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Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII

*Grietje Baars**

(I) Introduction

It is well known that in the 'subsequent trials' held in Nuremberg by the US military, the directors of three of Germany's largest industrial combines (and one bank) were prosecuted for their roles in the Nazis' aggressive wars and the Holocaust. What has remained largely hidden is how the rapidly changing geopolitical landscape influenced the decision to try industrialists for their war responsibility, the articulation of the 'economic case' at the International Military Tribunal (IMT), the conduct of the industrialists' trials at the US Military Tribunals at Nuremberg (NMT) and eventually the early release and rehabilitation of the convicted business leaders. The US and USSR had at one point both understood World War II (WWII) as a war of economic imperialism in which industrialists had played a key role—both in planning and waging. With the commencement of the Cold War this idea became a point of sharp ideological divide. The economic story of WWII gradually moved over to 'hidden history' in the West, while remaining visible only in the German Democratic Republic and Soviet discourse. Likewise, the omission of *zaibatsu* leaders from the Tokyo International Tribunal hid the Allies' expressed conviction that also the war on the Eastern front had been one of economic imperialism. Over time, the way international conflict is conceptualized and explained in mainstream Western (legal) discourse has changed, as has the role that international criminal law (ICL) is accorded in world politics, and whose

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accountability is sought through ICL. Together, these facts reflect capitalism's hidden victor's justice.

In contrast to mainstream liberal-legal and positivist accounts of 'Nuremberg',¹ in this chapter I tell the story—in particular the specific story of the 'economic case' and the industrialists—as situated in the material context and relations of the time. Doing so shows the direct effect of specific turns of events not only on the legal processes, but also on how ICL was interpreted and applied. Through a historical materialist reading of Nuremberg, we can explain, for example, how the NMT trials turned from an ostensible morality play to a performance of *théâtre de l'absurde*.

It is hoped that through highlighting the processes and contradictions at Nuremberg this chapter will give impetus to investigating precisely how *current* use of ICL also seeks to 'spirit away' economic causes of contemporary conflict and thus forms an integral element of capitalist imperialism.²

Section II begins with an examination of the Allied (effectively, US and USSR³) consensus on the nature of WWII as imperialist, on the role of the industrialists in Hitler's aggressive war, the formulation of the 'economic case' and the indictment, trial and judgment at the IMT. I tell this history focusing on the US perspective because the main international trial was very much a US-directed affair.⁴ It served to simultaneously legitimize and showcase the US's role as the rising hegemon of the 'free world'. While the US leadership's desire to prosecute industrialists and discipline the German economy played an instrumental role in its decision to hold subsequent trials at Nuremberg,⁵ the appetite for this declined with the turnaround in US foreign and economic policy that gradually materialized after WWII. Section III traces this turnaround—the start of the Cold War—and its impact on US political and economic involvement in Europe. In Section IV, I go on to show how this turnaround manifested itself in the conduct and outcomes of the trials

¹ See, eg, those contained in Guénaél Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008). Among the off-mainstream accounts are, Florian Jeßberger, 'Die I.G. Farben vor Gericht: Von den Ursprüngen eines "Wirtschaftsvölkerstrafrechts"', *Juristenzeitung*, 19 (2009), 924; Florian Jeßberger, 'On the Origins of Individual Criminal Responsibility Under International Law for Business Activity: IG Farben on Trial', *Journal of International Criminal Justice*, 8 (2010), 783; J. A. Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said', *Columbia Law Review*, 109 (2009).

² According to Arthur, the task of the legal academic 'is that of tracing... both the relationships that are expressed in the legal superstructure and those that it ideologically spirits away': C. Arthur, 'Introduction' in E. Pashukanis, *Law and Marxism: A General Theory* (London: Ink Links, Ltd, 1978), 31.

³ I use 'US', 'USSR' etc as shorthand for the leading members of the government at any given moment—in other words, the momentary 'winners' of the constant competition between various sectors of a state administration (for a similar approach, see Nikolai Bukharin, *Imperialism and World Economy* (London: Bookmarks, 2003), 137).

⁴ See, eg, Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, NY: Little, Brown & Company 1992), 634 and generally, F. Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda and the Making of the Postwar Order', *American Historical Review*, 113 (2008), 730.

⁵ Taylor, above n 4, 161; Bush, above n 1, 1112–29; Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), 24.

of the industrialists at Nuremberg. Section V compares the US trials to the largely forgotten post-WWII international trials of industrialists by the French, British and Soviet military tribunals, and with the decision of the Military Tribunal for the Far East not to indict Japanese *zaibatsu* leaders. Finally, Section VI connects the aftermath of the trials, the 'McCloy clemency' and subsequent reinstatement of most of the industrialists to their former positions, with contemporary debates around ICL, the economic causes of conflict and 'corporate impunity'.

(II) The Economic Causes of WWII at the International Military Tribunal at Nuremberg

The 'Trial of the Major War Criminals at Nuremberg' commenced at a moment when the role of the German industrial combines in Hitler's aggressive war was emphasised by US political leaders in public statements, declarations and reports. The US leadership considered the aggressive, expansive war to have been orchestrated by the 'unholy trinity' of corporatism, Nazism and militarism,⁶ for the markets and resources of the neighbouring countries, and indeed, with the eventual aim of 'world conquest'.⁷ The American administration had scrutinized the nature and activities of German industry in this respect since the beginning of the war. In his memoirs, Josiah Dubois (a State Department lawyer who was to become the lead prosecutor in the *IG Farben* case) tells of travelling the Western Hemisphere with Bernard Bernstein of the Treasury Department in the early 1940s to seek out and freeze IG Farben's financial interests.⁸ The German industrial and banking giants had been discussed in depth in the US Senate, for instance in the Kilgore Committee, and formed a major site of investigation for the Office of Strategic Services (OSS), the forerunner of the Central Intelligence Agency.⁹ German chemicals giant IG Farben appears to have been a main object of interest for the

⁶ Telford Taylor in *Flick*, below n 51, 32. See also, Jackson's June 1945 Report—this report contained the 'basic features of the plan of prosecution' written at the request of the US President by the (then) US Representative and Chief Counsel for War Crimes: Justice Jackson's Report to the President on Atrocities and War Crimes; 7 June 1945, available from Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy* [website], <http://avalon.law.yale.edu/imt/imt_jack01.asp>, (Jackson June 1945 Report) (accessed 27 February 2013).

⁷ This view is expressed, for example, in the US Congress, Senate, Committee on Military Affairs, Cartel Practices and National Security, Hearings Before a Subcommittee of the Senate Committee on Military Affairs, 78th Cong., 2nd Sess., 1944. Vol. 16; IG Farben Material Submitted by the War Department, 79th Cong. (1945) (Bernstein Farben Report), 941 and 953–57; Christopher Simpson (ed), *War Crimes of Dresdner and Deutsche Bank: Office of the Military Government (US) Reports* (Teaneck, NJ: Holmes & Meier Publishers, Inc., 2001) (original report produced November 1946).

⁸ Josiah Dubois, *The Devil's Chemists: 24 Conspirators of the International Farben Cartel who Manufacture Wars* (Boston, MA: The Beacon Press, 1952), 14–15.

⁹ See, eg, Office of the US Chief of Counsel for the Prosecution of Axis Criminality, Staff Evidence Analysis (Gen. Thomas), Fundaments for a History of the German War and Armament Economy (1944), *Cornell Donovan Archive*, Vol. II, 6.15; Office of Strategic Services, Research and Analysis Branch, German Military Government over Europe: Economic Controls in Occupied Europe, Washington 28 August 1945, *Cornell Donovan Archive*, Vol. CVIII.

