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The War Crimes Trial Against German Industrialist *Friedrich Flick et al* - A Legal Analysis and Critical Evaluation

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Abstract

This research paper is an analysis of the case *United States v Flick et al* which took place in 1947 in Nuremberg, Germany. Friedrich Flick, a powerful German industrialist, and several high ranking officials of his firm were tried by a United States military tribunal for war crimes and crimes against humanity committed during the Third Reich. The proceedings and the decision itself are the subject of a critical examination, including an investigation of the factual and legal background. The trial will be regarded in the historical context of prosecutions against German industrialists after World War II. Seen from present-day perspective, the question will be raised whether any conclusions can be drawn from the Flick case in respect of the substance of present-day international criminal law.

Key Words

- Nuremberg War Crime Trials
- International Military Tribunal
- Control Council Law No. 10
- Friedrich Flick
- industrialists
- forced labour
- war crimes
- crimes against humanity
- inchoate crimes
- corporate liability

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Declaration of Authorship

I declare that **The War Crimes Trial Against German Industrialist *Friedrich Flick et al* - A Legal Analysis and Critical Evaluation** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student..... Date.....

Signed.....

List of Referenes

I. Primary Sources

- Charter of the International Tribunal, Nuremberg, in: 39 *American Journal of International Law* (1945), Suppl. 257.
- The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (1950).
- Control Council Law No. 10, Official Gazette of the Control Council for Germany No. 3, 31 January 1945, pp. 50 et seq.
- Military Government in the American Zone, Ordinance No 7 of 18 October 1946 ("*Organization and Powers of Certain Military Tribunals*").
- Military Government in the American Zone, Ordinance No 11 of 18 February 1947, ("*Amending Military Government Ordinance No. 7 of 18 October 1946, Entitled »Organization and Powers of Certain Military Tribunals«").*
- Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 – Vol. 6, 7, 8, 9, 12. Digital version available at http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html (accessed on 19 October 2010).
- Rome Statute of the International Criminal Court of 17 July 1998, 37 *ILM* (1998), pp. 999 et seq.
- T. Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10, 1949. Digital version available at **http://www.loc.gov/rr/frd/Military_Law/NT_final-report.html** (accessed on 19 October 2010).

II. Secondary Sources

Books

- Bähr, Johannes et al: *Der Flick-Konzern im Dritten Reich*, München, Oldenbourger Wissenschaftsverlag (2008).

- Bower, Tom: 'Die *Nürnberger Nachfolgeprozesse*', in: Eisfeld, Rainer/Müller, Ingo (eds.), Gegen Barbarei: Essays Robert M.W. Kempner zu Ehren, Frankfurt am Main, Athenäum (1989).
- Drobisch, Klaus: *Der Prozess gegen Industrielle (gegen Friedrich Flick und andere)*, in: G. R. Ueberschär (ed.), Der Nationalsozialismus vor Gericht. Die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943-1952, pp. 121 – 132, Frankfurt am Main, Fischer Taschenbuch Verlag (1999).
- Ferencz, Benjamin B.: *Lohn des Grauens; die verweigerte Entschädigung für jüdische Zwangsarbeiter*, Frankfurt/New York, Campus Verlag (1986).
- Frei, Norbert / Ahrens, Ralf / Osterloh, Jörg / Schanetzky, Tim: *Flick - Der Konzern, die Familie, die Macht,* München, Karl Blessing Verlag (2009).
- Griech-Polelle, Beth A.: *The Nuremberg War Crimes Trial and its policy consequences today*, Baden-Baden, Nomos Verlag (2009).
- Hankel, Gerd / Stuby, Gerhard (eds.): *Strafgerichte gegen Menschheitsverbrechen*, Hamburg, Hamburger Edition, HIS (1995).
- Jung, Susanne: *Die Rechtsprobleme der Nürnberger Prozesse: dargestellt am Verfahren gegen Friedrich Flick*, Tübingen, J.C.B. Mohr (1992).
- Kastner, Klaus: *Von den Siegern zur Rechenschaft gezogen. Die Nürnberger Prozesse*, Nürnberg, Hofmann Verlag (2001).
- Kudlich, Hans: *Die Unterstützung fremder Straftaten durch berufsbedingtes Verhalten*, Berlin, Duncker + Humblot (2004).
- Lillteicher, Jürgen (ed.): *Profiteure des NS-Systems?: Deutsche Unternehmen und das „Dritte Reich“*, Berlin, Nicolai Verlag (2006).
- Marienburg, Kerstin: *Die Vorbereitung der Kriegsverbrecherprozesse im II. Weltkrieg*, Hamburg, Verlag Dr. Kovac (2008).
- von zur Mühlen, Bengt (ed.): *Die 12 Nürnberger Nachfolgeprozesse 1946-1949*, Berlin, Chronos Verlag (2000).
- Nill-Theobald, Christiane: “Defences” bei Kriegsverbrechen am Beispiel Deutschlands und der USA, Freiburg im Breisgau, MPI (1998).

UNIVERSITY of the WESTERN CAPE

- Priemel, Kim Christian: *Flick: Eine Konzerngeschichte vom Kaiserreich bis zur Bundesrepublik*, Göttingen, Wallstein Verlag (2007).
- Reginbogin, Herbert R. / Safferling, Christoph J.M. (eds.): *The Nuremberg Trials: International Criminal Law Since 1945 = Die Nürnberger Prozesse: Völkerstrafrecht seit 1945*, München, K.G. Saur (2006).
- Stallbaumer, Lisa M.: *Strictly Business? The Flick Concern and 'Aryanizations': Corporate Expansion in the Nazi Era*, Ph.D. diss., University of Wisconsin-Madison, (1995).
- Taylor, Telford: *Die Nürnberger Prozesse, Hintergründe, Analysen und Erkenntnisse aus heutiger Sicht*, München, Heyne Verlag (1994).
- Thieleke, Karl-Heinz (ed.): *"Fall 5" Anklageplädoyer, ausgewählte Dokumente, Urteil im Flickprozeß*, Berlin, Deutscher Verlag der Wissenschaften (1965).
- Weinke, Annette: *Die Nürnberger Prozesse*, München, C. H. Beck Verlag (2006).
- Werle, Gerhard: *Principles of International Criminal Law*, 2nd Ed., The Hague, TMC Asser Press (2005).
- Wiesen, Jonathan S.: *West German Industry and the Challenge of the Nazi Past, 1945-1955*, Chapel Hill, University of North Carolina Press (2001).

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WESTERN CAPE

Articles

- Bush, Jonathan A.: The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg really said, in: *Columbia Law Review* (2009) Vol. 109, (pp. 1094 – 1262).
- Cassel, Doug: Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, in: *Northwestern University Journal of International Human Rights* (2008) Vol. 6, (pp. 306 et seq).
- Danner, Allision Marston: The Nuremberg Industrialist Prosecutions and Aggressive War, in: *Virginia Journal of International Law (*2006), (pp. 651- 676).
- Dix, Helmut: Die Urteile in den Nürnberger Wirtschaftsprozessen, in: *Neue Juristische Wochenschrift* 1949, (pp. 376 – 381).

- Herz, Richard: Corporate Alien Tort Liability and the Legacy of Nuremberg, in: *Gonzaga Journal of International Law* (2007), (pp. 76 – 80).
- Jacobson, Kyle: Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity, in: *The Air Force Law Review* (2005), Vol. 56 (pp. 167-231).
- Jessberger, Florian: Die I.G. Farben vor Gericht - Von den Ursprüngen eines "Wirtschaftsvölkerstrafrechts", in: *JuristenZeitung* 2009, Vol. 19 (pp. 924 – 932).
- Kranzbühler, Otto: Nuremberg Eighteen Years Afterwards, in: *De Paul Law Review*, (1964 – 1965), Vol. 14 (pp. 333 – 347).
- Lippman, Matthew: War Crimes Trials of German Industrialists: The "Other Schindlers," in: *Temple International and Comparative Law Journal*, (1995), (pp. 173 – 267).
- Ramasastry, Anita: Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations, in: *Berkeley Journal of International Law* (2002), (pp. 91 – 159).
- Schabas, William A.: Enforcing international humanitarian law: Catching the accomplices, in: *International Review of the Red Cross* (2001), Vol 83 (pp. 439 – 459).
- Skinner, Gwynne: Nuremberg's Legacy Continues: The Nuremberg Trials' Influencing on Human Rights Litigation in U.S. Courts under the Alien Tort Statute, in: *Albany Law Review* (2008) Vol. 71 (pp. 321 – 367).
- Stallbaumer, Lisa M.: Big Business and the Persecution of the Jews: The Flick Concern and the "Aryanization" of Jewish Property Before the War, in: *Holocaust and Genocide Studies* (1999), Vol. 13 (pp. 1 – 27).
- Stallbaumer, Lisa M.: Frederick Flick's Opportunism and Expediency, in: *Dimensions - A Journal of Holocaust Studies* Vol. 13, No. 2.
- Turner Jr., Henry Ashby: Big Business and the Rise of Hitler, in: *The American Historical Review* (1969) Vol. 75 (pp. 56 – 70).

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Table of Contents

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Introduction

On 22 December 1947, German industrialist Friedrich Flick was sentenced by a United States military tribunal in Nuremberg to seven years' imprisonment for committing war crimes and crimes against humanity during the Nazi era. Two high-ranking officials of the Flick concern were convicted as well, while three others were acquitted. This court's decision was the result of a trial which lasted for over nine months. The official judgement consists of over 1200 pages,[1] the complete trial protocols amount to 11,026 pages.[2]

The purpose of the research paper at hand is to conduct a legal historical analysis of the case. Hence, the court's decision is the main focus of this study. The factual and legal background of the trial will be examined, as well as the political context and the relevance for present-day international criminal law.

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The first chapter will illuminate the factual background of the Flick case by giving an overview of the involvement of the Flick firm with the Nazi system, focusing on the rearmament, spoliation, the forcible acquisition of Jewish property ("Aryanisation") and the forced labour policy.

In the second chapter, the legal setting for the Flick trial shall be outlined. Different legal approaches to holding German big businesses accountable were discussed amongst the Allies. The chapter explores why trials of individuals where chosen instead of other possible options, and why Friedrich Flick and the other five defendants were selected by the prosecution.

The trial itself is the main topic of the third chapter, covering the period from 15 March 1947 when Flick and five others were officially indicted, until 22 December 1947, the date of the court's final judgement. The several counts, their foundation in

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1 See Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 – Vol. 6. Digital version available at http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html (accessed on 19 October 2010). In the following referred to as "Flick Trial".

2 See Flick Trial 4. The unpublished version of the trial protocols is currently only available on microfilm, see: Jung, Susanne: *Die Rechtsprobleme der Nürnberger Prozesse: dargestellt am Verfahren gegen Friedrich Flick*, Tübingen, J.C.B. Mohr (1992) 251.

Control Council Law No. 10 as well as the strategies and arguments brought up by prosecution and defence with regard to the major legal problems (for example the question of necessity) will be scrutinised. Finally the court's decision and reasoning shall be examined.

The fourth chapter will put the Flick trial in context with the other business cases in post-World War II jurisdiction. Other businessmen were prosecuted for their involvement in the Nazi system, for example in the *Krupp* and the *I.G. Farben* cases. The analysis focuses on the question if and in how far the outcomes of these business trials were influenced by the changing political climate in the emerging Cold War.

In the fifth and last chapter, the Flick trial shall be critically examined from the perspective of present-day international criminal law. How persuasive was the court's reasoning? Which, if any, conclusions can be drawn from this case? Thus, the relevance of the Flick case for the interpretation of international criminal norms and for the substance of customary international law shall be discussed.

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Chapter One: National-Socialist Germany and the Flick Concern

1. Prologue – Development of the Flick Concern before 1933

Friedrich Flick was born in 1883 as a child of farmers in the German province of the Siegerland.[3] He received merchant training for two years and after his first employment in a small mine, he quickly became part of the management of a local mining company, the Charlottenhütte.[4] Being appointed the director of the company constituted the early basis for Flick's later economic rise.

In this position, by means of modernisation, restructuring and successful contractual negotiations Flick achieved to raise the company's profits significantly. At the same time, he became silent partner in a friend's scrap metal dealing business. By granting advantageous contractual conditions to this scrap dealing company, Flick was able to

[3] See Ferencz, Benjamin B.: *Lohn des Grauens; die verweigerte Entschädigung für jüdische Zwangsarbeiter*, Frankfurt/New York, Campus Verlag (1986) 196.

