite governmental plan... to separate the worshippers from the Church and its priests [and]destroy its leadership.”<sup>33</sup> But most were much larger. Some extended throughout Germany, such as the enterprise famously condemned in the *Justice* case: “a nationwide government-organized system of cruelty and injustice, in violation of

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<sup>30</sup> See, e.g., *Justice*, Order, 11 July 1947, XV TWC 235.

<sup>31</sup> *Farben*, Indictment, para. 146, VII TWC 59.

<sup>32</sup> *High Command*, XI TWC 483.

<sup>33</sup> *Ministries*, XIV TWC 520.

the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.”<sup>34</sup> Others extended throughout the Nazi empire. The Germanization program discussed in *RuSHA*, for example, reflected a government policy that “was put into practice in all of the countries, twelve in number, as they were ruthlessly overrun by Hitler’s armed forces.”<sup>35</sup> Similarly, the *Pohl* tribunal treated the entire concentration-camp system as a criminal enterprise designed to carry out “a broad categorical Nazi political policy” of slavery and “wholesale extermination.”<sup>36</sup>

No matter how large or small, those criminal enterprises had a common denominator: they relied on a sophisticated division of labor to accomplish their objectives. As the *Pohl* tribunal pointed out with regard to the Final Solution:

An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property, is obviously a task for more than one man. Launching or promulgating such a program may originate in the mind of one man or a group of men. Working out the details of the plan may fall to another. Procurement of personnel and the issuing of actual operational orders may fall to others. The actual execution of the plan in the field involves the operation of another. Or it may be several other persons or groups. Marshaling and distributing the loot, or allocating the victims, is another phase of the operation which may be entrusted to an individual or a group far removed from the original planners.<sup>37</sup>

## 2. Horizontal and Vertical Enterprises

OCC indictments often relied on multiple criminal enterprises. In some cases, the enterprises were pleaded horizontally, with no relationship to each other. The *Milch* indictment is an example: Count 1 alleged that the defendant was connected to “plans and enterprises involving slave labor and deportation to slave labor,” while Count 2 alleged that the defendant was connected to unrelated “plans and enterprises involving medical experiments without the subjects’ consent.”<sup>38</sup> In other cases, the criminal enterprises were pleaded vertically, nesting a series of smaller, interrelated enterprises inside of a larger, overarching one. The *RuSHA* indictment alleged, for example, that the defendants had participated in the Nazis’ “systematic program of genocide” through their connection to “plans and enterprises” involving, *inter alia*, kidnapping the children of Eastern workers, Germanization of enemy nationals, and persecuting Jews.<sup>39</sup> Similarly, the indictment in the *Justice* case operationalized the “nationwide government-organized system of cruelty and injustice” by alleging that the defendants were connected to various aspects of that system, such as the Night and Fog program or the enforcement of the Law against Poles and Jews.<sup>40</sup>

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<sup>34</sup> Justice, III TWC 985.

<sup>35</sup> RuSHA, V TWC 96.

<sup>36</sup> Pohl, V TWC 969.

<sup>37</sup> Id. at 1173, Supplemental Judgment.

<sup>38</sup> Milch, Indictment, paras. 1, 8, II TWC 360, 362.

<sup>39</sup> RuSHA, Indictment, para. 2, IV TWC 609.

<sup>40</sup> Justice, Indictment, para. 11-15, III TWC 20-22.



The OCC's rationale for pleading such vertically-nested criminal enterprises was clear: it wanted to use proof that a defendant was involved in a small enterprise to hold him responsible for participating in the overarching one. That strategy, however, was only partially successful. Some tribunals accepted it. The *Justice* tribunal, for example, specifically held that "[t]he record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment."<sup>41</sup> The Tribunal thus convicted Rothenberger for taking part in the "system of cruelty and injustice" because he had taken a consenting part in the Night and Fog program.<sup>42</sup> Similarly, the *Ministries* tribunal held Puhl responsible for the Nazis' "program of extermination" because he had participated in Action Reinhardt. As the Tribunal noted, "[i]t would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who knowingly took part in disposing of the loot must be exonerated and held not guilty as a participant in the murder plan."<sup>43</sup> By contrast, the *RuSHA* tribunal limited defendants' responsibility to the specific enterprises in which they participated. Creutz, for example, was convicted of participating in kidnapping alien children, forced resettlement, forced Germanization, and slave labor, but was not held responsible for the overarching "systematic program of genocide."<sup>44</sup>