Americans. The OSS investigated the concealment of ownership of IG Farben subsidiaries operating in Allied jurisdictions, the identity and role of the German bankers and financiers and the precise mechanisms of economic warfare employed by the Reich.¹⁰ Intensive investigation into the global span of the IG Farben cartel led the US leadership to fear that German imperialism would not be confined to the European continent.¹¹ In 1945 the Congressional Subcommittee on War Mobilization, chaired by Senator Kilgore, heard evidence to the effect that one of Farben's key objectives was to drive the US out of the European market. It also learnt how IG Farben managed to exclude US companies from acquiring necessary resources on the Latin American market and so significantly curbed US war production and thus military potential.¹² Through US subsidiaries, IG Farben gathered important intelligence on US war production and through ingenious patenting and subcontracting arrangements it excluded American industry from important military technologies.¹³ The US investigation found that, besides Standard Oil, dozens of US companies had agreements with IG Farben—and this was without counting Farben-owned subsidiaries.¹⁴ Bernstein's Farben Report quotes Farben witnesses who profess to have been fully aware of, and in complete agreement with, Hitler's plans for aggressive war, with Farben director Von Schnitzler even going so far as to state 'IG Farben [was] completely responsible for Hitler's policy'.¹⁵ As a household name, producing both Aspirin and Nylon stockings and present in every American home, Farben spoke to the imagination of the American public.¹⁶ There can be little doubt that this played a role in the US government's later decision to prosecute the Farben directors.

Furthermore, the Finance Division of the Office of the Military Government of the US (OMGUS) (which had its headquarters in the former IG Farben complex in Frankfurt) produced a series of reports totalling over 10,000 pages detailing the investigations into German banks and other financial institutions.¹⁷ Together, the sources paint a picture of highly sophisticated and effective economic warfare

¹⁰ See, eg, US Group CC/Finance Division, 'Preliminary Report: Concealment of Ownership of Some I.G. Farben Selling Companies', *Cornell Donovan Archive*, Vol. VII, Section 13.18. The OSS investigation was led by Franz Leopold Neumann, a German intellectual and who had fled to New York in the 1930s with other Frankfurt School members Otto Kirchheimer and Herbert Marcuse. His 1944 book *Behemoth: The Structure and Practice of National Socialism* served as the blueprint for the US leadership's understanding of the Nazi 'apparatus' (Franz Leopold Neumann, *Behemoth: The Structure and Practice of National Socialism* (London: Octagon Books 1963)). Other US authors had also analysed—already during WWII—Germany's 'industrial offensive', see, eg, Joseph Borkin and Charles Welsh, *Germany's Master Plan: The Story of Industrial Offensive* (New York, NY: Duell, Sloan and Pearce 1944). Borkin was economic advisor to the Antitrust Division of the Department of Justice in Washington (T. Arnold, 'Introduction', in Borkin and Welsh (eds), *Germany's Master Plan*, xvi), and responsible for this office's investigation into IG Farben during WWII. See further Joseph Borkin, *The Crime and Punishment of IG Farben* (New York, NY: The Free Press, 1978).

¹¹ Donny Gluckstein, *A People's History of the Second World War: Resistance Versus Empire* (London: Pluto Press, 2012), 10.

¹² Bernstein Farben Report, above n 7, 947, 952; US Congress, Senate, Committee on Military Affairs, above n 7; 79th Cong. (1945), Part 10, IG Farben Exhibits (Kilgore Farben Exhibits).

¹³ Bernstein Farben Report, above n 7, 945.

¹⁴ Bernstein Farben Report, above n 7, 993.

¹⁵ Bernstein Farben Report, above n 7, 957.

¹⁶ Dubois, above n 8, 3.

¹⁷ Simpson, above n 7, 1.

carried out by the German industrial leaders in collusion with military and Nazi leaders.¹⁸ The Soviet leadership shared this understanding of imperialism; responsible for WWII was a band of “unconscionable adventurers and criminals”—comprising the Nazi party and military leaders as well as the directors of the larger banks and corporations’.¹⁹ There was broad agreement on the imperialist nature of Germany’s aggressive war and the role of the constellation Eisenhower was later to call ‘the military-industrial complex’.²⁰ With WWII typified as a quarrel between Allied and Axis governments about who should dominate the world economy,²¹ it appears Hitler’s economic objectives troubled the US and USSR more than the Holocaust and the other atrocities carried out by the Nazis.²²

In a number of places this US/USSR meeting of minds led to concrete articulation and action.²³ Among the sites where the Allies’ understanding of the economic causes of the war were clearly articulated and responded to was the Potsdam Agreement.²⁴ This agreement, concluded on 2 August 1945 by the USSR, USA, and UK leaderships, de facto incorporated the ‘Morgenthau Plan’—the plan for a pastoralized Germany drawn up by US Secretary of State Henry Morgenthau.²⁵ The Potsdam Agreement stipulated the destruction of Germany’s future war potential through the ‘decartellization’: breaking up of the main German cartels through expropriation of physical property but also share ownership including ownership of foreign subsidiaries of German companies, demolition of factories and shipping off of heavy machinery to the Allies in the form of reparations in kind.²⁶ Significant parts of the Potsdam Agreement were carried out by the US and other

¹⁸ Some authors follow an ‘agency theory’ approach to argue that Hitler was a mere puppet in the employ of German industrialists but the better view is one of control by the German elites from all three sectors, which, particularly after the ‘nazification’ of industrial leadership and according of military ranks to industrialists, became difficult to distinguish clearly and can be said to have formed a ‘state-capitalist trust’ (see, eg, Bukharin, above n 3, 127). For an overview of theories of ‘war responsibility’ between ‘primacy of politics’ and ‘primacy of economics’ see Norbert Frei and Tim Schanetzky (eds), *Unternehmen im Nationalsozialismus: Zur Historisierung einer Forschungskonjunktur* (Göttingen: Wallstein Verlag, 2010).

¹⁹ Jörg Osterloh, ‘Die Monopole und ihre Herren: Marxistische Interpretationen’, in Frei and Schanetzky, above n 18, 36 (my translation).

²⁰ Eisenhower farewell address (17 January 1961), Press release containing the text of the address, Dwight D. Eisenhower: *Presidential Library and Museum* [website], <http://www.eisenhower.archives.gov/research/online_documents/farewell_address.html> (accessed 26 February 2013).

²¹ Indeed, ‘the belief of ordinary people, that the issue was fascism versus anti-fascism, was largely irrelevant for rulers on both sides of the Axis/Allied divide’: Gluckstein, above n 11, 9.

²² Bloxham, above n 5, 57–90; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011), 4.

²³ See, eg, Section V of the Yalta (Crimea) Conference Agreement reached on 11 February 1945 between Stalin, Churchill and Roosevelt, published in *A Decade of American Foreign Policy: Basic Documents, 1941–49* (Washington, DC: Government Printing Office, 1950).

²⁴ Potsdam Agreement of 2 August 1945 between the USSR, the USA and the UK (Potsdam Agreement): Yale Law School, *The Avalon Project: Documents in Law, History and Diplomacy* [website], <http://avalon.law.yale.edu/20th_century/decade17.asp> (accessed 27 February 2013).

²⁵ Hans Morgenthau, *Germany is Our Problem* (New York, NY: Harper & Brothers, 1945).

²⁶ Potsdam Agreement, Part IIB (Article 12) and Part III.