[4] See Ferencz (1986: 196); Priemel, Kim Christian: *Flick: Eine Konzerngeschichte vom Kaiserreich bis zur Bundesrepublik*, Göttingen, Wallstein Verlag (2007) 53 et seq.

realise quite an amount of private profits, which went far beyond his actual director's salary.[5] These profits he then used to acquire stocks of the mining company of which he was the director. In order to achieve this secretly, Flick made use of several straw persons. Eventually, Flick himself became the majority stockholder of the company.

In the following years, Flick was able to expand his business activities, by acquiring several other steel and coal mines and spreading out into other industrial areas. But the most important factor allowing Flick to become Germany's richest industrialist was yet to come. In 1914, World War I started and in the following years, the demand for steel and other products of Flick's companies by the German military increased many times over.[6]

One particular strategy used by Flick can already be observed at this stage and was employed several times under very different political situations in the later course of events. By using quite sophisticated means, Flick was able to convince high ranking political decision makers that several of his private business activities were in fact in the public interest and indeed questions of "state necessity".[7] Unquestionably, all major producers in the steel industry made huge profits during these times. But by picturing how essential his companies were for the overall success of the German army in World War I Flick managed to receive certain concessions, which placed him in the position of a quasi-monopolist in some areas.[8]

In the 1920s, Flick's business activities expanded further and he became the owner of a major industrial conglomerate, consisting of various corporations and subsidiaries, commonly referred to as the "Flick Concern".[9]

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5 See Priemel (2007: 58 et seq.).
6 See Priemel (2007: 119).
7 See Priemel (2007: 86).
8 See Priemel (2007: 71 et seq.).
9 See Priemel (2007: 106 et seq.). The German term "Konzern" describes a large business entity, similar to a trust. The English term "Concern", though not too often found in everyday language, has been employed by the parties and the judges in the Flick trial (see for example Flick Judgement p. 176) and a number of academics (see for example Stallbaumer, Lisa M.: Big Business and the Persecution of the Jews: The Flick Concern and the "Aryanization" of Jewish Property Before the War, in: *Holocaust and Genocide Studies* (1999), Vol. 13 [pp. 1 – 27]). In the following, the term "Concern" will be used as as general reference to Friedrich Flick's industrial empire.

While his companies were growing even larger during the time of the Weimar Republic, the world economic crisis of 1930 led the whole Flick Concern to a near bankruptcy.[10] Unlike many other German steel industrialists, Flick could not rely on huge assets or savings, as his main strategy was focused on expansion.[11] His way of escaping this difficult situation is another example of the aforementioned strategy and led to what was called the "Terberger scandal".[12] Flick managed to create an illusionary threat of a takeover of his companies by the French and thus persuaded the German government to purchase his depreciated industrial shares in the German city of Gelsenkirchen at par value.[13]

Without a doubt, Flick was a brilliant businessman and an economic genius. But, on the other hand, he was rather unscrupulous and ready to use illegal means to further his own success.[14]

2. Early Support of the NSDAP

Flick's connections to the German Nazi party *NSDAP* (Nationalsozialistische Deutsche Arbeiterpartei) can be traced back early. Financial support by Flick's company can already be observed before Hitler became appointed Reich Chancellor on 30 January 1933. In 1932, Flick donated 150.000 Reichsmark to the NSDAP's electoral campaign.[15] However, as part of his political lobbying, Flick contributed to other parties including the Social Democratic Party as well, although the donations concentrated on the conservative parties.[16]

Also in 1932, Flick became a member of a group of industrialists initially called the "Keppler Circle". Initiated by Hitler, this group was assembled in order to ensure the

[10] See Lippman, Matthew: War Crimes Trials of German Industrialists: The "Other Schindlers," in: *Temple International and Comparative Law Journal*, (1995), (pp. 173 – 267), p. 188; Priemel (2007: 179 et seq.).
[11] See Priemel (2007: 220).
[12] See Priemel (2007: 237 et seq.).
[13] See Lippman (1995: 188); Priemel (2007: 237 et seq.).
[14] See for example Ferencz (1986: 196), stating that Flick's stock manipulations and ruthless way of acquiring property enabled him to become the sole owner of one of the biggest companies in the world.
[15] See Lippman (1995: 188).
[16] See Bähr, Johannes et al: *Der Flick-Konzern im Dritten Reich*, München, Oldenbourger Wissenschaftsverlag (2008) 52.

cooperation between the Nazi political leadership and like-minded powerful industrialists.[17] Later renamed into the "Circle of Friends of Heinrich Himmler", this group in particular furthered the activities of the infamous Nazi security police SS by way of financial funding. Friedrich Flick himself paid an annual sum of 100.000 Reichsmark to the SS since 1933.[18] As a component of this membership, Flick personally visited the Concentration Camp of Dachau in 1936.[19]

From an economical point of view, Flick's efforts to establish good relationships with the Nazi government were a success story. Some measures of the new regime, such as the abolition of trade unions, were directly in the interests of the leading figures in the German industry.[20]

Already by the end of 1933, the Flick's Mitteldeutsche Stahlwerke GmbH signed several contracts with the new government over the manufacturing of bombs, artillery ammunition and gun barrels.[21] With support of Reich minister Göring, Flick increased the production of military air-planes in his facilities in Leipzig in the same year as well.[22]

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Hitler's plans of expanding German territory, so called living-space (*Lebensraum*) by military means were already contained in his 1925 tract "Mein Kampf".[23] Immediately after his rise to power, he made clear that building up a forceful military required a strong industrial foundation.[24] The general policy to achieve this goal was the concept of a "*Wehrwirtschaft*" ("defence economy"). Accordingly, German industry was put under the control of the Reich Chamber of Economics and regional coordinating bodies were established consisting of business as well as state officials.[25] Flick

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17 See Lippmann (195: 188).
18 See Stallbaumer, Lisa M.: Frederick Flick's Opportunism and Expediency, in: *Dimensions - A Journal of Holocaust Studies* Vol. 13, No. 2; See Drobisch, Klaus: *Der Prozess gegen Industrielle (gegen Friedrich Flick und andere)*, in: G. R. Ueberschär (ed.), Der Nationalsozialismus vor Gericht. Die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943-1952, pp. 121 – 132, Frankfurt am Main, Fischer Taschenbuch Verlag (1999) 127.
19 See Flick Trial 1218; Danner, Allision Marston: The Nuremberg Industrialist Prosecutions and Aggressive War, in: *Virginia Journal of International Law (*2006), (pp. 651- 676) 200.
20 See Lippman (1995: 188).
21 See Drobisch (1999: 123).
22 See Drobisch (1999: 123).
23 See Lippman (1995: 176).
24 See Lippman (1995: 176).
25 See Lippman (1995: 176).

himself and a number of other high-ranking officials of the Flick company were appointed *Wehrwirtschaftsführer* ("defence economy leaders").[26]

3. Aryanisation of Jewish Property

Another policy of the Nazi regime, which gave Flick the opportunity to make huge profits and to increase his wealth was the expropriation of Jewish property, the so-called Aryanisation.[27] Immediately after Hitler's rise to power, the systematic discrimination and persecution of Jewish citizens began. By legal and non-legal measures, step-by-step Jews were deprived of their citizen rights, *inter alia* by prohibiting them to hold certain public functions or to carry out their learned professions. One part of this anti-Semitic state policy was the Aryanisation, an euphemistic term for the forced transfer of property from their Jewish owners to "Aryans", i.e. non-Jewish Germans.

Friedrich Flick himself was probably neither an ideological National Socialist nor a convinced anti-Semite.[28] However, he quickly recognized that the anti-Jewish developments in Germany created the opportunity to further expand his business empire.[29] A number of lucrative steel manufacturing companies, mines and arms factories had Jewish owners and Flick was not willing to have his competitors get all the advantages out of this re-distribution program.[30] Altogether, the Flick Concern was involved in four Aryanisation projects: The Simson arms factory, the Lübeck blast furnace and the Julius and Ignatz Petschek enterprises.[31]

However, it would be misleading and inaccurate to describe these Aryanisations simply as a combined effort of the Flick Concern and the Nazi government to get hold of Jewish property, as some historians have suggested and as the prosecution in the later trial seemed to have approached the issue.[32]

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[26] See Drobisch (1999: 122).
[27] See Priemel (2007: 430); Drobisch (1999: 126).
[28] See Jung (1992: 27); but see also Stallbaumer (1999: 3), who observes hints for an anti-Semitic attitude, but leaves the issue eventually open.
[29] See Stallbaumer (1999: 4).
[30] See Stallbaumer (1999: 3).
[31] See Stallbaumer (1999: 2).
[32] See Stallbaumer (1999: 1).

Instead, the leading factor for Flick seemed to have been profit orientation and opportunism and he continuously adapted his approaches to the changing political circumstances.[33]

Being a Jewish-owned arms facility, the Simson factories came into the focus of the Nazis as soon as 1934.[34] At that time, many Jews had not conceived the full scale of the Nazi threat, also because the Nazi government was still taking regard of its international reputation.[35] The owner, Artur Simson was intimidated by Nazi officials, *inter alia* for alleged tax violations, and eventually agreed that the company was being placed under trusteeship. The Nazi official in charge of this issue, Wilhelm Keppler, decided that Flick was appointed for the position of a trustee.[36] Although Flick's final goal was to become himself the owner of the factory, he ultimately failed in his attempts when the property was transferred to a state-owned foundation in 1935.[37]

The anti-Jewish policy in Germany rapidly radicalised in the following years, and Flick made extensive use of this political climate when he entered into negotiations with the Julius Petschek group in 1938.[38] By Flick's pointing out numerous times that the groups mines and factories were soon being expropriated by the government, the owners finally agreed to sell to the Flick Concern for a price half the actual value.[39]

The same strategy was then used in respect of the Ignaz Petschek group. But the owners, in contrast, were far more reluctant to accept a completely unreasonable price despite lengthy negotiations.[40] After the Reich Pogrom Night and the radicalisation of foreign politics, however, the Nazi government had no need for taking regard of its international reputation anymore and expropriated the Ignatz Petschek group.[41] But due to his political networking, Flick managed to acquire the property afterwards

[33] See Priemel (2007: 352); Stallbaumer (1999: 2, 4).
[34] See Stallbaumer (1999: 5).
[35] See Stallbaumer (1999: 3).
[36] See Stallbaumer (1999: 5).
[37] See Stallbaumer (1999: 5); Priemel (2007: 352).
[38] See Bähr et al (2008: 323 et seq.) for a detailled analysis.
[39] See Stallbaumer (1999: 4).
[40] See Bähr et al (2008: 343 et seq.).
[41] See Stallbaumer (1999: 5).

from the German state in exchange for some of his hard coal mines.[42] It is noteworthy that a representative of Göring mentioned to Flick's proxy Steinbrinck in 1938 that the ownership of these objects might one day be tried before an international court.[43]

The profits from the sale of iron, steel and military goods of the Flick Concern increased dramatically in the 1930's due to the rearmament policy. But economic historians have assessed that the company's expansion and increased production could have never been financed without the Aryanisation policy.[44] In-depth studies conducted recently have revealed that Flick played a very active, planning role, often even superior to the involved state officials, especially in the Aryanisation of the Julius Petschek and the Ignatz Petschek groups.[45]

4. Forced Labour

Probably the most infamous part of the Flick company's history during the Third Reich was its large-scale use of forced labour.[46] Between 1939 and 1945, every manufacturing branch of the Flick company without exception used forced labourers for their wartime production.[47] The majority of them were citizens of the occupied countries of Western and Eastern Europe who were forcibly removed from their home countries in order to work in the German Reich. Additionally, prisoners of war and concentration camp inmates were involuntarily employed in the Flick company's mines, production facilities and other branches.[48] By 1944, over half of the 120.000 employees of the Flick Concern were forced labourers.[49] More than 60. 000 prisoners of war and civil workers from foreign countries as well as 1000 concentration camp inmates had to work under inhuman living conditions.[50] Many died from exhaustion and numerous diseases; others were maltreated and executed by the SS for refusal to

42 See Drobisch (1999: 127). See Bähr et al (2008: 343 et seq.) for a detailled analysis.
43 See Drobisch (1999: 127).
44 See Priemel (2007: 431).
45 See Priemel (2007: 431).
46 See Priemel (2007: 502); Drobisch (1999: 123); Ferencz (1986: 100).
47 See Priemel (2007: 503).
48 See Priemel (2007: 502 et seq.).
49 See Drobisch (1999: 123).
50 See Drobisch (1999: 123). See Bähr et al (2008: 548 et seq.) for a detailed analysis of the forced labourers' living conditions.

work or for a breach of the discriminatory and draconic Nazi laws governing forced labour.[51] This usually occurred with full knowledge of the local directors.[52] An illustration can be taken from the testimony of a former SS officer, stating that concentration camp inmates in a specific factory of the Flick Concern were in fact incapable to work due to frozen limbs and open wounds. In the case of children spitting blood, the local directors called it the "symptoms of a cold".[53]