## **B. Commission of a Crime**

Because enterprise liability was a mode of participation, not an inchoate crime, the tribunals required the prosecution to prove that the criminal enterprise had actually resulted in the commission of at least one war crime or crime against humanity. Although rarely contentious, the tribunals took that requirement seriously. In *Ministries*, for example, Tribunal IV concluded that both von Weizsaecker and Woermann had participated in a Foreign Office plan to strip Italian Jews of their citizenship. It nevertheless acquitted them because there was no evidence "that their efforts ever reached fruition, or that the crime was consummated."<sup>45</sup>

## **C. Mens Rea**

The tribunals consistently emphasized that knowledge was sufficient to satisfy the *mens rea* of enterprise liability. In *Ministries*, Tribunal IV began its analysis of von Weizsaecker and Woermann's responsibility for the mass deportation of Jews following the Wannsee Conference by stating that "[t]he question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it."<sup>46</sup> In the *Justice* case, Tribunal III said that the defendants' responsibility for the Night and Fog program depended solely on whether they had participated in it, because "[a]ll of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out knew that its enforcement

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<sup>41</sup> Id. at 985.

<sup>42</sup> Id. at 1118.

<sup>43</sup> *Ministries*, XIV TWC 611.

<sup>44</sup> *RuSHA*, V TWC 155.

<sup>45</sup> *Ministries*, XIV TWC 560.

<sup>46</sup> *Ministries*, XIV TWC 478.

violated international law of war.”<sup>47</sup> And in *Pohl*, Tribunal II held Frank responsible for participating in the concentration-camp system because he “knew that the slave labor was being supplied by the concentration camps on a tremendous scale.”<sup>48</sup>

What is particularly striking about these examples – and there are numerous others – is the complete absence of any reference to the defendant’s intent to commit the crimes contemplated by the criminal enterprise. Indeed, the *Ministries* tribunal made clear that a defendant could be convicted of participating in a criminal enterprise even if he did not subjectively desire the commission of those crimes. With regard to von Weizsaecker and Woermann’s responsibility for the deportation program, for example, the Tribunal specifically acknowledged that they “neither originated it, gave it enthusiastic support, nor in their hearts approved of it.”<sup>49</sup> Even more dramatically, the Tribunal held Puhl responsible for the extermination program even though it believed that Action Reinhardt “was probably repugnant to him” and that he would not have participated in the extermination program itself “even under orders.” The fact that he “knew that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration camps” was enough.<sup>50</sup>

Although not requiring intent, the tribunals rejected the idea that the requisite knowledge could be inferred from the defendant’s position in the Nazi hierarchy. In *Pohl*, the prosecution argued that the defendants had to have known that crimes were being committed in the concentration-camps, because they each held important positions in the WVHA. That argument was only partly successful. The Tribunal categorically rejected the idea that knowledge of a criminal enterprise could be inferred “solely from the official title” that a defendant held.<sup>51</sup> It thus acquitted Scheide because it concluded that “the only evidence on the part of the prosecution to sustain... conviction would be the organizational charts of the WVHA, which show (and the defendant admits it) that he was the chief of Amt B V.”<sup>52</sup> The Tribunal did acknowledge, however, that a defendant’s authority had some probative value regarding his knowledge of a criminal enterprise.<sup>53</sup> It thus held Fanslau responsible for participating in the concentration-camp system because “[h]is claim that he was unaware of what was going on in the organization and in the concentration camps which it administered is utterly inconsistent with the importance and indispensability of his position” as chief of Amtsgruppe A.<sup>54</sup>

#### **D. Actus Reus**

Once a tribunal determined that a defendant had knowledge of a criminal enterprise that had led to the commission of a crime, “the remaining question” was whether he had participated in the enterprise.<sup>55</sup> The tribunals took an extremely broad approach to defendant’s participation in a criminal enterprise, holding that it was immaterial to a defendant’s responsibility for the enterprise’s crimes whether he “originated or

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<sup>47</sup> Justice, III TWC 1038.

<sup>48</sup> Pohl, V TWC 995, 1015.

<sup>49</sup> Ministries, XIV TWC 478.

<sup>50</sup> Id. at 620-21.

<sup>51</sup> Pohl, Supplemental Judgment, V TWC 1171.

<sup>52</sup> Id. at 1017-18.

<sup>53</sup> Id. at 1171, Supplemental Judgment.

<sup>54</sup> Id. at 998.