Allied occupation authorities in Germany.²⁷ In the Eastern Soviet Occupation Zone most industries were nationalized.²⁸

In the execution of the plan, 'Morgenthau Boys'—young German-speaking mainly Jewish men who had fled to the US during the war—were deployed to Germany by OMGUS to investigate the state of industry after the war, and to interview the key industrialists in each sector.²⁹ In the immediate post-war period hundreds of industrialists were interned by the Allies, with the British for example detaining 120 business leaders in the banking, chemical, electrical and automobile sectors from the Ruhr area in the autumn of 1945.³⁰

It is in this context, where the emphasis was on disabling Germany's potential as a competing empire, that the US and the other Allies decided to hold an international trial at Nuremberg.

(1) The IMT and the 'economic case'

The international trial to be held at the IMT formed a cornerstone of the Allies' post-WWII policy. It was the main public spectacle, or 'morality play', aimed at justifying the sacrifice of Allied manpower and resources. It also papered over the Allies' own failure to act sooner and more effectively against aggressive Nazism, to stop the Holocaust and also its failures with regard to Jewish refugees.³¹ Moreover, the role of 'Nuremberg' was to help establish US moral authority as the rising superpower.³² Henry Stimson, who is credited as the main driver for trials within the US government, 'saw the moralist agenda of outlawing war as one way to ensure greater security for an American-dominated economic empire'.³³ To achieve this objective, the main international trial at Nuremberg had to produce an historical record of war responsibility.³⁴ There was to be an emphasis on the

²⁷ See, eg, the Military Government of Germany, 'Control of IG Farben', in *Special Report of Military Governor US Zone* (1 October 1945) which details the measures taken to disable Farben's 'war potential'.

²⁸ A. Hilger, 'Die Gerechtigkeit nehme ihren Lauf'? Die Bestrafung deutscher Kriegs—und Gewaltverbrecher in der Sowjetunion und der SBZ/DDR', in Norbert Frei (ed), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Göttingen: Wallstein Verlag, 2006), 180.

²⁹ K. Majchrzak, interview with Peter Weiss, 12 October 2008, Berlin. Peter Weiss, now Vice-President of Board of the Centre for Constitutional Rights in New York, in this interview relates his own experience as one of the 'Morgenthau Boys'.

³⁰ Tim Schanetzky, 'Unternehmer: Profiteure des Unrechts', in Norbert Frei (ed), *Hitlers Eliten nach 1945* (Munich: Deutscher Taschenbuch Verlag, 2003), 74.

³¹ Richard D. McKinzie, interview with Josiah E. Dubois, 29 June 1973, Camden, NJ: *Harry S. Truman Library and Museum* [website], <<http://www.trumanlibrary.org/orallhist/duboisje.htm>> (accessed 27 February 2013) (Dubois Interview).

³² Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: The Belknap Press of Harvard University Press, 2005). Cf. Martti Koskeniemi, 'Between Impunity and Show Trials', *Max Planck UNYB*, 6 (2002), 10.

³³ Borgwardt, above n 33, 75.

³⁴ Famously, Robert Jackson, IMT Opening Address, *International Military Tribunal, The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (commencing 20 November 1945).

totality of the war rather than on the detail.³⁵ Chief Prosecutor Robert Jackson stated:

Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan. The groundwork of our case must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world.³⁶

What became known as the 'economic case' was included as part of the overarching conspiracy charge. The Soviets agreed with the US on the importance of holding individuals responsible for aggressive war.³⁷ The shared understanding of the nature and causes of WWII as described above persisted at the IMT trial. The '*Leitmotif* of the IMT trial was exposing Nazism, militarism, economic imperialism in an "orgy of revelation"'.³⁸

In the US's official view, what had enabled WWII to be started, and thus all its atrocities to be committed, had been the 'captur[e of] the form of the German state as an instrumentality for spreading their [Nazi] rule to other countries'.³⁹ This was to be reflected in the choice of defendants:

Whom will we accuse and put to their defence? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial and economic life in Germany who by all civilised standards are provable to be common criminals.⁴⁰

The Soviet representative at Nuremberg, Aron Trainin stated that the industrialists and financiers' 'political position is clear: these were the masters for whom the Fascist State machine was zealously working', adding, 'the German financial and industrial heads must also be sent for trial as criminals'.⁴¹

From the very start it was clear that the 'economic case'—the part of the prosecution dealing with the economic causes of, and motivations for, the war and the responsibility of economic actors and policy-makers—would be key in the Nuremberg Trial.⁴² Frankfurt School intellectual Franz Neumann was employed by the prosecution team, and his book *Behemoth: The Structure and Practice of*

³⁵ A delicate balance had to be drawn between showing the barbarity of the Nazis and retaining popular support for the trial. The film made about the trial, *Nuremberg: Its Lessons for Today*, was prevented from being finished and shown in the US, apparently because it was feared it would affect popular support also for the Marshall Plan (below). The film was recently finished: Schulberg Productions and Metropolis Productions, *Nuremberg: Its Lessons for Today* [website], <<http://www.nurembergfilm.org/>> (accessed 27 February 2013).

³⁶ Jackson Negotiations Report, Part III, above n 6.

³⁷ Hirsch, above n 4, 701. See also, Franz Leopold Neumann, 'The War Crimes Trials', *World Politics*, 2 (1949), 135, 139.

³⁸ Bloxham, above n 5, 203.

³⁹ Jackson Negotiations Report, Part III, above n 6.

⁴⁰ Jackson Negotiations Report, Part III, above n 6.

⁴¹ Aron Naumovich Trainin (Andrey Yanuaryevich Vishinski, ed), *Hitlerite Responsibility under Criminal Law* (London: Hutchinson & Co. Ltd, 1945), 84, 85.

⁴² See, eg, Bush, above n 1, 1110–15.

National Socialism—which emphasized the role of economic actors in causing WWII—was a must-read for Nuremberg prosecutors.⁴³ The leading defendant at the IMT was Hermann Göring, Hitler's second-in-command, who had been in charge of readying the German economy for war. For the US prosecution, the key issue to be addressed was 'the Nazi plan to dominate the world and to wage aggressive war',⁴⁴ as had been partly discovered through the Kilgore Farben investigations.

When Justice Jackson and his staff commenced work in preparation for the trial, four indictment-drafting committees were established each dealing with a different core aspect of the war for which charges were to be brought. Committee One (Britain) dealt with the aggressive war charge; Committee Two (USSR) with war crimes and crimes against humanity in the East; and Committee Three (France) with equivalent crimes in the West. The Americans would prepare the 'common plan and conspiracy' charge.⁴⁵ The latter charge was to cover the pre-WWII story of Nazism, Hitler's seizure and exploitation of power, his plans and steps to occupy much of Europe, and his design to attack the United States. As the first count of the indictment, it would comprise the basic narrative of the case as a whole.⁴⁶ This committee was headed by Justice Jackson himself. As a vital part of this charge, the 'economic case' was entrusted to American lawyer Frank Shea.⁴⁷ Shea produced a memorandum in which he proposed for prosecution Hjalmar Schacht (former head of the Reichsbank and Minister of Economics, who had provided the financing for war production), Fritz Sauckel (a primary figure in the foreign forced labour programme), Albert Speer (an architect and later Minister of Armaments and Munitions), Walter Funk (Schacht's successor)⁴⁸ as well as Alfried Krupp and six other German industrial and financial leaders. Shea considered the guilt of the industrialists and financiers lay in the fact that 'they had given Hitler the material means to rearm Germany, *with full knowledge* that Hitler planned to use these armaments to carry out a program of German aggrandizement by military conquest'.⁴⁹

From the mid-1930s the German economy had been geared towards heavy industry, which comprised the mining of coal (Germany's main natural resource) and the manufacture of iron and steel products. These industries were controlled by small number of large industrial and mining combines including Krupp, Flick, Thyssen, the state-owned Reich-Werks-Hermann-Göring and IG Farben. By a law of 15 May 1933, individual enterprises were compulsorily combined into cartels, while by a law of 30 January 1937, enterprises with a capital of less than 100,000 marks were subject to liquidation, and henceforth only companies with a capital of not less than 500,000 marks were permitted.⁵⁰ The concentration of capital in fewer hands gave rise to a powerful group of financial and industrial magnates.⁵¹

⁴³ Above n 7, and Bush, above n 1, 1108, fn 36. ⁴⁴ Bloxham, above n 5, 6.