Although the forced labour programme was initiated and tightly regulated by the Nazi government, Flick and his associates still had some freedom of decision-making within this framework.[54] For instance, any improvements of the living conditions would have been clearly possible under the NS regime; however no such efforts whatsoever can be noticed.[55] The guiding principle was economic expansion and the fate of these workers was irrelevant from this perspective.[56] In some cases, concentration camp inmates were specifically demanded, because the wide range of disciplinary measures was anticipated to ensure a better performance of these people.[57]

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The management of the Flick Concern usually left the concrete organisation of how the forced labourers were employed and treated to the local directors.[58] But Flick and his authorised representatives were in most instances fully informed about the use of forced labour in the different branches of the Concern.[59]

5. The Flick Concern in Occupied Countries

In the early years of World War II, German troops had noticeable military success. With its Blitzkrieg strategy, the German army conquered large foreign territories both in the east and west of the German Reich. The military occupation of France, Poland

[51] See Bähr et al (2008: 549).
[52] See Bähr et al (2008: 555).
[53] See Bähr et al (2008: 555).
[54] See Priemel (2007: 504).
[55] See Priemel (2007: 505).
[56] See Priemel (2007: 503).
[57] See Priemel (2007: 504).
[58] See Priemel (2007: 505).
[59] See Priemel (2007: 505).

and other countries meant that the German government also gained control of the industrial premises in these countries. Flick and his companions quickly recognised this as an opportunity to expand their business activities.[60]

After the German invasion of Poland, Flick tried to get hold of the Bismarck smeltery in Kattowice, but it was allocated to the Krupp Concern by the Nazi administration.[61] In lengthy negotiations with the Reich government, Flick planned to take over steel production facilities in the occupied Ukraine. However, when a joint venture between the Flick Concern and the state-owned Herrman Göring Works was set up for this purpose in early 1943,[62] the retreat of the German army put an end to these efforts shortly after the actual production had started.[63] Nevertheless, around 13.000 tons of machinery were removed from the factories and brought to companies situated within the German Reich.[64]

In 1940, within days after the French troops were defeated, the Flick Concern was seeking to expand into the eastern part of France, the Alsace.[65] Unlike in Eastern Europe, these efforts were successful with regard to the Rombach facilities.[66] Due to his advanced political connections, Flick succeeded over his competitors and Herrman Göring personally allocated the Rombach facilities to Flick.[67] During the negotiations, Flick in particular referred to his "successful" purchase of the aryanised Ignatz Petschek companies.[68] The Concern was granted a trusteeship over the factories and the 7000 employers, but they were basically treated as own property.[69] A complete acquisition of the facilities was targeted from the very beginning,[70] but did eventually not occur due to the liberation of France by the Western Allies.

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60 See Priemel (2007: 430 et seq.).
61 See Bähr et al (2008: 466).
62 The so-called Dnjepr-Stahl-GmbH, see Ahrens, Ralf, in: Lillteicher, Jürgen (ed.): *Profiteure des NS-Systems?: Deutsche Unternehmen und das „Dritte Reich"*, Berlin, Nicolai Verlag (2006) 140.
63 See Bähr et al (2008: 430).
64 See Drobisch (1999: 125).
65 See Bähr et al (2008: 462).
66 See Bähr et al (2008: 439 et seq.) for a detailed analysis of the Rombach case.
67 See Bähr et al (2008: 462).
68 See Bähr et al (2008: 462).
69 See Drobisch (1999: 124).
70 See Bähr et al (2008: 463).

In summary, the assets of the Flick Concern increased from 225 million to 953 million Reichsmark between 1933 and 1943, basically a quadruplication.[71] The annual turnover of the companies during World War II is estimated around 550 million Reichsmark.[72] Friedrich Flick himself had become Germany's wealthiest man, with estimated personal assets of 3 billion Reichsmark.[73]

Chapter Two: The Road to the Flick Case: Allied Plans for Business Trials

1. Initial Plans to Prosecute German Big Business

During World War II, public knowledge regarding the involvement of German big business with the Nazi regime's crimes was widespread among the Allied nations.[74] Due to the hundreds of thousands of slave labourers transported throughout Europe, a large amount of information on the business practices of German companies flooded through many different channels into several foreign countries.[75] In addition to the quantity of cases in which German firms were involved in inhuman treatment and international crimes, the public's perception in the U.S. and other Allied countries was especially influenced by reports of extraordinary vicious business conduct such as the distribution of poison gas Zyklon B to the concentration camp Auschwitz by a German chemical company.[76] However, for the majority of the public these war-time activities were not the primarily condemnable behaviour of German big business. For most observers, the main guilt was seen in the early financial support of Hitler and his Nazi party.[77]

Thus, it does not come as a surprise that as soon as the Allies initiated plans to conduct war crime trials, these plans already included the idea that major German busi-

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71 See Bähr et al (2008: 740).
72 See Drobisch (1999: 121).
73 See Drobisch (1999: 121).
74 See Bush, Jonathan A.: The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg really said, in: *Columbia Law Review* (2009) Vol. 109, (pp. 1094 – 1262) 1105.
75 See Bush (2009: 1105).
76 See Bush (2009: 1105). See also below, Chapter Four – 1. Further Trials of Industrialists (39).
77 See Bush (2009: 1105).

ness leaders needed to be held accountable for their crimes as well.[78] In autumn 1942, the Western Allies set up the United Nations War Crimes Commission, which began collecting documents on the occurrence of war crimes and drafted a list of potential suspects to be tried before a war crime tribunal.[79] In November 1943, Churchill, Roosevelt and Stalin issued the Moscow Declaration, expressing their will to prosecute Nazi perpetrators.[80]

These efforts became more concrete in summer 1944, when British and American troops achieved military victories on the western front and advanced towards German territory.[81] Although the general idea of prosecuting German war crimes was shared among the Allies, the leading force working on the institutional prerequisites to hold such trials and conducting most investigations where the United States.[82] Under the roof of the Office of Military Government for Germany, United States (OMGUS), which handled all Germany-related political questions, several teams were appointed with different tasks such as de-cartelisation, economic development and investigating war crimes.[83]

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OMGUS itself was staffed by members of all different U.S. institutions, *inter alia* by officials from the Foreign Office, the Departments of Finance, the War Department and the White House.[84] The opinions on the issue of how to deal with German industrialists who were involved in Nazi crimes differed significantly between these institutions and therefore among the staff of OMGUS as well.[85] Substantial tensions existed especially between the policies of the Financial and the War Department. The Financial Department under Henry Morgenthau followed a strong anti-trust plan of action and is today primarily known for the idea of a complete de-industrialisation of

78 See Bush (2009: 1105).
79 See Ahrens (2006: 131).
80 See Declaration on German Atrocities [Moscow Declaration], released on 1 November 1943, in: Flick Trial X.
81 See Ahrens (2006: 131).
82 See Ahrens (2006: 131).
83 See Bähr et al (2008: 571).
84 See Bähr et al (2008: 571).
85 For an in-depth analysis, see Bush (2009: 1130 et seq.).

Germany (the so-called Morgenthau plan)[86]. Morgenthau himself also favoured the summary execution of high-level Nazi leaders instead of holding lengthy and costly trials with unpredictable outcomes.[87] The War Department on the other hand generally supported criminal tribunals, but had already been concerned during wartime that German industry might be needed in the future to build up a strong defence against communist influence.[88]

As the whole matter was controversial not only between the Allied countries but also within state institutions, the approach of holding German industrialists criminally responsible did not pursue a clear-cut strategy but was to become a dynamic process with significant shifts in the following years.[89]

2. Indictment and Dismissal of *Krupp* in the First Nuremberg Trial

In case of the preparations for the Trial of the Major War Criminals in Nuremberg (IMT),[90]initially it was in fact a strong agreement between the four Allies that at least one representative of German industry would have to stand trial. Nevertheless, no such private business representative was tried before the IMT in the end, due to a rather unfortunate chain of events and miscommunication.[91]

At first, the heads of the four allied delegations rather quickly agreed upon putting Krupp on the list of the defendants at the IMT.[92] It turned out, however, that the British and the Americans had two different Krupps in mind. The British representative Shawcross on the one hand wanted to indict the father, Gustav Krupp von Bohlen und Halbach, who had led the Krupp corporation in the 1930's and was known to have a very close relationship to the Nazi regime in its initial phases. The U.S. prosecutor Robert Jackson on the other hand had the son, Alfried Krupp, in mind who took over

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86 See Jung (1992: 10).
87 See Ahrens (2006: 130).
88 See Ahrens (2006: 131).
89 See Bush (2009: 1103).
90 See The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (1950). In the following referred to as "IMT Judgement".
91 See Frei, Norbert / Ahrens, Ralf / Osterloh, Jörg / Schanetzky, Tim: *Flick - Der Konzern, die Familie, die Macht,* München, Karl Blessing Verlag (2009) 406; Bush (2009: 1112).
92 See Bush (2009: 1111).

the control in 1943.[93] This miscommunication eventually led to the situation that the father, Gustav Krupp, was put on the list for the trial at the IMT. Gustav Krupp however was already an elderly person and just shortly before the trial at the IMT was about to begin, it became clear that Gustav Krupp was suffering from dementia and it was seen as very unlikely that he would be able to stand trial at all.[94] Recognising that in this constellation, no representative of the German industry was to be tried before the IMT, Jackson tried to convince the other Allies to put Alfried Krupp on the list instead of his father. But Shawcross was in strong opposition to this suggestion.[95] The French however were rather desperate in the interest to put a member of the Krupp family on trial, as the Krupp company had established a devastating forced labour regime in France during the time of German occupation, and even suggested to put Gustav's wife Berta on trial before the IMT.[96] At last, this all led to the outcome that no German industrialist was tried at all. In the following years, both the American and British representatives each denied any own failures and tried to shift the responsibility on each other.[97]

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The fact that no German industrialist had to stand trial before the IMT does not mean that the Trial of the Major War Criminals did not affect the Allied policy towards business trials. On the contrary, it had some negative impact on proposed future trials. This is especially true for the business-related case against former German Minister of Economics and President of the Reichsbank, Hjalmar Schacht.[98] While one may well argue that it was not feasible indicting Schacht in the first place, as he was only influential during the first years of the Nazi regime but spent the last years in a concentration camp,[99] his acquittal before the IMT definitely gave a negative precedent for oth-

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93 See Bush (2009: 1112).
94 See Ahrens (2006: 132); Bower, Tom: 'Die *Nürnberger Nachfolgeprozesse*', in: Eisfeld, Rainer/Müller, Ingo (eds.), Gegen Barbarei: Essays Robert M.W. Kempner zu Ehren, Frankfurt am Main, Athenäum (1989) 239.
95 See Ahrens (2006: 132).
96 See Ahrens (2006: 132). One reason for this rather strange suggestion may also have been that a huge artillery gun produced by the Krupp company which was used to attack Paris in World War I was named “Dicke Bertha” after Krupps wife.
97 See Bush (2009: 1112).
98 See IMT Judgement 124 et seq.
99 IMT Judgement 126.

er business-related trials in the future.[100] The weakness of this case was in fact pointed out by the IMT prosecutor Robert Jackson in later discussions on how German business can be held criminally accountable.[101]

3. Another Nuremberg for Industrialists?

Although the idea to hold a complete international criminal trial solely against representatives of German industry and banks had come up some time earlier, it was fuelled again by the dismissal of Krupp in the trial of the major war criminals. Especially Telford Taylor, who was to become the successor of Robert Jackson and in this position also the prosecutor in the Flick trial, very much favoured a second international military tribunal against German business.[102] This never took place. Firstly, the British were very much opposed to this idea.[103] In their opinion, war crime trials against industrialists were a rather dubious idea; mere commercial activity was not very much considered a crime and it was assumed that the role of the German industry was not too different from business companies for example in Britain or the U.S. This standpoint, though, only seems understandable to a certain degree if one regards the responsibility of the German industry for the initiation and waging of aggressive war. However, German big business was responsible for a number of very severe criminal acts such as slave labour, where one cannot say at all that it was comparable to the conduct of, for example, the steel industrialists in Great Britain.