<sup>55</sup> Justice, III TWC 981.

executed them, or merely implemented them, justified them to the world, or gave aid and comfort to their perpetrators.”<sup>56</sup>

The tribunals did not, however, treat all participants in a criminal enterprise equally. On the contrary, they distinguished between defendants who were involved in *creating* the enterprise and defendants who simply *executed* an enterprise created by others: whereas creating an enterprise automatically satisfied the participation requirement, executing an enterprise satisfied it only if the defendant possessed a certain amount of authority and discretion in his professional activities. As the *Ministries* tribunal wrote, the question was whether the defendants “participated in the initiation or formulation of such spoliation program, or whether they... were vested with responsibility for execution thereof, and in such positions of responsibility, influenced or played a directing role in the carrying out of such criminal program.”<sup>57</sup>

## 1. Creators

The tribunals convicted numerous defendants for participating in the “initiation or formulation” of criminal enterprises. The *RuSHA* tribunal held Creutz responsible for the kidnapping of alien children because he had “issued instructions for the carrying out of a ‘children’s operation’, which meant the bringing of children into Germany for Germanization.”<sup>58</sup> The *Pohl* tribunal held Pohl responsible for the Eastern Industries Limited Liability Company’s systematic theft of Jewish property because he was “an original incorporator” of the program and had served as its “directing head and chief executive.”<sup>59</sup> And the *Einsatzgruppen* tribunal held Haensch responsible for a series of executions committed by his Sonderkommando even though he was on leave at the time, noting that “[a] high ranking officer who plans an operation or participates in the planning and has control over officers taking part in the movement certainly cannot escape responsibility for the action by absenting himself the day of execution of the plan.”<sup>60</sup>

The tribunals also included defendants who either drafted or issued decrees that gave rise to criminal enterprises in the category of “creators.” In *Ministries*, for example, Stuckart was held responsible for the extermination program because he had “drafted and approved” legislation and regulations that gave shape to the program. The Tribunal specifically noted that “if those who implemented or carried out the orders for the deportation of Jews to the East are properly tried, convicted, and punished... then those who in the comparative quiet and peace of ministerial departments, aided the campaign by drafting the necessary decrees, regulations, and directives for its execution are likewise guilty.”<sup>61</sup>

## 2. Executors

Unlike creating a criminal enterprise, executing a criminal enterprise had two requirements: (1) action in connection with the enterprise; and (2) sufficient authority or discretion concerning that action.

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<sup>56</sup> *Ministries*, XIV TWC 472.

<sup>57</sup> *Id.* at 684.

<sup>58</sup> *RuSHA*, V TWC 106.

<sup>59</sup> *Pohl*, V TWC 991.

<sup>60</sup> *Einsatzgruppen*, IV TWC 549.

<sup>61</sup> *Ministries*, XIV TWC 645-46.

### a. Action

Nearly any activity that was connected to an enterprise satisfied the “action” requirement. Four categories of actions were particularly common. The first included defendants who had administered criminal programs formulated and initiated by others, such as Mettgenberg in the *Justice* case, who had overseen the execution of the Night and Fog program,<sup>62</sup> and Loerner in *Pohl*, who had “helped administer” the slave-labor program “in an active and responsible fashion.”<sup>63</sup>

The second category, related to the first, included defendants who had applied decrees enacted by others. The *Justice* tribunal, for example, held that the action requirement was satisfied by Lautz “zealously” enforcing the Night and Fog Decree,<sup>64</sup> by Klemm supervising the enforcement of the Law against Poles and Jews in terms of clemency decisions,<sup>65</sup> and by Rothaug serving as “an instrument” of his superiors by subjecting Night and Fog prisoners to unfair trials.<sup>66</sup>

The third category included defendants who had provided resources necessary for the effective implementation of a criminal enterprise. The *Pohl* tribunal convicted Pohl for participating in the medical-experimentation program because he had supplied the subjects from his concentration camps, even though that was his only connection to the program.<sup>67</sup> The *Ministries* tribunal convicted Berger for participating in the concentration-camp program because he “furnished the exterior guards” for the camps.<sup>68</sup> And the *Einsatzgruppen* tribunal convicted Klingelhofer for participating in the “Einsatzgruppe operation” because he had been involved in “in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization.”<sup>69</sup>

The fourth and final category included defendants who had participated in distributing the proceeds of criminal enterprises involving the plunder of property. Pohl was thus responsible for Action Reinhardt because it “was a broad criminal program, requiring the cooperation of many persons, and Pohl's part was to conserve and account for the loot.”<sup>70</sup> In *Ministries*, Pohl was held responsible for Action Reinhardt for similar reasons.<sup>71</sup>

### b. Authority and Discretion

The NMTs also specifically limited responsibility for executing a criminal enterprise to defendants who possessed a certain degree of authority and discretion with regard to the actions that connected them to the enterprise. That limitation is both implicit and explicit in the judgments. It is implicit in the tribunals’ consistent emphasis on the authority and discretion of the defendants they convicted for executing a criminal enterprise. In the *Justice* case, Tribunal III noted that Mettgenberg “exercised wide

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<sup>62</sup> *Justice*, III TWC 1128.

