United States Military Tribunal at Nuremberg - United States v. Alfried Krupp et al.

N.B. As per the disclaimer [1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. X, 1949, pp. 130-159; footnotes omitted]

THE KRUPP TRIAL
TRIAL OF ALFRIED FELIX ALWYN KRUPP VON BOHLEN UND HALBACH AND ELEVEN OTHERS
UNITED STATES MILITARY TRIBUNAL, NUREMBERG,
17th NOVEMBER, 1947 – 30th JUNE 1948

[...]

4. The judgment of the tribunal on counts II and III [...]

(ii) The Law relating to Plunder and Spoliation [...]

“[...] The Articles of the Hague Regulations, quoted above [Arts 45-52 and 56], are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority – permissions which all refer to the army of occupation. [...]

”Spoliation of private property, then, is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort – always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation insofar as such needs do not exceed the economic strength of the occupied territory.

“Article 43 of the Hague Regulations is as follows:

> ‘The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.’”

This Article permits the occupying power to expropriate either public or private property in order to preserve and maintain public order and safety. However, the Article places limitations upon the activities of the occupant. This restriction is found in the clause which requires the occupant to respect, unless absolutely prevented, the laws in force in the occupied country. This provision reflects one of the basic standards of the Hague

Regulations, that the personal and private rights of persons in the occupied territory shall not be interfered with except as justified by emergency conditions. The occupying power is forbidden from imposing any new concept of law upon the occupied territory unless such provision is justified by the requirements of public order and safety. [...]

"'[...] Art. 46 [...] requires belligerent to respect enemy private property and which forbids confiscation, and [...] Art. 47 [...] prohibits pillage.'

[...]

"The general rule contained in Article 46 is further developed in Articles 52 and 53. Article 52 speaks on the 'requisitions in kind and services' which may be demanded from municipalities or inhabitants, and it provides that such requisitions and services 'shall not be demanded except for the needs of the *Army of Occupation*.' As all authorities are agreed, the requisitions and services which are here contemplated and which alone are permissible, must refer to the needs of the Army of Occupation. It has never been contended that the Krupp firm belonged to the Army of Occupation. For this reason alone, the 'requisitions in kind' by or on behalf of the Krupp firm were illegal. [...]

"The situation which Article 52 has in mind is clearly described by the second paragraph of Article 52:

> 'Such requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.'

"The concept relied upon by the defendants – namely: that an aggressor may first overrun enemy territory, and then afterwards industrial firms from within the aggressor's country may swoop over the occupied territory and utilise property there – is utterly alien to the

laws and customs of warfare as laid down in the Hague Regulations, and is clearly declared illegal by them because the Hague Regulations repeatedly and unequivocally point out that requisitions may be made only for the needs of, and on the authority of, the Army of Occupation. [...]

”The defendants cannot as a legal proposition successfully contend that, since the acts of spoliation of which they are charged were authorised and actively supported by certain German governmental and military agencies or persons, they escape liability for such acts. It is a general principle of criminal law that encouragement and support received from other wrong-doers is not excusable. It is still necessary to stress this point as it is essential to point out that acts forbidden by the laws and customs of warfare cannot become permissible through the use of complicated legal constructions. The defendants are charged with plunder on a large scale. Many of the acts of plunder were committed in a most manifest and direct way, namely, through physical removal of machines and materials. Other acts were committed through changes of corporate property, contractual transfer of property rights, and the like. It is the results that count, and though the results in the latter case were achieved through ‘contracts’ imposed upon others, the illegal results, namely, the deprivation of property, was achieved just as though materials had been physically removed and shipped to Germany”.

(iii) The Plea of National Emergency

The Judgment continued:

“Finally, the Defence has argued that the acts complained of were justified by the great emergency in which the German War Economy found itself. [...]

“[...] [T]he contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected on other grounds. War is by definition a risky and

hazardous business. That is one of the reasons that the outcome of a war, once started, is unforeseeable and that, therefore, war is a basically-unrational means of "settling" conflicts – why right-thinking people all over the world repudiate and abhor aggressive war. It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly – and at the sole discretion of any one belligerent – disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely."

(iv) The Tribunal's Application of these Rules to the facts of the Case: Findings on Count II

In the following paragraphs the Tribunal is seen to have made specific application, to certain of the facts of the case, of the rules elaborated above:

"We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by the *Krupp firm* constitute a violation of Article 43 of the Hague Regulations which requires that the laws in force in an occupied country be respected: that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected: that the *Krupp firm*, through defendants Krupp, Loeser, Houdremont, Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations by purchasing and removing the machinery and leasing the property of the Austin plan and in leasing the Paris property: and that there was no justification for such action, either in the interest of public order and safety or the needs of the army of occupation. […]

"From a careful study of the credible evidence we conclude there was no justification under the Hague Regulations for the seizure of the Elmag property and the removal of the

machinery to Germany. This confiscation was based on the assumption of the incorporation of Alsace into the Reich and that property in Alsace owned by Frenchmen living outside of Alsace could be treated in such a manner as to totally disregard the obligations owned by a belligerent occupant. This attempted incorporation of Alsace into the German Reich was a nullity under international law and consequently this interference with the rights of private property was a violation of Article 46 of the Hague Regulations."

Of the taking of machines from the Als-Thom Factory, the Tribunal also ruled: "We conclude from the credible evidence that the removal and detention of these machines was a clear violation of Article 46 of the Hague Regulations."