While the British were opposed to a second international trial against industrialists, the Soviets strongly favoured such an approach. Their motivation at the time was also quite clear to the Western allies: such a trial was supposed to be a great opportunity to denounce private business and capitalism in general and be very helpful to communist propaganda.[104] From Soviet perspective, the purpose of such trials was not to establish

[100] See Bush (2009: 1161).
[101] See Bush (2009: 1124).
[102] See Bush (2009: 1125).
[103] See Bush (2009: 1127).
[104] See Bush (2009: 1116).

individual responsibility but rather to hold political show trials, similar to those infamous ones held in the Soviet Union in the 1930's under Stalin's notorious state prosecutor Wyschinski. Unsurprisingly, the Western allies did not want to give the Soviets such propagandistic opportunities.[105] In May 1946, Jackson delivered a memorandum to U.S. president Truman, bringing up quite a number of arguments against a second international trial and also pointing out that such a trial was likely to have a negative impact on the cooperation of German military industry with the U.S. in the future.[106]

Apart from these political reasons, the idea of a second international military tribunal for industrialists was also given up for economical reasons.[107] The lengthy trial before the IMT had already shown a number of disadvantages. With judges from France, Great Britain, U.S.A. and the Soviet Union and with German defendants, an enormous amount of documents had to be translated in several languages, which created quite some logistic problems. Having to pay for the judges, secretaries, guards, translators etc. over several months made the whole trial a rather cost-intensive enterprise. And the IMT had also shown that the interest of the media and the world community subsided gradually the more time the trial took and the more the participators where concerned with detail issues.

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By September 1946, senior staff at the prosecutors' office became aware that no complement international business trial was going to take place and that American zonal trials would have to serve as a substitute.[108]

4. Legal Debates: Conspiracy, Membership Liability and Corporate Liability

From a lawyer's perspective, it becomes of special interest to look at the legal debates which took place concerning the concrete approach to business trials.[109] Under which

[105] See Wiesen, Jonathan S.: *West German Industry and the Challenge of the Nazi Past, 1945-1955*, Chapel Hill, University of North Carolina Press (2001) 69.
[106] See Ahrens (2006: 133).
[107] See Bush (2009: 1116).
[108] See Bush (2009: 1129).
[109] For an in-depth analysis, see Bush (2009: 1094 et seq.).

legal theories and dogmatic approaches can economic actors be held criminally liable for committing crimes under international law? This question was in the 1940's and is still today very difficult to answer, as it touches and combines several different areas of criminal law, which are already complicated each for itself.

Firstly, international criminal law in general usually deals with large-scale atrocities committed by a network of perpetrators.[110] Traditional modes of participation developed under domestic criminal law do not serve as an adequate approach to establish individual responsibility of persons acting within a complex organisation such as a military unit or even a whole state.[111] While present-day international criminal law has developed a number of sophisticated doctrinal approaches,[112] the issue was only rudimentary set out in 1945/46.[113]

Secondly, even under domestic criminal law it is a difficult task to determine if and under which circumstances business practices may be considered a criminal offence. This difficulty can be observed by taking a look at the still ongoing and controversial legal debates over so called "neutral acts".[114] Thus, holding industrialists liable for international crimes was a task in the overlap of these complex legal fields.

Furthermore, the prosecutors at Nuremberg had to work with fragmentary and incomplete legal provisions in this regard.[115] Article 6 of the Nuremberg Charter reads as follows: "*Leaders, organizers and accomplices in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan*".[116] In addition, modes of participation were also included in the definition of the crimes itself.[117] This

[110] See for example Werle, Gerhard: *Principles of International Criminal Law*, 2nd Ed., The Hague, TMC Asser Press (2009), marginal no. 441.
[111] See (2009: marginal no. 441). Eventually this led to several new legal approaches, for example the theory of the "perpetrator-by-means", see Werle (2009: marginal nos. 451, 467).
[112] See Article 25 (3) of the ICC Statute, furthermore Werle (2009: marginal no. 446).
[113] See Werle (2009: marginal no. 442).
[114] See for example Kudlich, Hans: *Die Unterstützung fremder Straftaten durch berufsbedingtes Verhalten*, Berlin, Duncker + Humblot (2004).
[115] See Werle (2009: marginal no. 442).
[116] Charter of the International Tribunal, Nuremberg, in: 39 *American Journal of International Law* (1945), Suppl. 257.
[117] See Werle (2009: marginal no. 443).

obscured the whole issue even more, as for example "conspiracy", though contained in the general provision, was only included in the definition of "Crimes against Peace" and not into the other two international crimes of the IMT Charter.[118]

Furthermore, Control Council Law No 10, the core legal basis for the Nuremberg follow-up trials contained a very broad list of different modes of participation in Article II (2).[119]

The prosecutor's team at Nuremberg around Robert Jackson and his successor Telford Taylor drafted several legal assessments on the preferable legal basis for business trials.[120] Basically three different theories were developed. The first approach was to indict industrialists solely as individuals.[121] Under the second approach, the membership liability provisions of the IMT Charter, respectively Control Council Law No 10 were to be used.[122] Under this theory, industrial enterprises such as IG Farben and other huge German companies involved in Nazi crimes might be treated as criminal organisations and the criminal liability of its leading staff could then be inferred from their membership within the company.[123] The third, and presumably predominant approach among the prosecutors was to apply conspiracy theories.[124] Conspiracy charges were successfully used in a number of domestic business-related cases in the U.S. before and it seemed to provide a solution to the problem that though large scale atrocities (such as the mass use of slave workers) were easily proven, there existed still a deficiency of individualised documentary evidence.[125]

While the trial against the Major War Criminals was still ongoing, the prosecutors in their preparations for future business trials put a strong focus on conspiracy charges.[126] However, when the IMT issued its final judgement, these plans were

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[118] See Bush (2009: 1139).
[119] Control Council Law No. 10, Official Gazette of the Control Council for Germany No. 3, 31 January 1945, pp. 50 et seq.; see Werle (2009: marginal no. 444). See below, *Chapter 3, No. 5 b) Individual Accountability and Modes of Participation* (28 et seq.), for a detailed examination.
[120] For a very detailed examination, see Bush (2009: 1130 et seq.).
[121] See Bush (2009: 1136).
[122] See Bush (2009: 1136).
[123] See Bush (2009: 1147).
[124] See Bush (2009: 1137).
[125] See Bush (2009: 1137).
[126] See Bush (2009: 1140).

thrown into disarray. In their decision, the judges at the IMT expressed some deep scepticism towards both conspiracy and membership charges. Although twenty-four defendants were charged with conspiracy, only eight were convicted on this count.[127] The judges did not find it adequate to assume a single Nazi conspiracy, pointing out that the indictment on the conspiracy charge covered a period of twenty-five years,[128] thus making it difficult to determine when the conspiracy actually started (In 1919 with the formation of the NSDAP? In 1933 with Hitler's rise to power? With the initiation of aggressive acts in Austria and Czechoslovakia in 1936-1938?). The judges therefore left it open whether such a general Nazi conspiracy existed, but emphasised that "*conspiracy must be clearly outlined in its criminal purpose*".[129] With respect to the ambiguous wording of Article 6 of the IMT Charter, the judges applied a restrictive interpretation, stating that conspiracy is limited only to the crime of aggression and cannot be applied to crimes against humanity and war crimes.[130]

With regard to membership charges, the judges at the IMT also applied a narrow interpretation.[131] They stated that the application of membership liability "*unless properly safeguarded, may produce great injustice*"[132] and emphasized that "*criminal guilt is personal*".[133] Some groups such as the General Staff and the High Command were deemed as too small,[134] others such as the Reich Cabinet were regarded as being more of a titular than a functional group.[135]

As a result, the prosecution at Nuremberg refrained from experimenting with conspiracy and membership liability approaches for their upcoming business trials and instead resorted to traditional theories of individual liability.[136] However, as a number of authors have examined, the idea of a conspiracy between German industry and the

[127] See Bush (2009: 1162).
[128] See IMT Judgement 56.
[129] See IMT Judgement 57.
[130] See IMT Judgement 58.
[131] See Bush (2009: 1146).
[132] IMT Judgement 81.
[133] IMT Judgement 82.
[134] IMT Judgement 98.
[135] IMT Judgement 97.
[136] See Bush (2009: 1161 et seq.).

Nazi leadership still seemed to be underlying most of the prosecutors' reasoning.[137] This aspect will be further scrutinised at a larger stage, as it was going to have a strong impact on the proceedings and the outcome of the upcoming Flick trial.

Summing up the findings, the IMT trial and judgement with the failed attempt to indict Krupp, the acquittal of Schacht and the restrictive interpretation of the IMT Charter regarding conspiracy and membership liability established a rather unfavourable precedent for future business trials and put an end to some ambitious plans of the prosecution, already before these trials actually started.[138]

5. Why Flick?

Friedrich Flick himself was taken into custody by the Allies on 13 June 1945.[139] The criminal proceedings against him and his assistants constituted case number five of the Nuremberg follow-up trials[140] and it was the first of the so-called industrialists' trials. A multitude of reasons played a role as to why the prosecution actually chose this case to be the first business case and not, for example, indicted I.G. Farben or someone of the well-known Ruhr dynasties such as Alfried Krupp first.

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One reason was Flick's holding of public positions such as Wehrwirtschaftsführer. The prosecution misinterpreted this position as being of high political influence[141], therefore Flick was assumed to be a prime example of a ruthless Nazi businessman. And while the traditional Ruhr dynasties had already an enormous amount of wealth decades before the Nazis actually took over power in Germany, Flick's incredibly fast economic rise created special suspicions.[142] Furthermore, Flick was not only the owner of a gigantic business empire, he also held positions in other notorious German businesses like the Dresdner Bank AG.[143]

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137 See Ahrens (2006: 132); Bähr et al (2008: 565); Frei et al (2009: 404).
138 See Bush (2009: 1161).
139 Jung (1992: 7).
140 See Thieleke
141 See Bähr et al (2008: 564).
142 See Frei et al (2009: 413).
143 See Frei et al (2009: 403).

Finally, putting Flick on trial first was also a pragmatic decision. At that stage, of all potential business trials most evidence had been gathered for a trial against Flick.[144] Indicting a single major industrialist (together with his associates) was deemed as an easier task than taking on a complex organisational enterprise such as the I.G. Farben.[145]

Chapter Three: The Trial *U.S.A. v Flick et al*

The Flick trial itself began on 15 March 1947, when the prosecution officially indicted Flick and five other high-ranking members of his company. The court proceedings took over nine months, by which time over 900 documents of evidence were presented by the prosecution and the defence[146] and over 45 witnesses interrogated.[147]

The legal basis for the Flick trial was Control Council Law No 10.[148] It was issued by the Allied Control Council on 20 December 1945 followed basically along the lines of IMT Charter.[149] CCL No. 10 though only included material law provisions; the procedural provisions for the Flick trial were contained in ordinance No. 7 and ordinance No. 11 of the Military Government in the American Zone.[150] These procedural norms were only set out rudimentarily and constituted a mix of continental and common law procedure.[151]

1. Defendants and Defence Counsel

As the leading figure of the Flick company, Friedrich Flick was the main defendant and focal point of the whole trial. But it was clear that not a single person was bearing all responsibility and consequently, five high-level assistants of Friedrich Flick were indicted, too. Otto Steinbrinck, born 1888, NSDAP and SS member, was Flick's chief assistant and in particular responsible for the company's relations to public adminis-

[144] See Bush (2009: 1117).
[145] See Bush (2009: 1117).
[146] See Jung (1992: 81).
[147] See Jung (1992: 83, FN 440).
[148] See Flick Trial 11; Jung (1992: 23).
[149] See Werle (2009: marginal nos. 35,36).
[150] See Flick Trial XXIII; Jung (1992: 23).
[151] See Jung (1992: 23).

tration.[152] Konrad Kaletsch, a cousin of Flick, entered the business enterprise in the early 1920s and became authorised representative in 1937.[153] He also was a member of the NSDAP and appointed *Wehrwirtschaftsführer*.[154] The fourth defendant, Bernhard Weiss was a nephew of Friedrich Flick who worked in the Flick company's headquarters in Berlin since 1939. He, too, was appointed authorised representative and his main area of operation was the organisation of the hard coal mines.[155] Defendant Odilo Burkart was a studied lawyer and the third authorised representative in the company. In his position, he was mainly concerned with the supervision of the iron and steel production as well as the brown coal mines.[156] The last accused, Herman Terberger had not been employed at the Flick headquarters but was an executive board member in a large local meltery, the Maximilianhütte AG.[157] Terberger was a member of the NSDAP, the SA as well as *Wehrwirtschaftsführer*.[158]

The defendants in the Flick trial were counselled and represented by a number of skilled and experienced German criminal defence lawyers.[159] Even prosecutor Telford Taylor acknowledged in his closing statement the defendants' "*very able and energetic counsel".*[160] Most of them had already worked as defence counsel before the IMT and thus were used to the Anglo-American adversarial procedure and had already gained some expertise in the field of international criminal law.[161]

Former naval judge Dr. Otto Kranzbühler had defended Admiral Dönitz before the IMT.[162] Dr. Hans Flaechsner had provided counsel for Albert Speer and Dr. Walter Siemers defended Raeder.[163] Dr. Horst Pelckmann had defended the SS before the IMT.[164] Dr. Rudolf Dix had even achieved an acquittal for his client Hjalmar

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[152] See Jung (1992: 27); Drobisch (1999: 121).
[153] See Jung (1992: 28); Drobisch (1999: 121).
[154] See Jung (1992: 28).
[155] See Jung (1992: 29); Drobisch (1999: 121).
[156] See Jung (1992: 29).
[157] See Drobisch (1999: 122).
[158] See Jung (1992: 30).
[159] See Bush (2009: 1218).
[160] Flick Trial 971.
[161] See Jung (1992: 38).
[162] See IMT Judgement 5; Jung (1992: 38).
[163] See IMT Judgement 5; Jung (1992: 38).
[164] See IMT Judgement 6; Jung (1992: 38).