<sup>63</sup> *Pohl*, V TWC 1107-08.

<sup>64</sup> *Justice*, III TWC 1120.

<sup>65</sup> *Id.* at 1095.

<sup>66</sup> *Id.* at 1155.

<sup>67</sup> *Pohl*, V TWC 998.

<sup>68</sup> *Ministries*, XIV TWC 548.

<sup>69</sup> *Einsatzgruppen*, IV TWC 569.

<sup>70</sup> *Pohl*, V TWC 989.

<sup>71</sup> *Ministries*, XIV TWC 611.

discretion and had extensive authority”<sup>72</sup> and von Ammon “held an executive position of responsibility involving the exercise of personal discretion” concerning the Night and Fog program.<sup>73</sup> In *Pohl*, Tribunal II pointed out that Tschentscher “was not a mere employee of the WVHA, but held a responsible and authoritative position in this organization,”<sup>74</sup> and that Loerner “was more than a mere bookkeeper,” because “he exercised discretion and judgment and made many important decisions.”<sup>75</sup> And in *Ministries*, Tribunal IV convicted Ritter for participating in the plan to murder downed Allied flyers because he was “selected to occupy a position of considerable delicacy,” not “a mere messenger boy,”<sup>76</sup> and convicted Lammers for participating in the perversion of the Ministry of Justice because he was not “a notary public certifying the acts of others,” but “possessed sufficient rank to interpose and exercise judgment and power.”<sup>77</sup>

The tribunals also explicitly relied on the “authority and discretion” requirement to acquit defendants accused of executing a criminal enterprise. Two examples are particularly notable. The first is the *Ministries* tribunal’s explanation of why Schwerin von Krosigk could not be held responsible for helping to implement the concentration-camp program:

As Minister of Finance the defendant furnished the means by which the concentration camps were purchased, constructed, and maintained, but it is clear that he neither originated nor planned these matters, and the funds were provided by him on Hitler's express orders. They were Reich funds and not Schwerin von Krosigk's, and he had no discretion with respect to their disposition. His act in disbursing them for these purposes was actually clerical, and we cannot charge him with criminal responsibility in this matter.<sup>78</sup>

The tribunal’s explanation is revealing in two respects. First, it explicitly grounded the “authority and discretion” requirement in the fact that Schwerin von Krosigk did not plan or originate the concentration-camp program. Second, it indicates that the tribunals viewed the requirement as conjunctive, not disjunctive: although Schwerin von Krosigk did not have discretion concerning the funds, as Minister of Finance he clearly had authority.

The other notable example is the *Pohl* tribunal’s explanation of why, despite the fact that they were both auditors in the WVHA, Vogt was acquitted of participating in the concentration-camp program while Hohberg was convicted. The difference, according to the Tribunal, concerned the extent of their authority and discretion: “Vogt at no time was anything but an auditor, whereas Hohberg, in addition to being an auditor, was an active participant in the economic enterprises of the SS in the several capacities of chief of staff W, financial director, and economic advisor.”<sup>79</sup>

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<sup>72</sup> Justice, III TWC 1128.

<sup>73</sup> *Id.* at 1134.

<sup>74</sup> *Pohl*, V TWC 1000.

<sup>75</sup> *Id.* at 1014.

<sup>76</sup> *Ministries*, XIV TWC 441.

<sup>77</sup> *Id.* at 604.

<sup>78</sup> *Id.* at 676.

<sup>79</sup> *Pohl*, V TWC 1042.

## E. “Abetting” a Criminal Enterprise

Article II(2)(b) of Law No. 10 enumerated abetting an independent mode of participation in a crime. The tribunals, however, addressed abetting solely in the context of enterprise liability, considering defendants who had executed a criminal enterprise to have abetted it: Rothenberg “aided and abetted” the perversion of the Nazi justice system<sup>80</sup>; the question was whether von Weizsaecker and Woermann “aided, abetted, or implemented” the deportation program, because they had not “originated” it<sup>81</sup>; Pohl did not “have a decisive part in formulating” the extermination program, but was guilty if he “was an accessory to or abetted” it<sup>82</sup>; etc.