Again, the Tribunal decided that: "We conclude that it has been clearly established by credible evidence that from 1942 onwards illegal acts of spoliation and plunder were committed by, and in behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly between about September, 1944, and the spring of 1945, certain industries of the Netherlands were exploited and plundered for the German war effort, 'in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.'" [...]

(vii) The Plea of Superior Orders or Necessity

After dealing with the law and evidence regarding the employment of civilians, the Tribunal turned its attention next to a plea put forward by the Defence:

"The real defence in this case, particularly as to Count III, is that known as necessity. It is contended that this arose primarily from the fact that production quotas were fixed by the Speer Ministry; that it was obligatory to meet the quotas and that in order to do so it was necessary to employ prisoners of war, forced labour and concentration camp inmates made available by government agencies because no other labour was available in sufficient

quantities and, that had the defendants refused to do so, they would have suffered dire consequences at the hands of the government authorities who exercised rigid supervision over their activities in every respect. [...]

“The defence of necessity in municipal law is variously termed as ‘necessity’, ‘compulsion’, ‘force and compulsion’, and ‘coercion and compulsory duress’. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

“The rule finds recognition in the systems of various nations. The German criminal code, Section 52, states it to be as follows:

> ‘A crime has not been committed if the defendant was coerced to do the act by irresistible force or by a threat which is connected with a present danger for life and limb of the defendant or his relatives, which danger could not be otherwise eliminated’.

“The Anglo-American rule as deduced from modern authorities has been stated in this manner:

> ‘Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil. Homicide through necessity – i.e., when the life of one person can be saved only by the sacrifice of another – will be discussed in a subsequent chapter. The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief. To the same general effect speak high English and

American authorities. Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.'

"As the Prosecution says, most of the cases where this defence has been under consideration involved such situations as two shipwrecked persons endeavouring to support themselves on a floating object large enough to support only one; the throwing of passengers out of an over-loaded lifeboat; or the participation in crime under the immediate and present threat of death or great bodily harm. So far as we have been able to ascertain with the limited facilities at hand, the application to a factual situation such as that presented in the Nurenberg Trials of industrialists is novel. [...]

"The defence of necessity is not identical with that of self-defence. The principal distinction lies in the legal principle involved. Self-defence excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right. [...]

"Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. Upon the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct. That is this case. [...]

The Tribunal dealt with another aspect of the plea of necessity as follows:

"It will be observed that it is essential that the 'act charged was done to avoid an evil both

serious and irreparable,' and 'that the remedy was not disproportioned to the evil'. What was the evil which confronted the defendants and what was the remedy that they adopted to avoid it? The evidence leave no doubt on either score." In the opinion of the Tribunal, in all likelihood the worst fate which would have followed a disobedience of orders to use slave labour would have been, for Krupp, the loss of his plant, and for the other accused the loss of their posts.

(viii) The Individual Responsibility of the Accused

When dealing with the law protecting prisoners of war, the Tribunal interjected the following remark: "The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel. In case they are violated there may be a difference in the degree of guilt, depending upon the circumstances, but none in the fact of guilt." [...]

[T]he Tribunal emphasised that guilt must be personal. It continued: "The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient. The rule which we adopt and apply is stated in an authoritative American text as follows:

> 'Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefore. [...] He is liable where his [...] authority is established, or where he is the actual present and efficient actor. When the corporation itself is forbidden to do an act, the prohibition extends to the board of directors and to each director, separately and individually.' [*Corpus Juris Secundum*, Vol. 19, pp. 363, American Law Book Co. (1940), Brooklyn, N.Y.]

"Under the circumstances as to the set up of the Krupp enterprise after it became a private firm in December, 1942, the same principles apply. [...]

Discussion

1. According to IHL, what constitutes looting? In what circumstances may property of occupied territory be used? Any type of property? Who may use such property? (HR, Arts 23(g) [2], 46(2) [3], 47 [4], 52 [5], 53 [6] and 55 [7]; CIHL, Rules 49 [8]-52 [9]) Do the foregoing IHL provisions prohibit the use of such property by private individuals? Even if those private individuals are authorized by the occupying power? May an occupying power delegate certain of its prerogatives under IHL to private enterprises?
2. a. To whom do the rules of IHL apply? Only to States? Only to combatants? Only to agents of the State? To private individuals? If applicable to private individuals, does IHL prohibit only actions committed by individuals against the State? Or also actions against another individual? (GC I-IV, Arts 49 [10]/50 [11]/129 [12]/146 [13]respectively; P I [14], Arts 85 [15] and 86 [16])
   b. Was it proper for the Court to find private individuals guilty of violations of IHL? Particularly if the State not only authorized but actively encouraged such actions? Could the Court have so held if those individuals had not acted in conformity with the policy and ideology of the Nazi regime, but instead under an "occupying power" following a "Manchester liberal approach" of not interfering with private enterprise? Are looting and slave labour imaginable under pure market conditions, without any interference by the occupying power?
3. Did the Court correctly determine that the accused could not invoke the defence of national emergency? Is it correct to say that in no circumstances may a State or an individual derogate from the rules of IHL in a national emergency? Is the pertinent passage in this decision compatible with the theory of the ICJ in the Nuclear Weapons Advisory Opinion [**See** ICJ, Nuclear Weapons Advisory Opinion [17]], where the ICJ leaves the question open whether "in an extreme circumstance of self-defence, in which the very survival of a State is at stake", rules of IHL might be violated?
4. a. Is the defence of necessity or duress available for an individual accused of grave breaches of IHL? If so, when?
   b. Are the defences of national emergency and of necessity to be treated in the same way as far as breaches of IHL are concerned?

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