⁴⁵ Taylor, above n 4, 79–80. ⁴⁶ Taylor, above n 4, 80.

⁴⁷ Taylor, above n 4, 90–2. ⁴⁸ Nazi Conspiracy and Aggression, Vol. I, Ch. VIII.

⁴⁹ Taylor, above n 4, 81 (emphasis in original).

⁵⁰ Trainin, above n 41, 83.

⁵¹ *United States v Friedrich Flick et al (Flick)*, US Military Tribunal Nuremberg, Judgment of 20 August 1947, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. VI, Prosecution Opening Statement, 35–6.

Other aspects of the 'economic case' in the IMT Indictment included war crimes and crimes against humanity. Göring and the other defendants had to a greater or lesser extent been involved in the 'aryanization' of industries in the occupied countries in the expansion of the German *Lebensraum*. This involved the expropriation of foreign businesses and resources, as well as the recruitment and deployment of around five million slave labourers, part of whom had been work-to-death labour supplied by the Nazi extermination camps.⁵²

The economic case gathered criticism from the start, with one critic arguing it was not the US's job to 'reform European economics' or 'turn a war crimes trial into an anti-trust case'.⁵³ The gradual change in attitude vis-à-vis Nuremberg must be seen in the context of the change in US leadership at this crucial time. On 12 May 1945 Roosevelt died and was succeeded by Truman—a more business-oriented leader:

Of the 125 most important government appointments made by President Truman in the first two post-war years, 49 were bankers, financiers and industrialists, 31 were military men and 17 lawyers, mostly with Big Business connections. The effective locus of government seemed to shift from Washington to some place equidistant between Wall Street and West Point.⁵⁴

The prosecution list was whittled down to twenty-four defendants.⁵⁵ In relation to the 'economic case', only the former ministers Sauckel, Funk and Speer were indicted, with Schacht, the 'redoubtable banker'⁵⁶ and Krupp as the sole industrialist, despite the fact that the prosecution teams, supported by OMGUS staff, had gathered much evidence to support the 'economic case'.⁵⁷

The retention of Krupp, the 'main organiser of German industry', in the indictment made him the *pars pro toto* for German industry. However, there was disagreement among the different teams of lawyers working on the indictment as to whether Gustav Krupp, the man who had run the Krupp concern until 1941, or Alfried Krupp, his son, who had been the company's executive director before becoming sole owner in 1943, was the intended defendant. Eventually, Gustav the elder was selected, but his British captors, by way of a 'catastrophic blunder', failed to discover until days before the trial was to commence that he was—at 80 years of age—too ill and demented to stand trial.⁵⁸ The US immediately requested the court replace Gustav with his son Alfried on the indictment. The prosecution of at least one Krupp family member was in the public interest, explained in the words of Justice Jackson:

The Krupp influence was powerful in promoting the Nazi plan to incite aggressive warfare in Europe. Krupps were thus one of the most persistent and influential forces that made this

⁵² Office of United States Chief of Counsel for Prosecution of Axis Criminality, *I Nazi Conspiracy and Aggression* 349 (1946), esp. 'Chapter VIII—Economic Aspects of the Conspiracy' (Economic Aspects).

⁵³ Taylor, above n 4, 81.

⁵⁴ Howard K. Smith, *The State of Europe* (New York, NY: Knopf, 1949), 83, 95.

⁵⁵ Partly also due to British efforts to keep the list short and the trial brief (Taylor, above n 4, 90).

⁵⁶ Taylor, above n 4, 591.

⁵⁷ Economic Aspects, above n 53.

⁵⁸ Taylor, above n 4, 630.

war... Once the war was on, Krupps, both Von Bohlen and Alfried being directly responsible therefor, led German industry in violating treaties and international law by employing enslaved labourers, impressed and imported from nearly every country occupied by Germany... Moreover, the Krupp companies profited greatly from destroying the peace of the world through support of the Nazi program... The United States respectfully submits that no greater disservice to the future peace of the world could be done than to excuse the entire Krupp family.⁵⁹

The request was rejected. Apparently the British objected on the grounds that allowing it would delay the start of the trial.⁶⁰ Although what might have been the first ever international trial of an industrialist was thus curtailed, its shadow was still present at Nuremberg. The IMT decided against formally trying Krupp *in absentia*, but *did* retain the charges against him in the indictment,⁶¹ which were read out in court on the first day of the trial. Moreover, the case against Krupp was still explicitly made, for example in the US Prosecution team's presentation on Count One on day four of the trial.⁶²

In addition, the economic case more generally featured prominently in the evidence presented by the US team at Nuremberg. Prosecutor Sidney Alderman, for example, presenting on the aggressive war charge cited the 'Hossbach Notes' in evidence to show that Hitler himself had also conceptualized the war as one of economic imperialism—the objective was conquest of a sufficient living space for food production for the German people plus the dominance of global trade and commerce.⁶³

Where the trial had focused on Göring's role as, 'in theory and in practice... the economic dictator of the Reich',⁶⁴ the IMT Judgment illustrates this role while strongly implicating the absent industrialists. The judges recount how, in November 1932, a petition signed by leading industrialists and financiers had been presented to President Hindenburg, calling upon him to entrust the Chancellorship to Hitler.⁶⁵ Subsequently, according to evidence submitted to the Tribunal:

⁵⁹ Answer of the United States Prosecution to the Motion on Behalf of Defendant Gustav Von Krupp Von Bohlen, 12 November 1945, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 134ff.

⁶⁰ Order of the Tribunal Rejecting the Motion to amend the Indictment, dated 15 November 1945, in I TWC, 146, and see, Memorandum of the British Prosecution on the motion, in I *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 139. They had promised instead to cooperate on a second international trial in which Krupp could be tried (Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2003), 24).

⁶¹ Indictment of the International Military Tribunal, I *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* 27, 1947 (IMT Indictment).

⁶² Nuremberg Trial Proceedings, Volume II, Day Four—Continuation of Colonel Storey's Presentation on Count 1, 222–3 and see the underlying prosecution file, a summary of which is published in Nazi Conspiracy and Aggression, Volume 2, Chapter XVI, Part 13.

⁶³ Nuremberg Trial Proceedings, Volume II, Day Five—Sidney Alderman's Presentation on Aggressive War, 261–5.

⁶⁴ IMT Judgment in International Military Tribunal, Judgment of 1 October 1946, in I *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* 171, 1947 (IMT Judgment), 183.

⁶⁵ IMT Judgment, 177.