## F. The Responsibility of Private Economic Actors

As we have seen in previous chapters, the tribunals were generally more lenient toward private economic actors – bankers and industrialists – than toward military and government defendants. That lenience extended to enterprise liability. To begin with, most of the economic defendants who were accused of being “connected with plans or enterprises” involving war crimes or crimes against humanity were acquitted. Despite convicting Flick of plunder and the use of slave labor, for example, the *Flick* tribunal refused to consider him a member of either the “program of systematic plunder” or the slave-labor program. In its (questionable) view, Flick had not been aware of the former<sup>83</sup> and had not taken part in the “formation, administration, or furtherance” of the latter.<sup>84</sup> Similarly, although the *Ministries* tribunal acknowledged that Puhl – the Vice President of the Reichsbank – had financed SS enterprises that he knew made use of slave-labor, it nevertheless acquitted him of participating in the slave-labor program because it did not believe that he had played “a decisive role in the granting of such loans.”<sup>85</sup>

The tribunals were also willing to ignore their own jurisprudence when doing so favored an economic defendant. As we have seen, the *Ministries* tribunal convicted a variety of military and government defendants who had knowingly used their authority and discretion to execute a criminal enterprise. The Tribunal nevertheless refused to hold Rasche – the head of the Dresdner Bank – responsible for helping implement the slave-labor program by making loans to SS enterprises, even though it believed that he knew the enterprises were using slaves *and* that he had authority and discretion concerning the loans:

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law?... A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the

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<sup>80</sup> Justice, III TWC 1118.

<sup>81</sup> Ministries, XIV TWC 478.

<sup>82</sup> Pohl, Supplemental Judgment, V TWC 1174.

<sup>83</sup> Flick, VI TWC 1208.

<sup>84</sup> *Id.* at 1198.

<sup>85</sup> Ministries, XIV TWC 852. The *Krupp* tribunal, it is worth noting, did not consider enterprise liability even though the indictment alleged that the defendants had participated in the slave-labor and plunder programs. See *Krupp*, Indictment, paras. 36, 48, IX TWC 25, 30.

interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit.<sup>86</sup>

The *Ministries* tribunal's unprincipled lenience toward Rasche is particularly striking in light of its willingness to convict Keppler and Kehrl on the ground that their corporation, Deutsche Umsiedlungs-Treuhandgesellschaft (DUT), had been "an important component in the scheme of German resettlement and in the crimes charged in count five relating to it."<sup>87</sup> The difference between the situations was that, unlike the Dresdner Bank, DUT was "in form a private, limited liability corporation," but "was in fact a governmental agency."<sup>88</sup>

### **G. The Responsibility of Legal Advisors**

A number of defendants in the NMT trials were legal advisors: the *Justice* case's Klemm, Mettgenberg, Joel, and von Ammon advised the Reich Minister of Justice; *Farben's* von Knieriem was the corporation's chief lawyer; *Ministries'* von Weizsaecker and Woermann advised the Nazi government on behalf of the Foreign Office; and *High Command's* Lehmann was a legal advisor to the OKW. As we saw in the previous chapter, such advisors could be convicted of ordering a crime if they helped draft an illegal order; that was Lehmann's fate, for example, with regard to the Night and Fog Decree.<sup>89</sup> The tribunals also had little difficulty holding legal advisors responsible for crimes committed pursuant to a criminal enterprise when they had been directly involved in creating the enterprise or had used their authority and discretion to execute it. Klemm was convicted of helping execute the "nationwide system of cruelty and injustice," for example, because he had issued the letter that denied the protection of German's juvenile law to Jews, Poles, and gypsies.<sup>90</sup> Similarly, von Ammon was convicted of that implementing that system because he had used his "executive position of responsibility involving the exercise of personal discretion" to ensure that Night and Fog defendants were executed as quickly and efficiently as possible.<sup>91</sup>

The more difficult question is whether the tribunals believed that a legal advisor satisfied enterprise liability's participation requirement simply by providing inaccurate legal advice in response to an official query. The three tribunals that addressed the issue took different positions. The *Justice* tribunal implied that providing such advice would not satisfy the participation requirement. In holding Klemm responsible for participating in the perversion of the justice system, for example, it specifically pointed out that the letter limiting the ambit of Germany's juvenile law was "an expression of Party policy," not "a legal opinion," with regard to Poles and Jews and that it could "hardly be construed as a legal opinion as to gypsies in view of the statement therein made that a special regulation will come into effect" as a result of the letter.<sup>92</sup> Those statements suggest that, had Klemm simply offered

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<sup>86</sup> *Ministries*, XIV TWC 622.