Schacht.[165] Thus, defence counsel for Konrad Kaletsch, Dr. Herbert Nath was the only defence attorney in the Flick trial who had no prior practical experience in this specific legal field.

Furthermore, these six lawyers could rely upon assistance by the so-called Industry Office ("Industriebüro").[166] Being a joint cooperation of several powerful German industrialists, the Nuremberg-based Industry Office worked behind the scenes to create coherent interpretation of the role of German industry in the Nazi era which favoured their own position.[167] In particular, the aim of the office was to ensure a unified defence for those industrialists indicted before war crime tribunal, *inter alia* by collecting documents, providing legal advice and engaging in public relations campaigns.[168]

2. Counts

Flick and his associates were charged with several counts of war crimes (Control Council Law No 10 Article II, No 1 b) and crimes against humanity (Control Council Law No 10 Article II, No 1 c). The prosecution refrained from charging any of them with the crime of aggression for their support of the Nazi regime with all sorts of military equipment, as the evidence was regarded as being too weak.[169] The indictment reads as follows:

Count One covered forced labour, enslavement, forced deportation and the use of prisoners of war in the arms production.[170]

Count Two dealt with the plundering and spoliation of property in occupied countries.[171] All defendants were charged with Count One and Two.

Under *Count Three,* Flick, Kaletsch and Steinbrinck were indicted for the "Aryanisation" of Jewish property.[172] According to the prosecution, the defendants' involvement

[165] See IMT Judgement 5, 127; Jung (1992: 38).
[166] See Frei et al (2009: 418); Wiesen (2001: 70).
[167] See Wiesen (2001: 70).
[168] See Wiesen (2001: 73); Priemel (2007: 633).
[169] See Frei et al (2009: 415).
[170] Flick Trial 13.
[171] Flick Trial 17.
[172] Flick Trial 21.

in the Aryanisation process amounted to the crime against humanity of "persecutions on political, racial or religious grounds" according to CCL No. 10 Article II, No 1 c.[173] This count had great significance for the prosecutor's approach in the Nuremberg follow-up trials which were still to come, as it dealt with the legal question if and under which prerequisites military tribunals had jurisdiction over crimes committed prior to 1939, the beginning of World War II.[174]

Under *Count Four,* Flick and Steinbrinck were charged with complicity in murder and other crimes for their support of the SS, in particular through Flick's membership in and support of the circle of friends of Heinrich Himmler.[175]

Finally, Otto Steinbrinck was indicted under *Count Five* for his membership in the SS, according to CCL No. 10 Art II No 1 d.[176]

3. Prosecution Strategy

After the resignation of Robert Jackson, Telford Taylor became chief of the prosecution authorities for the Nuremberg War Crime Trials. Taylor in this position also played an important role during the beginning and the end of the Flick trial; the day-to-day work and most part of the litigation before the court however were done by his assistants Thomas E. Ervin, Charles S. Lyon and Edwin H. Sears.[177]

At first glance, it seems that the prosecution solely tried to prove individual criminal responsibility and thus abandoned any ideas of conspiracy or corporate liability.[178] In contrast to the legal discussions on how to hold German business criminally accountable as it had already been described, the wording of the indictment indeed seems to support this view. Only individuals were indicted and no effort was made to hold the Flick Concern as such, as a legal person, accountable. Additionally, at least at this point no reference is made to any kind of conspiracy. Although Count Four refers to

[173] Flick Trial 21.
[174] See Weinke, Annette: *Die Nürnberger Prozesse*, München, C. H. Beck Verlag (2006) 85.
[175] Flick Trial 23.
[176] Flick Trial 25.
[177] See Jung (1992: 33).
[178] See Frei et al (2009: 414).

membership liability, compared to the other counts this can be seen as a rather minor charge.

Therefore, some authors suggested that "the change was complete" and the prosecution now only tried to establish criminal liability of individuals.[179] However, if one does not focus exclusively on the wording of the indictment but on the whole prosecution strategy and the argumentation before the court, a rather different image appears. Right from the beginning, the prosecution had put a strong focus on the overall structure of the company and especially on its political networking.[180] On many occasions, the prosecutors tried to emphasise the financial and ideological support given to the Nazi regime by the defendants.[181] This point is very well illustrated by Telford Taylor's statement about the assumed *"unholy trinity of nazism, militarism, and economic imperialism*".[182]

Thus, it can be said that the core idea guiding the prosecution was still a concept of conspiracy,[183] though this was now rather implied than explicitly stated. To a large degree, this idea is in accordance with the contemporary view of academics and politicians on the relationship between German industry and the Nazi leadership. Since the 1940's and for some decades, many historians indeed saw German industrialists as conspirators who intentionally helped Hitler to come to power (the so-called "*Steigbügelhalter*") and furthermore were involved in many of the regime's crimes out of a similar ideology.[184] And with respect to some individual representatives of German big business, such a assessment still holds today. However, a number of academic studies by historians and economists have revealed that the relationship between German industrialists and the Nazi leadership was of a more complex nature.[185] In the reality of the Third Reich, many businessmen collaborating in hor-

[179] See Bush (2009: 1177).
[180] See Frei et al (2009: 402); Ahrens (2006: 138).
[181] See Frei et al (2009: 404).
[182] Flick Trial 32.
[183] See Frei et al (2009: 403); Ahrens (2006: 139), Bähr et al (2008: 590).
[184] See Stallbaumer (1999: 1); Turner Jr., Henry Ashby: Big Business and the Rise of Hitler, in: *The American Historical Review* (1969) Vol. 75 (pp. 56 – 70) 56 et seq.
[185] See Stallbaumer (1999: 1); Ahrens (2006: 131); Wiesen (2001: ,

rendous crimes were not ideological Nazi fanatics. In many more instances, they rather acted scrupulously profit-oriented and applied Nazi ideology as much as it served their own financial gains. Taking over former Jewish property for example was often simply regarded as a very easy way to improve one's own economic position and did not require an extreme anti-Semitic attitude. The predominant state of mind of German industrialist was rather amoralism and opportunism rather than ideological persuasion.[186]

This misconception of the role of the German industry in the Third Reich by the prosecution has to be stressed, because it had a strong impact on the prosecutors' argumentation, the defence strategy of the attorneys and eventually on the final outcome of the whole trial.[187]

4. Defence Strategy

Already at a very early stage and long before the actual trial started, Flick and his associates took several precautions in order to avoid potential charges before Allied criminal courts.[188] When it became clear that Germany was going to lose the war, they began to destroy any incriminating documents and at the same time looked for exonerating documents.[189] Before and during the court proceedings, Flick and associates approached several persons, including ministry officials, other industrialists and opponents of the Nazi regime and requested them to issue exculpatory affidavits.[190] In many instances, these persons agreed to write these affidavits and they were consequently presented before the military tribunal. As an example, well-known German pastor and oppositionist Martin Niemöller gave a written statement in favour of defendant Steinbrinck, emphasising that the latter was purportedly a conscious Christian and "*man of entirely honorable character*" despite his SS membership.[191]

[186] See Stallbaumer (1999: 15)
[187] See Ahrens (2006: 138).
[188] See Priemel (2007: 625).
[189] See Bähr et al (2008: 604).
[190] See Priemel (2007: 626).
[191] Flick Trial 340.

In response to the prosecution's allegations, the defendants and their lawyers drew a completely different image of the role of the Flick company during the Third Reich. In fact, they maintained that it was not the person Friedrich Flick, but German industry itself which was on the bench.[192] Flick was seen as a mere representative, a symbol; thus a large part of the trial proceedings turned out to become a fight over the interpretation of the role of German industry during the Nazi era.[193]

Understandably, the defendants brought up a very different reading of the relationship between businessman and the Nazi government. The defendants were allegedly "*not the hammer, but the anvil*" of the dictatorial regime, as defence lawyer Kranzbühler illustrated his viewpoint.[194]

According to the defendants' version of history, the political leadership in the Nazi state had almost omnipotent powers, degrading industrialist and other powerful businessmen into a position of merely receiving orders from the state.[195] Freedom of making one's own economic-based decisions had allegedly almost ceased to exist since the Nazi party's rise to power. Thus, it was argued, the defendants had no other choice but to take part in criminal state programmes such as forced labour and spoliation of foreign countries' economies.[196]

Flick's contributions to the SS and the Circle of Friends of Heinrich Himmler were labelled as an "insurance".[197] Disobedience to the Nazi governments order would have led to immediate threats, including even the deportation to a concentration camp. Some defendants even went so far as to describe themselves as being almost resistance fighters.[198]

Thus, all responsibility was basically put upon the Nazi government.[199] However, in cases where it was impossible to blame the guilt solely on the political leadership, a

[192] See Flick Trial 161; Ahrens (2006: 141).
[193] See Bähr et al (2008: 635); Ahrens (2006: 140); Jung (1992: 65 et seq.).
[194] See Jung (1992: 65); Ahrens (2006: 140).
[195] See Jung (1992: 65); Drobisch (1999: 128).
[196] See Jung (1992: 66).
[197] Flick Trial 390.
[198] See Frei et al (2009: 421).
[199] See Drobisch (1999: 128).

different defence strategy was taken. Especially in respect of the slave labour count, the defendants argued that the leading officials of the Flick empire had no influence on the concrete working conditions of the forced workers and emphasised the alleged decentralised structure of the Flick Concern.[200] Initially, the defendants denied that any inhuman treatment of workers had existed at all.[201] At a later state, it was argued that maltreatment of forced workers was not part of the company's organisation but instead the result of excesses by low ranking officials.[202]

The battle before the court was also a battle about terminology. While the prosecutors always referred to the terms "slave labourers" or "forced labourers", defence counsel was cautious to use only the word "foreign labourers", a quite euphemistic transcription of the factual working conditions.[203]

During the cross-examination of witnesses, the defence counsel also showed a remarkably harsh treatment of the victims who were forced to work in the companies of the Flick empire.[204] Former forced labourers who worked for several years under inhumane conditions in one of Flick's companies were discredited for purportedly being hate-filled liars with inferior character.[205] This manner of examining the witnesses by the defence nevertheless seemed to have had some effect on the judges, as it is illustrated by the Presiding Judge Sears' asking a former forced worker without showing any hint of irony: "*You had a small glass of wine at the evening meal, didn't you? Did you have a little wine with the evening meal?*". [206]

5. Main Legal Issues

During the trial, the occurrence of various facts was denied, a lack of knowledge was claimed or other persons were said to have been responsible.[207] Basically all legal is-

[200] See Jung (1992: 69); Bähr et al (2008: 636).
[201] See Jung (1992: 68).
[202] See Jung (1992: 68).
[203] See Bähr et al (2008: 626); Jung (1992: 66).
[204] See Bähr et al (2008: 638); Jung (1992: 84).
[205] See Jung (1992: 84).
[206] Cited from Bush (2009: 1219).
[207] See Drobisch (1999: 128).

sues were contested by the defence, for example the jurisdiction of the tribunal and the validity of Control Council Law No. 10 were put into question.[208] Over a dozen times, the counsel assumed that the prohibition of retroactive punishment (*nulla poena sine lege*) had been violated.[209] In the following, some of the main legal debates of the Flick case will be illustrated.

a) Direct Liability of Civilians Under International Criminal Law

Before the Trial of the Major War Criminals and the decision of the IMT, it was very doubtful whether individuals could be held personally criminally responsible under international law. The IMT, however, gave strong support to this position; and with reference to international legal documents and authorities stated that individual criminal responsibility indeed exists under international law.[210] The presumably most famous statement of the IMT on this issue is that "*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced*."[211] As the IMT judgement constituted a binding precedent for the Nuremberg follow-up trials,[212] this legal concept could hardly be contended by the defence counsel in the Flick trial. Nonetheless, the defence lawyers argued that since international law in general only binds states, only state officials can be hold individually liable for breaches of any international law provisions.[213] The defendants in the Flick trials were charged for crimes committed out of their private position, and therefore it was argued that international criminal law is not applicable in this situation. They supported their position with a written legal opinion provided by a German expert on international law, Prof. Karl Kraus.[214]

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[208] See Drobisch (1999: 128).
[209] See Priemel (2007: 644); Jung (1992: 165 et seq.).
[210] See Jung (1992: 171 et seq.).
[211] IMT Judgement 55.
[212] See Military Government in the American Zone, Ordinance No 7 of 18 October 1946 ("*Organization and Powers of Certain Military Tribunals*"), Art. X.
[213] Flick Trial 162.
[214] See Jung (1992: 181).