On the invitation of Goering, approximately 25 of the leading industrialists of Germany, together with Schacht, attended a meeting in Berlin on 20 February 1933. This was shortly before the German election of 5 March 1933. At this meeting Hitler announced the conspirators' aim to seize totalitarian control over Germany, to destroy the parliamentary system, to crush all opposition by force, and to restore the power of the Wehrmacht. Among those present at that meeting were Gustav Krupp, four leading officials of the I.G. Farben Works, one of the world's largest chemical concerns; Albert Vogler, head of United Steel Works of Germany; and other leading industrialists.⁶⁶

At this meeting, Göring opened an election fund (into which the industrialists contributed) to support Hitler in the March elections. Göring predicted these elections would be Germany's last.⁶⁷

A month after the meeting between Göring and the industrialists, Krupp submitted to Hitler—on behalf of the Reich Association of German Industry—a plan for the reorganization of German industry. Krupp is cited in the Judgment as having stated that the plan was 'characterised by the desire to coordinate economic measures and political necessity', and that 'the turn of political events is in line with the wishes which I myself and the board of directors have cherished for a long time'.⁶⁸ The industrialists' plan was adopted.⁶⁹

So while the US administration's support for the economic case waned, its legal officers still followed through on the initial sentiment. The IMT Judgment surmised, '[i]n this reorganization of the economic life of Germany for military purposes, the Nazi Government found the German armament industry quite willing to co-operate'.⁷⁰ Moreover, the Judgment related how industrialists picked the rich fruits of aggressive war and participated directly in the Holocaust. This was exemplified by Krupp's extensive use of slave labour at his plant in Essen, where 'punishments of the most cruel kind were inflicted on the workers'.⁷¹

The lingering wish (strongest among the US Prosecution team) to actually prosecute industrialists became one of the reasons the US went ahead with the 'subsequent proceedings' at the NMT.⁷² Both Robert Jackson and his successor as Chief Prosecutor, Telford Taylor, pushed hard for the opportunity to try representatives of all sections of the German elite, including members of relevant professional groups, including the industrialists. However, by now the tide was irrepressibly turning, and the US lawyers started to face more resistance from the US government—supported in this respect by the increasingly hostile home media.⁷³

⁶⁶ Economic Aspects, above n 52.

⁶⁷ IMT Judgment, above n 64, 184. Schacht was acquitted (Soviet judge Nikitchenko dissenting), as the Court found his knowledge of an impending aggressive war not proven beyond reasonable doubt (IMT Judgment, above n 64, 506–7). On the impact of Schacht's acquittal on the industrialists' cases, see Bush, above n 1, 1124.

⁶⁸ IMT Judgment, above n 64, 183.

⁶⁹ Economic Aspects, above n 52.

⁷⁰ IMT Judgment, above n 64, 419.

⁷¹ IMT Judgment, above n 64, 462.

⁷² Above n 8; Bush above n 1, 1239.

⁷³ See, eg, Donald Bloxham, 'British War Crimes Trial Policy in Germany, 1945–1957: Implementation and Collapse', *Journal of British Studies*, 42 (2003), 97.

(III) The Turnaround: From Germany is our Problem to Germany is our Business

In the spring of 1947 clearer signs started appearing of a changing Allied policy towards Germany, from one where Germany was to be publicly castigated and disabled (in trials and through economic policies as envisaged in the Morgenthau Plan) to one where Germany was to be rehabilitated into the world community of states and its economy rebuilt.⁷⁴ Here I focus on how this change (effectively, the start of the Cold War) was reflected in the US leadership's decision-making regarding the industrialists' trials, and subsequently (Section IV) on the clearly perceptible impact it had in the proceedings and the decisions of the tribunals.

Individual members of the US administration disagreed strongly on appropriate US policy towards Germany.⁷⁵ Morgenthau relates how already during WWII orders were given to the military to spare German industrial plants.⁷⁶ In his memoirs, Dubois describes a secret State Department memorandum setting out its 'post-war program' relating to in kind reparations payments from Germany.⁷⁷ Such reparations could form a public justification for sparing, and where necessary rebuilding, Germany's productive capacity, as well as retaining US-German trade ties. However, the programme remained secret as at that point public and key political support was still behind the pacific, 'pastoralized' Germany as proposed in Morgenthau's plan. Morgenthau, sensing support for his plan waning, reinforced his stance by publishing it as a book entitled *Germany is our Problem*.⁷⁸

Over time, however, Morgenthau lost ground.⁷⁹ Dubois tells of seeing a second secret memorandum, circulated within the US delegation at Potsdam. According to this memo, the US goal now was 'rebuilding a strong Germany as a buffer against Communism'.⁸⁰ While the Potsdam Agreement (and occupation directive JCS1067, on which much of Potsdam was based)⁸¹ mirrored the Morgenthau Plan, Dubois states, 'of course, it was never followed through. The US officials did do just

⁷⁴ See generally, John Gimbel, 'On the Implementation of the Potsdam Agreement: An Essay on U.S. Postwar German Policy', *Political Science Quarterly*, 87 (1972), 242–69.

⁷⁵ Generally, see Gimbel, above n 74. According to Maguire, the US Nuremberg Prosecution staff 'included a disproportionate number of Harvard Law School graduates, former New Dealers, and liberal democrats': Peter Maguire, *Law and War: International Law and American History* (New York, NY: Columbia University Press, 2010), 117.

⁷⁶ H. Schild (ed), *Das Morgenthau Tagebuch—Dokumente des Anti-Germanismus* (Leoni am Starnberger See: Druffel Verlag, 1970), 64.

⁷⁷ Dubois Interview, above n 31, 13.

⁷⁸ Morgenthau, above n 25; Schild, above n 76, 64.

⁷⁹ Exceptions made to Law No.56 to allow for the rehabilitation of German industry are detailed in: Office of the Military Government for Germany (US), *Special Report of the Military Governor: Ownership and Control of the Ruhr Industries*, November 1948.

⁸⁰ Dubois Interview, above n 31, 34.

⁸¹ Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, April 1945 (JCS1067); US Department of State, *Foreign Relations of the United States: European Advisory Commission: Austria, Germany*, Vol. III (Washington DC: US Government Printing Office 1945), 484; and generally, Dubois Interview, above n 31.

what Morgenthau was afraid of, and in effect what the State Department memorandum recommended'.⁸² A strong, indentured economy was more attractive than a pastoralized state. Shortly after Potsdam Morgenthau was 'in effect... fired by Truman'.⁸³

The turnaround was not complete at this point, though, and elements of the plan persisted for some time. For example, the work of the OMGUS Decartelization Branch—staffed by, the 'Morgenthau Boys'⁸⁴—continued for two years after Henry Morgenthau's departure. Many items of machinery were shipped to the United States and the other Allies by way of reparations payment. The IG Farben Control Commission, which was run by all four occupation powers, split the Farben cartel into forty-seven parts, including the four sections that had only come together years before: Hoechst, Agfa, Bayer and BASF.⁸⁵ The entire German economy came to be strictly controlled by the occupation authorities. OMGUS passed anti-cartel laws that considered any enterprise with more than 10,000 employees *prima facie* in violation.⁸⁶ Secret programmes were underway to control and harvest German scientific development. Thousands of industrial patents, as well as hundreds of scientists were transferred to the US in 'Operation Paperclip'.⁸⁷

The 'Restatement of Policy on Germany' was US Secretary of State James Byrnes' public announcement of the turnaround on 6 September 1946. In his speech, Byrnes raised the issue of the political and economic future of Europe: 'Germany is a part of Europe and recovery in Europe, and particularly in the states adjoining Germany, will be slow indeed if Germany with her great resources of iron and coal is turned into a poorhouse'.⁸⁸ In this statement Byrnes effectively echoed Soviet Foreign Minister Molotov's speech on Germany's economic future at the Paris Peace Conference in July 1946. However, unlike Molotov, Byrnes omitted mention of the industrialists' role in WWII, a notion that by then was starting to disappear from 'Western' discourse, and would disappear all but completely after the subsequent trials.⁸⁹

In March 1947 Truman announced the 'Truman Doctrine' promising economic support to those 'states resisting attempted subjugation' (read: to communism).⁹⁰ Soviet representative Zhdanov responded with the 'two camps' speech in which he repeated the view that capitalist imperialism, personified in the directors of

⁸² Dubois Interview, above n 31, 32, 33.