<sup>87</sup> *Id.* at 588.

<sup>88</sup> *Id.* at 583.

<sup>89</sup> *High Command*, XI TWC 693.

<sup>90</sup> *Justice*, III TWC 1095.

<sup>91</sup> *Id.* at 1041-42.

<sup>92</sup> *Id.* at 1095.

an opinion about the legality of the proposed policy, the Tribunal would not have convicted him.

By contrast, the *Farben* tribunal suggested that providing inaccurate legal advice *could* satisfy the participation requirement. When it acquitted von Knieriem of participating in the Nazis' spoliation program, the Tribunal noted that there was no evidence "that he was consulted for legal advice in connection with" Farben's plunder in Poland and emphasized that "[h]is action in a legal capacity in the establishment of the eastern corporations for possible operations in Russia [was]s not connected with any completed act of spoliation."<sup>93</sup> Both statements imply that, in the right circumstances, providing legal advice would be criminal.

Finally, the *Ministries* tribunal held in no uncertain terms that legal advisors could participate in a criminal enterprise simply by providing inaccurate legal advice. On 9 and 11 March 1942, Eichmann wrote the Foreign Office to ask whether the SS could deport thousands of French and stateless Jews to Auschwitz. Nine days later, von Weizsaecker and Woermann replied in a signed order that it had "no objection" – language von Weizsaecker had changed from Woermann's "no misgivings."<sup>94</sup> The Tribunal held that, as the Reich's principal legal advisors, both men had an absolute duty to object to the deportations when Eichmann asked them to assess their legality. Their failure to do so was thus criminal:

The Foreign Office was the only official agency of the Reich which had either jurisdiction or right to advise the government as to whether or not proposed German action was in accordance with or contrary to the principles of international law. While admittedly it could not compel the government or Hitler to follow its advice, the defendants von Weizsaecker and Woermann had both the duty and responsibility of advising truthfully and accurately...

Unfortunately, for Woermann and his chief von Weizsaecker, they did not fulfill that duty. When Woermann approved the language "the Foreign Office has no misgivings" and von Weizsaecker changed it to the phrase "has no objections," which phrases so far as this case is concerned are almost synonymous, they gave the "go ahead" signal to the criminals who desired to commit the crime.<sup>95</sup>

The *Ministries* tribunal also emphasized that providing inaccurate legal advice satisfied enterprise liability's participation requirement even if accurate advice would not have prevented the commission of war crimes or crimes against humanity. The Tribunal had "no doubt" that the SS would have deported the French Jews even if von Weizsaecker and Woermann had objected to the deportation. It nevertheless held that "[i]f the program was in violation of international law, the duty was absolute to so inform the inquiring branch of the government."<sup>96</sup>

### III. CRIMINAL MEMBERSHIP

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<sup>93</sup> Farben, VIII TWC 1159.

<sup>94</sup> Ministries, XIV TWC 496.

<sup>95</sup> Id. at 958-59, Motion for Correction.

<sup>96</sup> Id. at 959.



Article II(1)(d) of Law No. 10 recognized as a crime “[m]embership in categories of a criminal group or organization declared criminal by the International Military Tribunal.” Eighty-seven defendants in the NMT trials were charged with membership in one of the four organizations that the IMT had declared criminal: the SS, the SD, the Gestapo, and the Leadership Corps of the Nazi Party.<sup>97</sup> None were charged solely with criminal membership; Taylor decided early on to leave pure “membership cases” to the denazification tribunals.<sup>98</sup> Seventy-four of the 87 were convicted of criminal membership,<sup>99</sup> 10 of whom were acquitted of all other charges.<sup>100</sup>

### **A. Nature of the Crime**

Most scholars have described the crime of criminal membership as a form of conspiracy.<sup>101</sup> That description accords with the IMT judgment, which described a criminal organization as “analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.”<sup>102</sup> As the “formed *or* used” language indicates, such organizations could have been held criminal even if they had never committed a crime.

It is also possible, however, to view criminal membership as a form of enterprise liability. Article 9 of the London Charter provided that “[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.” The parenthetical language implies that a conviction for membership required proof that a defendant was responsible for at least one criminal act committed by the organization of which he was a member. Indeed, that was Justice Jackson’s view: he specifically argued at the IMT that a criminal organization “must have committed crimes against the peace or war crimes or crimes against humanity.”<sup>103</sup> As the UNWCC pointed out, “[v]iewed in this light, membership resembles more the crime of acting in pursuance of a common design than it does that of conspiracy.”<sup>104</sup>

### **B. Elements of the Crime**

The IMT touched only briefly on the elements of criminal membership, recommending that “[m]embership alone” not be considered criminal and that the crime “should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation.”<sup>105</sup> The tribunals distilled

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<sup>97</sup> JESSE JOSEPH SILVERGLATE, *THE ROLE OF THE CONSPIRACY DOCTRINE IN THE NUREMBERG WAR CRIMES TRIALS* 215 (1969).