The prosecution rejected this position completely.[215] They argued that no distinction between private persons and public officials could be found in CCL No. 10.[216] The argumentation of the defence was regarded as being part of the outdated doctrine that only states were bound by the norms of international law.[217] Prosecutor Telford Taylor furthermore argued that a state practice of indicting private citizens exists.[218] As an example of this assumed state practice, Taylor referred to the failed indictment of Gustav Krupp in the Trial of the Major War Criminals.[219] Presiding Judge Sears, though, was very sceptical on whether this case would in fact constitute a valid precedent.[220] As another precedent, Taylor cited the case against German industrialist Herrmann Röchling who had been tried before a French military tribunal after World War I.[221]

As a conclusion on this issue, Taylor held that "*this entire line of defense, which has been put forward is, we believe, so flimsy that we doubt that defense counsel ever intended it to be taken seriously on its own merits."*[222]

b) Individual Accountability and Modes of Participation

In order to establish criminal liability of Flick and his associates, it was of crucial importance to prove that their actions fell under the terms of criminal behaviour defined in the elements of the crimes in CCL No. 10. In her analysis, the author *Jung* describes this aspect as the "most difficult issue" of the whole trial.[223] The core difficulty arose out of the fact that the slave labour programme, the Aryanisation policy as well as the spoliation of foreign economies were in the first place state-organised crimes.[224] However, the defendants in the Flick trial all took part in these state programmes by various forms of collaboration with Nazi authorities, playing a more or

[215] See Jung (1992: 187).
[216] Flick Trial 1026.
[217] Flick Trial 1026.
[218] See Jung (1992: 187).
[219] Flick Trial 1026.
[220] See Flick Trial 1927; Jung (1992: 188).
[221] Flick Trial 1028.
[222] Flick Trial 1031.
[223] See Jung (1992: 47).
[224] See IMT Judgement 71 et seq. on slave labour, 75 et seq. on persecution of the jews; on spoliation see e.g. 47.

less active role. From a legal point of view, the crucial task was to determine a standard of liability, by defining for which crimes the defendants could be held accountable for.

Control Council Law No. 10 contained provisions on the modes of participation in Art II 2a-e, which reads as follows:

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was

(a) a principal or

(b) was an accessory to the commission of any such crime or ordered or abetted the same or

(c) took a consenting part therein or

(d) was connected with plans or enterprises involving its commission or

(e) was a member of any organization or group connected with the commission of any such crime

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Given the great importance of the whole matter, it is a surprise that no real attempt of establishing a coherent standard of liability was undertaken throughout the whole trial.

In the indictment, the prosecution listed the modes of participation contained in CCL No. 10 Art II 2a-e.[225] During the following proceedings though, no clear reference to these modes was made, instead the prosecution merely spoke of "main perpetrator", "culprits" etc. In many instances, the prosecution used the term "responsible" in connection with the defendants' relationship to the crimes committed.[226] But it is not possible to make out a clear meaning of this term, neither to subsume it under the commonly known modes of criminal participation.[227] At one point, defence counsel Siemers took on this issue, emphasising that with the "*extraordinarily comprehensive*

[225] See Flick Trial 13.
[226] See Jung (1992: 49).
[227] See Jung (1992: 49).

forms of participation" in this provision, one hundred thousand German industrialists, their assistants and labourers must have been war criminals in the eyes of the prosecution.[228]

A large part of the disputes between the defence lawyers and the prosecution were dealing with questions if the defendants' collaboration with Nazi authorities amounted to own criminal responsibility or whether the crimes concerned were basically committed by the Nazi government.[229] However, a clear dogmatic approach to the standard of liability can nowhere be found. Likewise, the judges at the Flick trial have not attempted to subsume the defendants' behaviour under the provisions of CCL No. 10 Art II 2 a -e, either. As a consequence, the whole issue remained rather unclear.

c) Necessity and Duress

The core argument of the defence, which was brought up dozens of times throughout the trial, was that the defendants had committed their acts due to constant threats of the Nazi regime.[230] Already in the beginning of his opening statement for defendant Flick, lawyer Dix stressed the cruelty and mercilessness of the Nazi government forcing its own citizens to commit iniquitous acts.[231] He assumed that the defendants' behaviour "*was their tragedy, but not their guilt*". [232] Following their way of interpreting the Nazi past, it was alleged that the Allies were even unable to conceive the true extent of the Nazi terror, leading all businessmen to working under the threat of being sent to concentration camps.[233] Although this argumentation was a substantial aspect of the general strategy of the defence, it was employed in particular with regard to the forced labour charges, by stating that anyone in Germany who would have refused to employ forced workers or concentration camp inmates would have been sentenced to

[228] Flick Trial 162.
[229] See Bähr et al (2008: 635).
[230] See Ahrens (2006: 140); Bower (1989: 248); Priemel (2007: 627); Frei et al (2009: 424). See also Telford Taylor, Flick Trial 1037, stating that necessity "*seems to us the ultimate defense in this case*".
[231] Flick Trial 115.
[232] Flick Trial 115.
[233] See Priemel (2007: 629).

death.[234] But, in the words of Dix, "*no legal obligation exists to die a martyr's death*".[235]

The prosecution, however, completely denied that the defendants had ever been in a situation of constant and severe pressure from the Nazi authorities.[236] Any evidence presented by the defence in this respect had assumable only shown that Flick and his associates had lived under a dictatorship, but not that they had actually been coerced into any unwanted business practices.[237] According to Taylor, "*not one iota of proof*" had been introduced which would have justified the assumption of a situation of necessity.[238] Furthermore, the prosecution emphasised that the defendants had not suddenly and unexpectedly found themselves living in a dictatorial regime. On the contrary, they had supported and facilitated the establishment and stabilisation of the Nazi rule in Germany from the very beginning.[239]

In his final statement on the behalf of all defendants, Flick emphasised their role as alleged victims again, stating that "*Nobody of the large circle of persons who know my fellow defendants and myself, will be willing to believe that we committed crimes against humanity, and nothing will convince us that we are war criminals*."[240]

6. The Verdict

On 22 December 1947, the judges delivered their verdict in the Flick trial. Friedrich Flick was sentenced to seven years of imprisonment.[241] Otto Steinbrinck received a prison sentence of five years and Bernhard Weiss of two and a half years.[242] Konrad Kaletsch, Hermann Terberger and Odilo Burkart were acquitted.[243]

Generally, the judges left no doubts that private citizens were bound by the rules of international criminal law.[244] They also did not find the principle of *nulla poena sine*

[234] Flick Trial 132.
[235] Flick Trial 132.
[236] Flick Trial 1032.
[237] Flick Trial 1039.
[238] Flick Trial 1039.
[239] Flick Trial 1041.
[240] Flick Trial 1187.
[241] Flick Trial 1223.
[242] Flick Trial 1223.
[243] Flick Trial 1223.
[244] See Priemel (2007: 644).

lege to be violated.[245] In their reasoning, nevertheless, the judges followed the line of the defence to a large degree.[246] They in particular largely accepted the defendants' defence of necessity. [247]

With respect to count one, the court stressed that the launching, the implementation and the organisation of the slave-labour policy was first and foremost a state programme.[248] The judges took it for granted that the defendants were *"not desirous of employing foreign labour or prisoners of war".*[249] The court acknowledged that CCL No 10. Article II 4 b) contained a provision according to which it was impossible to use "superior orders" as a defence,[250] however the general defence of "necessity" was seen as being still applicable.[251] Furthermore, the judges believed the defendants' assertion that severe penalties including the death sentence would have been imposed by the Nazi state in case of any refusal to accept forced workers.[252] Thus, the court regarded all cases of forced labour in the Flick Concern as justified by necessity, with a single exception.[253] Only in the case of the Linke-Hofman-Werke, where it was clearly proven that Bernhard Weiss with the approval of Friedrich Flick had applied for an increase in their quota of forced labourers, the court denied this defence.[254] The court furthermore held that the defendants had very little influence on the actual working conditions as the day-to-day administration of the factories was too remote from the Flick headquarters.[255]

In respect of count two, the spoliation of foreign economies, the court found Friedrich Flick alone guilty and acquitted all other defendants.[256] But as in the case with count one, the court stressed that it was primarily a government policy of which Flick himself had allegedly only little knowledge: "*If* [Flick's acts] *added anything to this pro-*

[245] See Priemel (2007: 644).
[246] See Frei et al (2009: 426 et seq.).
[247] See Weinke (2006: 86); Bush (2009: 1218).
[248] Flick Trial 1196.
[249] Flick Trial 1197.
[250] Flick Trial 1200.
[251] Flick Trial 1201.
[252] Flick Trial 1197.
[253] See Weinke (2006: 86).
[254] See Flick Trial 1198.
[255] Flick Trial 1199.
[256] Flick Trial 1212.

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gram of spoliation, it was in a very small degree ".[257] The judges applied a very restrictive interpretation of the Hague Convention of 1907, considering the defendants' behaviour mostly as results of the Nazi government's occupation, thus being of no great relevance to international law.[258] Even Steinbrinck, who acted as a government trustee for five years in occupied countries, was acquitted on this count.[259]

The prosecution suffered their biggest defeat on count three, though, the Aryanisation of Jewish property.[260] The judges refused to claim jurisdiction over crimes against humanity which occurred before 1939 and furthermore denied that Flick's acquisition of Jewish companies amounted to "persecution" as defined in CCL No. 10 Article II c) after all.[261] Unlike the Nuremberg Charter, CCL No. 10 expressly did not require a link between crimes against humanity and aggressive war. The judges in the Flick trial nevertheless read CCL No. 10 in the light of the decision of the IMT, thereby still requiring this nexus and holding that the military tribunal had no jurisdiction over any crimes committed prior to 1 September 1939.[262] By way of *obiter dictum*, the judges reasoned that Flick's and his associates' involvement in the Aryanisation process would not even have constituted a crime against humanity if the tribunal had jurisdiction.[263] According to their opinion, "persecution" as defined in CCL No. 10 Art II c) has to be understood very narrowly: only acts against the life and liberty of a civilian population amount to "persecution", acts against the property would clearly not.[264] Probably due to a misconception of the reality of the Aryanisation as it had occurred in Germany, the judges assumed that such forced sales may only be judicially reviewed before a court of equity, but not before a war crime tribunal.[265]

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[257] Flick Trial 1208.
[258] See Drobisch (1999: 129).
[259] See Bähr et al (2008: 427).
[260] See Bähr et al (2008: 428).
[261] See Flick Trial 1216; Bush (2009: 1185).
[262] Flick Trial 1212.
[263] Flick Trial 1213.
[264] Flick Trial 1215.
[265] Flick Trial 1214.

Counts four and five, Flick's support of the circle of friend of Heinrich Himmler and Steinbrinck's membership in the SS were decided by the court under one heading.[266] Although the factual support was undeniable, the judges assumed that none of the defendants were anti-Semitic and that basically all affiliation with the Nazis served as an "insurance" not to become the subject of Nazi repressions themselves.[267] The judges even believed the defendants' allegations of having been supporters of oppositionist groups, stating that "*Flick knew in advance of the plot on Hitler's life in July 1944, and sheltered one of the conspirators"*[268].