⁸³ J. Blum (ed), *From the Morgenthau Diaries*, Vol. 3 (Boston, MA: Houghton Mifflin 1967), 400–20, 451; Dubois Interview, above n 31, 25.

⁸⁴ Richard D. McKinzie, interview with Bernard Bernstein, 23 July 1975, New York, NY: *Harry S. Truman Library and Museum* [website], <<http://www.trumanlibrary.org/oralhist/bernsten.htm>> (accessed 27 February 2013); Bernstein Farben Report, above n 7.

⁸⁵ 'Control of IG Farben', *Special Report*, above n 27.

⁸⁶ *Special Report*, above n 85.

⁸⁷ Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, *Final Report to the United States Congress*, April 2007.

⁸⁸ US Department of State, *Documents on Germany 1944–1985* (Washington DC: Department of State, 1985), 91–9.

⁸⁹ Vyacheslav Mikhaylovich Molotov, *Speeches of V.M. Molotov, Minister for Foreign Affairs of the USSR and Head of the Soviet Delegation at the Conference* (London: Soviet News, 1946).

⁹⁰ John Merriman, *A History of Modern Europe*, Vols. 1 & 2 (New York, NY: 3rd edn, W.W. Norton & Co 2009), 119.

the cartels, was the true perpetrator of WWII.⁹¹ By this point hunger was widespread in Germany⁹² and there was real fear Germans would turn to communism. Acheson remarked that the US was at 'the point where we see clearly how short is the distance from food and fuel either to peace or to anarchy'.⁹³ In July 1947 JCS1067 was replaced with JCS1779, which codified the turn in US policy and stated that '[a]n orderly, prosperous Europe requires the economic contributions of a stable and productive Germany'.⁹⁴ German and generally Western European recovery took off, largely through the Marshall Plan announced on 5 June 1947,⁹⁵ which aimed to modernize Western European industry and remove barriers to trade among European countries and between Europe and the US.⁹⁶ According to the US leadership, the objective of the Marshall Plan was only in part humanitarian—rather, it was 'chiefly... a matter of national self-interest'.⁹⁷ The Plan both stimulated the dollar and US industry and services (as the aid largely took the form of financing of purchases to be made from US corporations) and provided leverage for building 'political and economic stability'.⁹⁸ For example, Marshall Aid was used to pressure French and Italian governments not to appoint communists to ministerial posts.⁹⁹ Combining this with a leadership position in the International Bank for Reconstruction and Development, the International Monetary Fund and the nascent international trade regime, the US was able to remake the economic configuration of the world in its image.¹⁰⁰

When Marshall presented Molotov at the Paris Economic Conference with a plan to stimulate only agricultural development in Eastern Europe, Molotov walked out of the meeting in one of the first major public clashes of the Cold War. On the Eastern side, the Cominform, the coordinating mechanism for all communist parties, was inaugurated in September 1947 as the successor to the Comintern, and Zhdanov was installed as its chair. Zhdanov also expressed opposition to the Marshall Plan, which to communists (in Western and Eastern Europe alike) enabled American imperialism through the medium of US

⁹¹ H. Wentker, *Die juristische Aufarbeitung von NS-Verbrechen in der Sowjetischen Besatzungszone und in der DDR* (Baden-Baden: Kritische Justiz, 2002), 63.

⁹² Lucius Clay, *Decision in Germany* (London: William Heinemann, 1950), 262–84.

⁹³ D. Acheson, 'The Requirements of Reconstruction', address made before Delta Council at Cleveland, MS on 8 May 1947, *Department of State Bulletin* (18 May 1947), 992 (Acheson Reconstruction).

⁹⁴ Directive to the Commander in Chief of United States Forces of Occupation of Germany (JCS 1779), Germany 1947–1949, 33–41, *Department of State Bulletin* (27 July 27 1947), 186–93.

⁹⁵ G. Marshall, 'European Initiative Essential to Economic Recovery', remarks by the Secretary of State at Harvard University on 5 June 1947, *Department of State Bulletin* (15 June 1947).

⁹⁶ Merriman, above n 90, 1120–1.

⁹⁷ Acheson Reconstruction, above n 93, 992.

⁹⁸ Acheson Reconstruction, above n 93, 992–3.

⁹⁹ Merriman, above n 90, 1120.

¹⁰⁰ See Ernest Mandel, *The Meaning of the Second World War* (New York, NY: Verso, 1986), at 168: 'US imperialism could restrain itself because it had a way out economically. The option it chose in 1946–48 was to concentrate its efforts on the political and economic consolidation of capitalism in the main imperialist countries, and to grant them sufficient credit and space for development to initiate a world-wide expansion of the capitalist economy, on the basis of which capitalism would be politically and socially stabilised in its main fortresses.'

corporations.¹⁰¹ Soviet power in Eastern Europe grew as Soviet troops took control of the Czech government in January 1948 and in June 1948 blocked foreign trains and truck routes into Berlin, in protest against US, British and French plans for a self-governing Western German zone. The latter sent shockwaves through the US trial teams at Nuremberg and some made the decision to take their families home.¹⁰² West German commentator Friedhelm Kröll summarizes the *Umorientierung* (turnaround) as follows: 'With the re-formation of political camps during the Cold War and the open warfare in Korea, the involvement of the young Federal Republic into the Western alliance weighed heavier than crime and punishment of Nazi crimes.'¹⁰³ East German commentators accused the US of 'liquidating Potsdam'.¹⁰⁴

It is against this backdrop that we must imagine the efforts of US lawyers such as Jackson and Taylor to persuade the US political leadership to allow further trials.¹⁰⁵ That these took place at all can partly be brought down to the tenacity of these lawyers.¹⁰⁶ Justice Jackson, in his report on the IMT Judgment, reminded the US government that:

The war crimes work that remains to be done, is to deal with the very large number of Germans who have participated in the crimes [and who] remain unpunished. There are many industrialists, militarists, politicians, diplomats, and police officials whose guilt does not differ from those who have been convicted except that their parts were at lower levels and have been less conspicuous.¹⁰⁷

Jackson noted that his successor, Brigadier General Telford Taylor, had already 'prepared a programme of prosecutions against representatives of all the important segments of the Third Reich including a considerable number of industrialists and financiers, leading cabinet ministers, top SS and police officials, and militarists'.¹⁰⁸ The initial proposal had been for a second international trial.¹⁰⁹ British Foreign Secretary Orme Sargeant, however, feared that such a trial would become a 'battle

¹⁰¹ United States Economic Cooperation Administration, *A Report on Recovery Progress and United States Aid* (February 1949), 142–4 and generally, Chapter VI: 'Communist Opposition to the ERP', 141–50.

¹⁰² Dubois, above n 8, 338.