<sup>98</sup> TAYLOR, *FINAL REPORT*, 17.

<sup>99</sup> SILVERGLATE, 216.

<sup>100</sup> *Id.* at 221.

<sup>101</sup> See, e.g., CARL HAENSEL, *DAS ORGANISATIONSVERBRECHEN: NÜRNBERGER BETRACHTUNGEN ZUM KONTROLLRATSGESETZ NR. 10, 54-55* (1947).

<sup>102</sup> IMT JUDGMENT, 67.

<sup>103</sup> XXII NUREMBERG TRIAL PROCEEDINGS 240 (29 Aug. 1946).

<sup>104</sup> XIII LRTWC 99.

<sup>105</sup> IMT JUDGMENT, 67.

those statements into a test for criminal membership that had three elements: (1) membership in a criminal organization; (2) voluntary membership; and (3) knowledge of the organization's criminal purposes.

## 1. Membership

The membership requirement, which the *Farben* tribunal described as a threshold test,<sup>106</sup> was rarely problematic. The easiest cases were defendants who had not been members of organizations deemed criminal by the IMT or had been members of non-criminal subgroups within criminal organizations. Rothaug was an example of the former: the *Justice* tribunal acquitted him because he had been a member of the Lawyer's League, which was connected to the Nazi Party but was not part of the Leadership Corps.<sup>107</sup> Von der Heyde was an example of the latter: he was acquitted in *Farben* because he had been a member of an SS Riding Unit, which the IMT had exempted from criminal liability.<sup>108</sup>

The more difficult cases involved honorary members of the SS – civilian defendants who received an honorary rank in the organization after the Nazis seized power.<sup>109</sup> The tribunals held that whether an honorary member of the SS satisfied the membership requirement was a functional test, “determined by a consideration of his actual relationship to [the SS] and its relationship to him.”<sup>110</sup> The *Farben* tribunal thus acquitted Bueteufisch of criminal membership because he had not taken the SS oath, had never attended SS functions, and refused to wear an SS uniform,<sup>111</sup> while the *Ministries* tribunal convicted Lammers because he remained an honorary member of the SS long after recognizing its criminal nature.<sup>112</sup>

## 2. Voluntariness

The OCC advanced a remarkably expansive concept of “voluntariness” – one that, as Silverglate notes, effectively rendered “the defense of involuntary membership meaningless.”<sup>113</sup> First, it argued that the tribunals should rely on Article X of Ordinance No. 7 to irrebuttably presume that a defendant was a voluntary member of any organization that the IMT had considered “entirely voluntary”<sup>114</sup> – a description that, conveniently enough, applied to all four of the organizations the IMT had declared criminal. Second, it contended that, in the alternative, the tribunals should limit the category of “involuntary” membership to being drafted into a criminal organization; “threats of political and economic retaliation” for failing to join should not qualify.<sup>115</sup> Third, and finally, it argued that the tribunals should not consider involuntary the membership of a defendant who had unsuccessfully attempted to

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<sup>106</sup> *Farben*, VIII TWC 1200.

<sup>107</sup> *Justice*, III TWC 1144.

<sup>108</sup> *Farben*, VIII TWC 1201-1202.

<sup>109</sup> *Ministries*, XIV TWC 855.

<sup>110</sup> See, e.g., *Farben*, VIII TWC 1201.

<sup>111</sup> *Id.* at 1199.

<sup>112</sup> *Ministries*, XIV TWC 859-60.

<sup>113</sup> SILVERGLATE, 218.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

resign from an organization once he learned of its criminal nature, as long as he had originally joined voluntarily.<sup>116</sup>

Voluntariness issues rarely arose during the trials – and when they did, the OCC’s arguments generally fell on deaf ears. The *Ministries* tribunal, for example, was “not impressed” by the OCC’s third argument, thus acquitting Darre of membership in the SS because Himmler and Hitler had refused to let him resign from the organization.<sup>117</sup> That said, the *Einsatzgruppen* tribunal relied on the first two arguments to reject Graf’s claim that he had not been a voluntary member of the SD. In its view, although there was evidence that his membership involved “compulsion and constraint,” the IMT’s declaration that the SD “was a voluntary organization and that membership therein was voluntary” foreclosed acquitting him. The Tribunal thus relegated the compulsion and constraint to mitigation of sentence.<sup>118</sup>