The fact that the outcome of the trial was observed as rather convenient for the defendants is well illustrated by a statement of Telford Taylor in his final report on the Nuremberg Trials, calling the verdict in the Flick case "*exceedingly (if not excessively) moderate and conciliatory.*".[269]

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Chapter Four: Historical Context – Increasing Unwillingness to Prosecute German Businesses in the Beginning of the Cold War

1. Further Trials of Industrialists

The Flick case was only the first post-World War II trial involving representatives of the industry and economy and several others were about to follow.[270]

Four month after the beginning of the Flick trial, the directors of the I.G. Farben were indicted before a U.S. military tribunal in "Case No 6" of the Nuremberg follow-up trials.[271] Out of the twenty-three defendants, ten received sentences between one and

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[266] Flick Trial 1216.
[267] Flick Trial 1221.
[268] Flick Trial 1222.
[269] See Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10, 1949 187. Digital version available at http://www.loc.gov/rr/frd/Military_Law/NT_final-report.html (accessed on 17 October 2010).
[270] For a more detailed analysis of the other business trials, see for example Lippman (1995: 181 et seq.); Danner (2006:658 et seq.); Jacobson, Kyle: Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity, in: *The Air Force Law Review* (2005), Vol. 56 (pp. 167-231) 177.
[271] See U.S. v. Karl Krauch et al, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 – Vol. 7, 8. See Jessberger, Florian: Die I.G. Farben vor Gericht - Von den Ursprüngen eines "Wirtschaftsvölkerstrafrechts", in: *JuristenZeitung* 2009, Vol. 19 (pp. 924 – 932) 924.

eight years in prison for committing war crimes and crimes against humanity, while the others were acquitted.[272]

"Case No 10" dealt with the management of the Krupp Concern.[273] Compared to the other Nuremberg follow-up trials against industrialists, the judges in the Krupp trial imposed the stiffest penalties.[274] Krupp and two of his managers received twelve years imprisonment and out of the twelve defendants, only one was acquitted.[275]

In the Ministries Trial (Case No. 10),[276] Dr. Karl Rasche, director of the Dresdner Bank was acquitted for having granted loans to the security police SS.[277] Bruno Tesch and Karl Weinbacher were tried and sentenced to death before a British court for their selling of poisonous Zyklon B to German concentration camps.[278] In 1948, the directors of the Roechling company were tried before a French court. Herrmann Roechling was held criminally liable for the spoliation of French factories and machineries and for using forced labourers.[279]

Compared to other industrialists' trials, the Flick trial was the one with the mildest sentences.[280] And while the judges sitting at other war crime tribunals generally agreed that necessity constituted a defence under international criminal law, they were much more reluctant in accepting that the factual requirements, i.e. an imminent threat to life and liberty, were actually given.[281] One author argues that according to the judges' reasoning in the Flick trial, Bruno Tesch should in fact have been acquitted.[282] A comparison of the business trials furthermore shows a common characteristic: the strategy of the U.S. prosecutors of focussing excessively on the political networking and on an assumed wide Nazi conspiracy of an "economic gang" eventually

[272] See Jessberger (2009: 926).
[273] U.S. v. Alfried Krupp et al, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 – Vol. 9.
[274] See (1992: 213); Weinke (2006: 90) .
[275] See Jung (1992: 213); Priemel (2007: 645).
[276] U.S. v. Ernst von Weizsaecker et al, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 – Vol. 12.
[277] See Lippman (1995: 267).
[278] See Lippman (1995: 182).
[279] See Lippman (1995: 184).
[280] See Weinke (2006: 86).
[281] See Werle (2009: marginal no. 557).
[282] See Bower (1989: 249).

benefited the defendants.[283] On the one hand, it gave the accused the possibility to whitewash their history by presenting a very favourable interpretation of their Nazi past in court.[284] Their cooperation through the Industry Office ensured that this interpretation was reasonably consistent and would also reach the general public. The judges on the other hand generally insisted on the proof of individual guilt, thus dismissing a number of charges.[285]

With regard to the I.G. Farben trial, one assistant of the prosecution criticised their own strategy afterwards, stating that it would have been better to put Auschwitz on the top of the indictment instead of spending so much effort and time on the company's general involvement in Nazi politics.[286]

2. Release and Economic Comeback

Friedrich Flick never had to serve the full length of the seven years prison sentence he had received. When deciding upon his punishment, the judges already stated that the time Flick spent in custody before and during the trial was to be deducted.[287] But Flick did not even have to serve the remaining time. He applied to the American High Commissioner for a pardon, but before the matter had been decided, he was released from prison for good behaviour on the 25 August 1950 after serving two thirds of his sentence.[288]

However, the American High Commissioner in Germany, John McCloy was rather eager to grant a pardon to those industrialists who were convicted during the Nuremberg follow-up trials. By 1951, all convicted German industrialists were released.[289] Interestingly, McCloy used in fact the mild sentences in the Flick trial as an argument for the pardons, stating that the other industrialists' guilt was not bigger than that of Friedrich Flick.[290]

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[283] See Ahrens (2006: 149).
[284] See Ahrens (2006: 143 et seq.).
[285] See Ahrens (2006: 146).
[286] See Ahrens (2006: 143).
[287] Flick Trial 1228.
[288] See Frei et al (2009: 435).
[289] See Bush (2009: 1193).
[290] See Bower (1989: 254); Danner (2006: 267).

Being a convicted war criminal nearly had no negative influence on the subsequent careers of those industrialists indicted at Nuremberg. For instance, many of the I.G. Farben directors were appointed to leading positions in successor companies such as Bayer chemicals.[291] The same holds true for Friedrich Flick and his associates. In the following years of the German economic miracle ("Wirtschaftswunder"), the Flick Concern was among those companies making most profits and further expanding their business activities. Within few years, Friedrich Flick himself became Germany's wealthiest man, again.[292]

Despite the huge assets of Flick's industrial empire, he was extremely reluctant to pay any damages to his former forced labourers.[293] While many other companies which employed forced labourers during the Third Reich after lengthy negotiations finally agreed to finance funds for the victims and relatives of the forced labour policy, Flick refused any payments.[294] Until his death in 1972, he showed no hindsight of the injustice done to the tens of thousands forced labourers in his companies.[295]

3. "Victor's Justice" and "Allies' Justice" - The Political Implications of the Flick Trial

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Given the fact that relatively few industrialists were indicted (compared to state officials), the sentences received were rather mild on average. And as quick pardons enabled many of them to pursue very successful careers in the early years of the Federal Republic of Germany, some observers speak of a "*near-total impunity for big business*".[296] Whether such a general assessment is fully correct shall not be decided in this work, but it is worth taking a closer look at the broader political implications of the Flick case.

Whether the Nuremberg War Crime Trials were genuine "legal" trials guided solely by the rule of law or if political aspects stood in the foreground has been a hot topic

[291] See Danner (2006: 267).
[292] See Danner (2006: 267).
[293] See Priemel (2008: 703 et seq.)
[294] See Ferencz (1986: 212).
[295] See Ferencz (1986: 212).
[296] See Bush (2009: 1140).

of discussion during the trials itself and for the following decades as well.[297] The most common argument in this discussion is that of alleged "victor's justice".[298] Commonly used by German lawyers and politicians but also found in the American debate, it was assumed that the victorious powers applied very different - and thus discriminatory - criminal rules to the citizens of their former enemy state in comparison to their own troops.[299]

The accusation of alleged "victor's justice" had also been brought up a number of times by the defence counsel in the Flick trial.[300] This is illustrated, for example, by defence attorney Dr. Dix' questioning the judges: "*Do you not believe, Your Honors, that [...] German judges, in a different outcome of the war, would inversely have been under the obligation to exercise the most stringent self-discipline and the highest objectivity?"*[301]

Although the trial clearly had the function to establish the individual guilt of the accused, the fact that Friedrich Flick had also the role of a representative of German industry in general cannot be completely rebutted.[302] However, the defence counsel was reasonably successful in employing this state of affairs as an argument to denounce the prosecution of pursuing an anti-capitalist agenda.[303]

These accusations by the defence fell on fertile grounds, as the political climate in the U.S.A. and the attitude towards war crime trials in Germany had significantly changed since the end of World War II. The Soviet Union and the spread of Communism seemed to many right-wing U.S. politicians to constitute a far greater threat then the defeated Germany and National-Socialism.[304] Robert Jackson himself had already pointed out that German industry would be needed for strengthening Ger-

[297] See also an assessment later issued by defence counsel Kranzbühler, who has differentiated view on the trials but still emphasises their political purpose; Kranzbühler, Otto: Nuremberg Eighteen Years Afterwards, in: *De Paul Law Review*, (1964 – 1965), Vol. 14 (pp. 333 – 347).
[298] See Werle (2009: marginal no. 25).
[299] See Werle (2009: marginal no. 25).
[300] See Jung (1992: 40).
[301] Flick Trial 120.
[302] See Ahrens (2006: 138).
[303] See Priemel (2007: 635); Jung (1992: 221).
[304] See Bush (2009: 1121).

many against Soviet influence in the future, and this point of view was shared by many in the U.S. administration.[305] Especially with regard to the business trials, the prosecutor's team around Telford Taylor had been denounced as being "hot heads" and "Morgenthau-boys" by the far right.[306] In autumn 1947, when the Flick trial was about to end, Republican senators in the United States alleged that business trials would serve Moscow's interests and went even so far as to denunciate members of the Nuremberg staff of being communists.[307]

Thus, especially Marxist scholars claimed that the verdict against Flick was first and foremost a political decision.[308] One author asserts that the reasons for this assumed error of judgement were *"not only sympathy and imperialistic bonhomie felt by judges towards the defendants, but in the first place instructions from USA*".[309]

Assuming such a direct political exertion of influence on the judges, however, is unfounded.[310] One may very well question whether the judges in the Flick trial had a correct perception of the dimension of the defendants' crimes and can likewise criticise parts of their legal reasoning – but they were clearly no "political marionettes".[311] Unlike judges in Nazi Germany or the Soviet Union, the judges in the Flick trial had practised for many years in a country under the rule of law. This does not make them immune to being influenced by the general political climate. But it seems very improbable that they would be accepting direct political orders, especially since no such evidence exists.[312]

Furthermore, such a theory is disproved when comparing the Flick trial with the other business trials. Assuming a general influence of the U.S. leadership on the military tribunals would be particular inconsistent with the outcome of the Krupp trial, where

[305] See Bush (2009: 1122).
[306] See Bush (2009: 1122).
[307] See Bush (2009: 1231).
[308] See for example Drobisch, Klaus in: Thieleke, Karl-Heinz (ed.): *"Fall 5" Anklageplädoyer, ausgewählte Dokumente, Urteil im Flickprozeß*, Berlin, Deutscher Verlag der Wissenschaften (1965) 9 et seq.
[309] See Drobisch in Thieleke (1965: 9), translation by author.
[310] See Jung (1992: 211).
[311] See Jung (1992: 217).
[312] See Jung (1992: 213).

relatively harsh sentences were imposed.[313] The political climate of the cold war seemed to have affected the Flick trial in some way, but it remains difficult to measure;[314] other factors connected with the specific circumstances of the trial such as the very skilled defence counsel were probably more decisive.[315]

Taking everything into account, the Flick trial was definitely not a case of "Victor's justice". One may call it "Allies' justice",[316] as German businessmen were by many regarded as future allies against communism. But it was still a judicial decision, not one made by a political body.[317]

Chapter Five: Critical Evaluation and Relevance for Current International Criminal Law

1. Further Developments in International Criminal Law

The Nuremberg trials were of fundamental significance for the establishment of an international criminal law order. One may very well describe the Nuremberg charter as "the birth certificate of international criminal law".[318] Though not nearly as well-known as the Trial Against the Major War Criminals, the importance of the Nuremberg follow-up trials should not be underestimated.[319] The legal principles established by the military tribunals constitute customary international law[320] and therefore influence the application of international criminal law up to the present day.[321]

Since the post-World War II trials, international criminal law underwent major developments. During the Cold War, the principles developed at Nuremberg were affirmed numerous times by the United Nations, *inter alia* by the ratification of the Genocide

[313] See Jung (1992: 212).
[314] See Bush (2009: 1218).
[315] See Jung (1992: 221), stating that reasons for the verdict can be found rather in the "microcosm" of the trial then in the "macrocosm" of the political situation.
[316] See Jessberger (2009: 930), who uses the German term ("Verbündetenjustiz") in respect of the verdict in the I.G. Farben trial
[317] See Jung (1992: 221).
[318] See Werle (2009: marginal no. 15).
[319] See Werle (2009: marginal no. 37).
[320] See Werle (2009: marginal nos. 141 et seq.).
[321] See Werle (2009: marginal no. 37).