¹⁰³ Friedhelm Kröll, 'Fall 10: Der Krupp-Prozess', in G. and R. Blasius (eds), *Der Nationalsozialismus vor Gericht: Die alliierten Prozesse gegen Kriegsverbrechen und Soldaten 1943–1952* (Frankfurt: Fischer Taschenbuch Verlag, 1999), 176.

¹⁰⁴ S. Kahn, 'Preface', in Richard Sasuly, *IG Farben* (Berlin: Volk und Welt, 1952), 6.

¹⁰⁵ On US domestic opposition to trying Nazis, see Maguire, above n 75, 119–20; Bush, above n 1, 1230–1.

¹⁰⁶ Bloxham, above n 60, 55.

¹⁰⁷ 'Jackson Report to the President of October 7', 1946, attached to *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (London, 1945) (Jackson Final Report).

¹⁰⁸ Jackson Final Report, 435.

¹⁰⁹ Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10 (Washington, DC: US Government Printing Office, 1949), 22–7. For Jackson's view on international versus US military trials, see Jackson Final Report, above n 108. For commentary see Heller, above n 22, 9–24; Bush, above n 1, 1123–9; Donald Bloxham, 'The Trial that Never Was': Why There Was No Second International Trial of Major War Criminals at Nuremberg', *J. Hist. Ass'n*, 87 (2002), 46–7.

between capitalism and communism'.¹¹⁰ Jackson's response shows industrialists were the prime target of further trials: '[I]f [the other Allies] were unwilling to take the additional time necessary to try industrialists in this case... [t]he quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out'.¹¹¹ This is what happened.

In the trials of the industrialists at the US NMT we can see the change in the broader geopolitical landscape and US attitude reflected. On a very practical level, for example, General Clay was ordered by JCS1779 to 'make every effort to facilitate and bring to early completion the war crimes program'.¹¹² In 1947 he put direct pressure on Taylor to wrap up the NMT trials—before they had even begun.¹¹³ Taylor's original plan to prosecute up to four hundred individuals had to be revised to 177.

The wish—and decision—to try individual industrialists in this changing landscape may seem contradictory at first glance. It is less so when we contrast the idea of trying them with what actually happened in the trials and decisions, as I illustrate in the next section. Below the surface, a deeper US need can be discerned: the need to reassure American industrialists, perhaps counter-intuitively *through these trials*, that production for the Korean and other, potentially *aggressive*, wars would not lead to their prosecution.¹¹⁴ From this perspective, the Tribunals' task was to distinguish culpable involvement with an evil regime from innocent 'business'.¹¹⁵

(IV) The Trials of the Industrialists: From Morality Play to *Théâtre De L'absurde*

The trials at the NMT were based on Control Council Law No. 10 (CCL10) of December 1945, which authorized each of the four German Occupation Zone Commanders to arrest suspected war criminals and to establish 'appropriate tribunals' for their trial.¹¹⁶ Of the trials carried out by the Allies and eventually also the German courts,¹¹⁷ those of the US, which took place in the same Nuremberg courthouse as the IMT trial, are by far the best documented and most widely known.

¹¹⁰ Donald Bloxham, *Genocide, the World Wars, and the Unweaving of Europe* (Middlesex: Vallentine, Mitchell and Co., 2008), 149.

¹¹¹ Jackson Final Report, above n 109, 436. ¹¹² JCS 1779, [10].

¹¹³ Clay, above n 94, 252. ¹¹⁴ Dubois, above n 10, 21.

¹¹⁵ Dubois, above n 10, 20. See also, Jeßberger, 'Die I.G. Farben vor Gericht', above n 1; Jeßberger, 'On the Origins of individual criminal responsibility under international law for business activity: IG Farben on Trial', above n 1.

¹¹⁶ Control Council Law No. 10 (CCL10), Article II 2, 20 December 1945, reprinted in Taylor, Final Report, above n 109, 250.

¹¹⁷ As per CCL10, Article III, the French, British and Soviet commanders granted German courts' jurisdiction.

It is these trials that are now once again cropping up in the literature around business and international criminal law,¹¹⁸ and indeed in recent legal practice.¹¹⁹

My task in this section is to show how the realignment of the geopolitical landscape and internal dynamics of the US state-capitalist trust manifested themselves directly in the trials and their aftermaths. Of the trials held at the NMT, this occurs most clearly in the *trials of the industrialists*. Here, the recent realignment manifests in four distinct, interrelated ways. First, the trials were marked by excessively conciliatory language employed by the judges towards, or about, the defendants. Second, facts and charges that were admitted by the defendants were considered 'not proven' or ignored by the judges, and third, the necessity and superior order defences were allowed to be used in ways specifically contradicting the main IMT decision and CCL10. Apart from the liberal application of exculpatory legal doctrines, the NMTs in the industrialists' cases were generous in other areas. For example, the NMTs accepted the defendants' ignorance regarding the plans for aggressive war and the fact of the Holocaust. Finally, these factors added up to the passing of very light sentences when compared to similar CCL10 convictions. Moreover, it was in the aftermath of the trials, in the extrajudicial review of sentences carried out by High Commissioner for Germany McCloy¹²⁰ and the reinstatement of many of the industrialists in their old positions, that capitalism's victor's justice was sealed.

As a general point, it can be said that the trials turned from a morality play into *théâtre de l'absurde*. *Théâtre de l'absurde*, a genre that emerged in the early post-war years, is characterized by a lack of formal structure or logical dialogue in the aftermath of a sudden loss of meaning or purpose. For example, Samuel Beckett's *Waiting for Godot* (1952) represents the impossibility of purposeful action and the paralysis of human aspiration.¹²¹ Below, I give only some representative examples from the three industrialists' trials, the *Flick* case,¹²² *Farben*¹²³ and *Krupp*.¹²⁴ There are many more.¹²⁵ I have added some factual context to each of the examples so

¹¹⁸ See, eg, K.R. Jacobson, 'Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials whose Business Transactions Facilitate War Crimes and Crimes Against Humanity', *Air Force Law Review*, 56 (2005), 167; G. Skinner, 'Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in US Courts under the Alien Tort Statute', *Albany Law Review*, 71 (2008), 321. Many recent works on Nuremberg perpetuate incorrect or incomplete facts about the trials (Bush, above n 1, 1237).

¹¹⁹ See, eg, the Nuremberg Scholars Amicus brief in support of the petitioners in *Kiobel v Royal Dutch Petroleum*, USSC 10-1491.

¹²⁰ Under Military Ordinance No. 7 (which established the tribunals) Article XVII (a), the Military Governor was authorized to reduce, mitigate or otherwise alter (but not raise) a sentence passed by the tribunals. While General Clay reviewed and confirmed sentences, his successor McCloy constituted a clemency board which would re-review sentences without involving or even informing the judges and prosecutors (see Maguire, above n 75, 166–8).

¹²¹ *The Oxford Dictionary of Literary Terms* (Oxford: Oxford University Press, 2008), 1–2.

¹²² *United States v Friedrich Flick et al (Flick)*, above n 51.

¹²³ *United States v Carl Krauch et al (Farben)*, *Trials of War Criminals before the Nuremberg Military Tribunals under CCL10*, Vol. VII.

¹²⁴ *United States v Alfred Krupp et al (Krupp)*, *Trials of War Criminals before the Nuremberg Military Tribunals under CCL10*, Vol. IX.

¹²⁵ G. Baars, 'Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law', Doctoral Thesis (University College London,

as to illustrate the role the leaders of these companies were said to have played in WWII and the Holocaust.