A more common involuntariness issue concerned defendants who had been drafted into a criminal organization. As noted above, the IMT had excluded such defendants from the crime of criminal membership unless “they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation.” Two tribunals applied that qualification literally: the *Einsatzgruppen* tribunal convicted von Radetzky of criminal membership in the SD because he had taken a consenting part in executions as a member of the organization,<sup>119</sup> while the *Ministries* tribunal acquitted von Weizsaecker of criminal membership in the SS because, although he was responsible for war crimes and crimes against humanity, he had committed those crimes in his capacity as an official in the Foreign Office, not as a member of the SS.<sup>120</sup> By contrast, a third tribunal – *Pohl* – acquitted Volk of criminal membership in the SS simply because he was drafted into the organization,<sup>121</sup> ignoring the fact that (as the Tribunal itself found) he had participated in the concentration-camp program as a member of the organization.<sup>122</sup> That acquittal was clearly incorrect.

### 3. Knowledge

In adopting knowledge as the *mens rea* of criminal membership, the IMT had specifically rejected Justice Jackson’s argument at trial that the lack of knowledge of an organization’s criminal purpose should “weigh in mitigation rather than in complete defense.”<sup>123</sup> The OCC nevertheless attempted to convince the NMTs to disregard the IMT’s knowledge requirement in favor of a simple negligence standard – knew or “reasonably should have known.”<sup>124</sup> That effort failed: all of the tribunals required actual knowledge instead of negligence.<sup>125</sup>

The tribunals emphasized, however, that the requisite knowledge could be inferred from the scope of an organization’s crimes and the defendant’s rank. The *Justice*

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<sup>116</sup> Id. at 220.

<sup>117</sup> *Ministries*, XIV TWC 862.

<sup>118</sup> *Einsatzgruppen*, IV TWC 587.

<sup>119</sup> Id.

<sup>120</sup> *Ministries*, XIV TWC 857.

<sup>121</sup> *Pohl*, V TWC 1051.

<sup>122</sup> Id. at 1058.

<sup>123</sup> VIII NUREMBERG TRIAL PROCEEDINGS 443 (1 Mar. 1946).

<sup>124</sup> *SILVERGLATE*, 219.

<sup>125</sup> See, e.g., *Pohl*, V TWC 1018.

tribunal convicted Alstoetter of membership in the SS, for example, because the SS's crimes were "of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberfuehrer in the SS, could have been unaware of its illegal activities."<sup>126</sup> Similarly, the *Flick* tribunal justified convicting Steinbrick of membership in the SS by pointing out that it was impossible for "a man of Steinbrick's intelligence and means of acquiring information could have remained wholly ignorant of the character of the SS under the administration of Himmler."<sup>127</sup>

The OCC also tried to convince the tribunals that voluntary membership in a criminal organization created a rebuttable presumption that the defendant was aware of the organization's criminal purpose.<sup>128</sup> That was the official American position, as demonstrated by an OMGUS proposal in late 1946 to amend Law No. 10 "to make clear that the burden of proving lack of knowledge... is upon the accused."<sup>129</sup> No such amendment was ever adopted, most likely because the British rejected the idea that the burden of proving knowledge could be shifted to the defendant.<sup>130</sup> The OCC's argument was no more successful: all of the tribunals assumed that the prosecution had to prove the defendant's knowledge beyond a reasonable doubt.<sup>131</sup> Indeed, the *Farben* tribunal explicitly endorsed that position.<sup>132</sup>

### CONCLUSION

The NMTs devoted comparatively little attention to conspiracy and criminal membership. They spent more time discussing what it meant for a defendant to be "connected with plans or enterprises" involving the commission of a crime. As we will see in Chapter 16, that jurisprudence not only anticipated the modern concept of joint criminal enterprise, it is in at least one important respect – its fine-grained approach to culpability – superior to the modern concept.

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<sup>126</sup> Justice, III TWC 1175.

<sup>127</sup> Flick, VI TWC 1217.

<sup>128</sup> Farben, VIII TWC 1198.

<sup>129</sup> Memo from Rockwell to Mickelwait, 12 Nov. 1946, 2.

<sup>130</sup> Memo from Ferencz to British Liaison Officer, 3 June 1947, NA-260-183a1-13-15, at 1.

<sup>131</sup> See, e.g., Pohl, V TWC 1018.

<sup>132</sup> Farben, VIII TWC 1198.