Convention in 1948 and the Geneva Conventions of 1949.[322] State practice by way of applying these rules in criminal trials though lacked completely.[323] This situation changed in the 1990s, when the UN established the *ad hoc* tribunals for the former Yugoslavia (International Criminal Tribunal for the former Yugoslavia, ICTY) and for Rwanda (International Criminal Tribunal for Rwanda, ICTR).[324] The most important step in the development of international criminal law was finally made with the adoption of the Rome Statute of the International Criminal Court (ICC) in 1998.[325] For the first time in history, a comprehensive codification of the core substantive and procedural norms of international criminal law, including a number of general principles, has been agreed upon.[326]

However, the liability of industrialists and other businessmen for committing crimes under international law did not play a role at all in the post-World War II jurisprudence.[327] Both the ICTY and the ICTR were solely concerned with the criminal accountability of political and military leaders, members of the private business sector were not prosecuted for possible involvement in international crimes.[328] So far, out of the few cases pending at the ICC, none is concerned with businessmen, either. However, in 2003 the prosecutor at the ICC, Luis Moreno Ocampo, issued a statement regarding the situation in the Congo.[329] Ocampo emphasised the importance of investigating the economic background of the crimes occurred. In particular, the activities of foreign organisations who were involved in the trade of gold and diamonds were in the focus. But it does not seem as if any further steps in this directions have been taken so far.[330]

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[322] See Werle (2009: marginal nos. 40, 42).
[323] See Werle (2009: marginal no. 44).
[324] See Werle (2009: marginal nos. 45 et seq.).
[325] See Werle (2009: marginal nos. 56, 66): "for now, the final milestone in the development of international criminal law".
[326] See Werle (2009: marginal no. 74).
[327] See Jacobson (2005: 201); Jessberger (2009: 931), Bush (2009: 1102).
[328] See Jacobson (2005: 201).
[329] See Press Release from the Office of the Prosecutor, (ICC-OTP-20030716–27) 3, available at http://icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2003/press%20conference%20of%20the%20prosecutor%20_%20press%20release (accessed on 19 October 2010).
[330] See Jessberger (2009: 932).

Trials against corporate officials for violations of international law have taken place before U.S. courts for many years, based on the U.S. Alien Tort Statute (ATS).[331] While the ATS jurisprudence refers to the precedents of the Nuremberg trials and also to the Flick case,[332] they are in substance civil tort claims and thus only partially relevant for criminal law liability. One case involving the responsibility of a corporation under international criminal law has recently come up in the Netherlands, however.[333]

Although there exists a lack of judicial precedences despite the post-World War II trials, the liability of businessmen under international criminal law has become a topic in the legal academic debate.[334] As a matter of legal doctrine, this issue is concerned with Article 25 of the ICC Statute and culminates around the question if and to what extent actions of corporate officials and other private economic actors may fall under the modes of participation established therein.[335] A particular difficulty lies in determining the scope of the provision on aiding and abetting (Article 25 No. 3 c of the ICC Statute), since a too broad understanding would lead to the criminalisation of everyday behaviours generally accepted as socially adequate.[336] The doctrinal debate on the appropriate legal standards and thresholds is still in its initial phase, though.[337]

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Since the Nuremberg trials constitute to a large degree customary international law, some scholars have conducted legal historical studies on the business trials in order to

[331] See Skinner, Gwynne: Nuremberg's Legacy Continues: The Nuremberg Trials' Influencing on Human Rights Litigation in U.S. Courts under the Alien Tort Statute, in: *Albany Law Review* (2008) Vol. 71 (321 – 367); Ramasastry, Anita: Corporate Complicity: From Nuremberg to Rangoon – An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations, in: *Berkeley Journal of International Law* (2002), (91 – 159); Herz, Richard: Corporate Alien Tort Liability and the Legacy of Nuremberg, in: *Gonzaga Journal of International Law* (2007), (76 – 80); Cassel, Doug: Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, in: *Northwestern University Journal of International Human Rights* (2008) Vol. 6, (306 et seq.).

[332] See for example Ramasatry (2002: 91 et seq.).

[333] See Jessberger (2009: 931).

[334] See Schabas, William A.: Enforcing international humanitarian law: Catching the accomplices, in: *International Review of the Red Cross* (2001), Vol 83 (pp. 439 – 459); Jacobson (2005: 167 et seq.); Jessberger (2009: 924 et seq.).

[335] See Schabas (2001: 443).

[336] See Schabas (2001: 449).

[337] See Jessberger (2009: 931).

determine their relevance for contemporary international criminal law.[338] In a similar way, a critical examination of the Flick trial will take place in the following.

2. Critical Evaluation: The Flick Decision from Today's Point of View

Evaluating the Flick trial can be conducted under two viewpoints. Firstly, was the court's judgement and legal reasoning convincing and in accordance with the legal framework at the time of the decision? Secondly, what relevance has the decision for present-day international criminal law? Which particular legal characteristics can be regarded as outdated and which are of importance still today?

In the author's opinion, the most important aspect of the Flick decision is a very general one: private citizens such as businessmen are in principle covered by the norms of international criminal law. From the point of view of present-day international criminal law, such a finding seems somehow self-evident. However, at the time of the decision, this issue was far from being uncontroversial.[339] It was the IMT which for the first time in history established the principle that individuals and not only states can be held accountable for committing crimes under international law. But it were only public officials such as military, political and administrative leaders of the Nazi state which were tried at the Trial of the Major War Criminals. In the following legal debates, some sound arguments could be brought up in arguing that only public officials fall under the scope of international criminal law.[340] A main argument states that only high public officials act as representatives of the state, therefore criminal liability derived from international law solely covers this limited group of persons.[341]

Therefore, a major achievement of the business trials in general and the Flick trial in particular was the extension of individual liability under international law to private citizens.[342] Industrialists, merchants, bankers etc. who are involved in international

[338] See Jessberger (2009: 929); Lippman (1995: 267); Jacobson (2005: 210 et seq.); Danner (2006: 654 et seq.).
[339] See Jung (1992: 170 et seq.).
[340] See Jung (1992: 182 et seq.).
[341] See Jung (1992: 183).
[342] See Danner (2006: 251); Jacobson (2005: 210); Lippman (1995: 267). But See Jung (1992: 191), arguing that such liability existed merely on paper due to the extremely wide interpretation of necessity by the court.

crimes have to be aware nowadays that they can be held accountable before international courts. This fact has to be stressed, as it is not solely a matter of legal dogmatic but also of legal politics.[343]

This general achievement of the Flick trial, though, cannot hide a number of shortcomings in several respects. Despite establishing the general principle that businessmen can commit international crimes, the concrete legal standards for determining accountability remain unclear. If one hopes to gain any hints on how to apply and interpret the present-day modes of participation of international criminal law on this matter, he will be disappointed.[344] But one cannot blame this state of affairs solely on the judges. For instance, the relevant provisions in CCL No. 10 were extremely broad and thus not very helpful.[345] Furthermore, defining the applicable legal standards also would have required detailed knowledge of contemporaneous German corporate law as well as a thorough understanding of the actual relationship between the private economy and the Nazi state;[346] two factors which do not seem to be have been present. In addition, the prosecutors' strategy of displaying the defendants as "evils" entangled in a Nazi conspiracy was eventually counter-productive and unhelpful in determining their actual responsibility.[347]

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Secondly, one can raise criticism on the fact that the court restricted Crimes against Humanity only to offences committed during wartime. CCL No. 10 expressly abandoned this nexus requirement,[348] but the judges nevertheless insisted on it, mainly by referring to the IMT judgement.[349] At the time of the decision, the issue was not dealt with uniformly. While the Supreme Court for the British zone claimed jurisdiction for crimes against humanity which occurred before the war, other military tribunals fol-

[343] See Jessberger (2009: 931).
[344] See Jessberger (2009: 931), who comes to similar findings in respect of the I.G. Farben trial.
[345] See Werle (2009: marginal no. 444).
[346] See Bähr et al (2008: 629).
[347] See Jung (1992: 221).
[348] See Werle (2009: marginal nos. 36, 783).
[349] Flick trial 1212 et seq.

lowed the line of the Flick decision.[350] Today, this nexus requirement can be regarded as clearly outdated.[351]

Furthermore, the very restrictive interpretation of the Crime against Humanity of "persecution" by the court casts doubts.[352] The court reasoned that persecution must constitute of such acts which are solely and directly aimed at the life and the liberty of the victims.[353] Thus, as the "Aryanisation" policy targeted primarily at the property rights of the Jewish population, this was deemed to fall outside the definition of "persecution".

In general, it is true that the violation of property rights is not always a clear-cut case of persecution.[354] But one should take into account the severity and the extent of property violations and thus employ a differentiated approach. Especially the ICTY has developed a much more sophisticated legal doctrine in this respect.[355] While the extortion of a single piece of property will not amount to "persecution" in that sense, the situation looks entirely different if a whole civilian population is basically deprived of all their belongings.[356] Thus, from today's point of view, one can hardly question that the "Aryanisation" of Jewish property constituted in fact the crime against humanity of persecution.[357]

Most probably the weakest part of the judgement is however the extensive application of the defence of necessity. This is not so much due to the fact that this defence was accepted in principle, but from the judges' eagerness to conclude that the actual requirements were present.

CCL No. 10 contained no provision on necessity, furthermore "superior orders" were explicitly excluded from being used as an exculpation.[358] The court nevertheless con-

[350] See Werle (2009: marginal no. 784).
[351] See Werle (2009: marginal nos. 783, 784, 787); see also Art. 7 ICC Statute.
[352] See Danner (2006: 252).
[353] Flick Trial 1215.
[354] See Werle (2009: marginal no. 895).
[355] Werle (2009: marginal no. 895).
[356] See Werle (2009: marginal no. 895) with further reference to ICTY case law.
[357] See Werle (2009: marginal no. 895).
[358] CCL No. 10 Article II 4 b.

cluded that this defence exists under international criminal law.[359] In substance, one can agree with the court in this respect. Other war crime tribunals have confirmed the existence of the defence of necessity in later decisions.[360] Necessity and duress are now contained in Article 31 (1) d of the ICC Statute and this defence has an important role in international case law.[361] However, the court's reasoning for establishing this defence is not very elaborate. The only authority provided in this regard is *Wharton's Criminal Law*, a standard reference book of U.S. criminal law.[362] The overall lack of references in the judgement (only six authorities are used all together) was explained by the court with a presumably inadequate library.[363] It is noteworthy, though, that other tribunals in Nuremberg used various references to found their decisions.[364]

Even if one cannot apply a statutory definition of this defence and refrains from using further more detailed authorities such as precedents and commentaries, but refers solely to the rudimentary definition given in *Wharton's Criminal Law,* it remains very dubious whether the requirements were actually fulfilled in the Flick case. In the first place, the alleged threats to life for industrialists who would refuse to employ forced labourers seem extremely far-fetched. The Nazi regime was undoubtedly ruthless and willing to use draconian sanctions against any oppositionists. However, this matter is not concerned with the question whether or not Flick should have been more active in the opposition against the Nazi government. Nobody expected him to actively hide Jews like an Oscar Schindler; it is simply about not employing forced labourers. Flick would have definitely suffered an economic loss if he had done so, but no historical proof exists that any German businessmen were killed or suffered other severe sanctions in similar situations.[365]

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[359] Flick Trial 1200.
[360] See Werle (2009: marginal no. 557); Nill-Theobald, Christiane: "Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA, Freiburg im Breisgau, MPI (1998) 182 et seq.
[361] See Werle (2009: marginal no. 557).
[362] Flick Trial 1200.
[363] See Jung (1992: 197).
[364] See Jung (1992: 198), specifically mentioning the Jurists Trial.
[365] See Bower (1989: 248): When Friedrich Flick was heard as a witness at the I.G. Farben Trial, he was unable to present a single industrialist who had been prosecuted in the Third Reich for refusing to employ forced labourers.

Furthermore, for an act to be justified on grounds of necessity, it has to be necessary and reasonable.[366] Instead of employing 60.000 forced workers, Flick had a variety of other options to avert the alleged threats to his life, such as changing his fields of business activity. Finally, necessity in general requires that the perpetrator acted with the intention of averting the threat.[367] The defendants in the Flick trial, though, had a very different intention - profit.

In his dissenting opinion in the I.G. Farben trial, judge Herbert raised harsh criticism against the decision in the Flick trial on necessity and encapsulates the issue by stating that *"Such a 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 expediency of the issuance of compulsory governmental regulations combined with the terrorism of the totalitarian or police state".*[368]

3. Concluding Remarks

The tribunal's legal reasoning especially in respect of crimes against humanity as well as of the defence of necessity were clear shortcomings of the Flick trial. Furthermore, the mild sentences were unproportional, in particular when taking into account the harm suffered by the tens of thousands of forced labourers who had to work in the Flick Concern. However, this outcome – at least partly – resulted also from the misguided prosecution strategy.[369] Under the aspect of litigation tactics, focussing excessively on the political entanglement of the Flick Concern and German industry in general provided the defendants and their skilled lawyers with a platform to present their very own version of history. But the prosecutors' approach was also questionable from the viewpoint of substantial international criminal law, especially in the light of the principle of individual guilt. It has to be appreciated that the Flick trial extended criminal liability in general to businessmen, but a clear standard of liability taking sufficient regard of individual responsibility in such cases still has to be developed.

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366 See Werle (2009: marginal no. 561).
367 See Werle (2009: marginal no. 563).
368 I.G. Farben Trial 1310.
369 See Ahrens (2006: 138); Jung (1992: 221).