(1) Excessively conciliatory language

Throughout the three judgments, examples of the judges' use of excessively conciliatory language can be found, which stands in stark contrast with the language of the prosecution. The first example here is from the *Flick* case. Friedrich Flick and five other officials of the Flick Concern were accused of participation in the deportation of thousands of foreigners including concentration camp inmates and prisoners of war to forced labour in inhuman conditions including in the Flick mines and plants; spoliation contrary to the Hague Conventions of property in occupied France and the Soviet Union; participation in the persecution of Jews in the pre-war years through securing Jewish industrial and mining properties in the 'Aryanization' process, and knowing participation (of defendants Flick and Steinbrinck) in SS atrocities through membership in the 'Circle of Friends of Himmler' (a select group of industrialists and SS officers).¹²⁶ The Flick group of enterprises included coal and iron mines, steel producing and fabricating plants. It was, at the time, the largest steel combine in Germany, rivalled in size only by Krupp AG.¹²⁷ Chief Prosecutor Telford Taylor opened this first industrialist case to be tried by the Americans with the nature of industry's responsibility:

What we are here concerned with is no mere technical form of participation in crime, or some more or less accidental financial assistance of the commission of crimes. The really significant thing... is the fact that the defendants assisted the SS and the Nazi regime with their eyes open and their hearts attuned to the basic purposes which they were subsidising. Their support was not merely financial. It was part of a firm partnership between these defendants and the Nazi regime that continued from before the Nazi seizure of power to the last days of the Third Reich.¹²⁸

The final judgment in the *Flick* case (and the other industrialists' cases) stands in stark contrast to this indictment. On the count of participation in the SS crimes through membership of the Himmler Circle, Flick and Steinbrinck were found guilty. As one of its most absurd proposals, the Tribunal suggested, that rather than forming an active part of the deliberations about the upcoming aggressive war, the defendants may just have attended the Himmler Circle's meetings for its 'excellent dinner'.¹²⁹

Moreover, the Tribunal attempted to show how Flick and company—despite attending these regular dinners—had not had the required knowledge to render them guilty of war crimes and crimes against humanity in relation to the killings and other atrocities carried out in the Nazi extermination camps. It recounted how:

2012) includes detailed treatment of the *Ministries Case* and *Pohl* as well as the other zonal trials (at 119–74).

¹²⁶ *Flick*, above n 51, 3 (Indictment).

¹²⁷ *Flick*, above n 51, 34 (Opening Statement for Prosecution).

¹²⁸ *Flick*, above n 51, 104.

¹²⁹ *Flick*, above n 51, 1218 (Judgment).

[i]n 1936 [Himmler] took members of the Circle on an inspection trip to visit Dachau concentration camp which was under his charge. They were escorted through certain buildings including the kitchen where they tasted food. They saw nothing of the infamous atrocities perhaps already there begun. But Flick who was present got the impression that it was not a pleasant place.¹³⁰

Again, this section bears an excessively conciliatory tone, which here interferes with the finding of knowledge with regards to the facts of the Holocaust, which had been deemed (including by the IMT) common knowledge among the German people at the time.¹³¹

The other 'reconciliation' that appears in the trials is that between German and US industry. *Farben* prosecutor Dubois had been instructed by the US War Department, before taking up his role, not to charge the *Farben* defendants with aggressive war.¹³² The US Government feared DuPont and other US industrialists' reaction. However, Dubois went ahead with the charge. It is clear from their statements that the industrialists on trial were aware of criticism of the trials voiced by US business leaders in the media—in particular, since *Farben* had had close relationships with Standard Oil, this trial had been watched closely by the home public.¹³³ The defendants were aware that the US in changed political times would come to rely on its own industrialists, evidenced in Krauch's closing statement:

When I heard the final plea of the prosecution yesterday, I often thought of my colleagues in the United States and in England and tried to imagine what these men would think, when they heard and read these attacks hurled at us by the prosecution. For after all, they, too, are scientists and engineers; they had similar problems. They, like us, were called upon by the state to perform certain duties. That was true then, before the world war, and that is true now, as we know from information received from the United States. A citizen cannot evade the call of the state. He must submit and must obey.¹³⁴

Seemingly in agreement with Krauch, the Tribunal acquitted the defendants of the charge of conspiracy to wage wars of aggression, finding that they had acted merely like ordinary citizens, who, although the majority of them supported the waging of war in some way, were not the ones who planned the war and led a nation. The Tribunal placed itself in opposition to the IMT on the role of industrialists, holding that the *Farben* defendants merely followed their leaders and offered no contribution to the war effort greater than any other normally productive enterprise.¹³⁵

Most controversially, the Tribunal stated '[w]e reach the conclusion that common knowledge of Hitler's plans did not prevail in Germany, either with respect to a general plan to wage aggressive war, or with respect to specific plans to attack

¹³⁰ Flick, above n 51, 1218 (Judgment).

¹³¹ IMT Judgment, above n 64, 480.

¹³² Dubois, above n 8, 20.

¹³³ Taylor, Final Report, above note 109, 79.

¹³⁴ *Farben*, above n 123 1055 (Final Statements by the Defendants: Krauch). Krauch's lawyer had also said, 'I have to harp again on the old subject: that is, did not other countries and other peoples act in the same way? Replace IG by I.C.I. (Imperial Chemical Industries) for England, or du Pont for America, Montecatini for Italy, and at once the similarity will become clear to you': at 921 (Closing Statements for Defendant Krauch).

¹³⁵ *Farben*, above n 125, 1126.

individual countries'.¹³⁶ Here we can see another direct contradiction of the IMT, both regarding Germans' general knowledge and the *Farben* defendants' specific knowledge.¹³⁷ As briefly noted above, the IMT had detailed the planning and strategy meetings of Himmler's circle of Friends, of which *Farben* defendant Buete fish had been a part (with Flick and Rasche, amongst others).¹³⁸

The *Farben* Tribunal played down the common interest between the industrial and political leaders. In support of the claim that the *Farben* leaders were well aware of, and perhaps more directly involved in planning the aggressive war for their own purposes, the prosecution had produced a letter in which Krauch argued for the takeover of neighbouring countries' industries, 'peaceably at first':

It is essential for Germany to strengthen its own war potential as well as that of its allies to such an extent that the coalition is equal to the efforts of practically the rest of the world. This can be achieved only by new, strong, and combined efforts by all of the allies, and by expanding and improving the greater economic domain corresponding to the improved raw material basis of the coalition, peaceably at first, to the Balkans and Spain.¹³⁹

Contrast this with the Tribunal's view:

The defendants may have been, as some of them undoubtedly were, alarmed at the accelerated pace that armament was taking. Yet even Krauch, who participated in the Four Year Plan within the chemical field, *undoubtedly did not realise* that, in addition to strengthening Germany, he was participating in making the nation ready for a planned attack of an aggressive nature.¹⁴⁰

Eventually the Tribunal concluded summarily on the further evidence submitted to it: 'This labour has led to the *definite* conclusion that Krauch did not knowingly participate in the planning, preparation or initiation of an aggressive war.'¹⁴¹ If Krauch's level of knowledge did not suffice to find him guilty, then DuPont and the other US industrialists could rest assured.

(2) Facts and charges admitted considered not proven or ignored by the judges

One of the most absurd features of the trials was how certain facts and charges that were admitted in court by the defendants were considered 'not proven' or ignored by the judges. The *Farben* case was by far the most absurd case in this respect.¹⁴² In this case the way facts and law are twisted, and the tone of the judges' statements, almost give the impression that the judges believed themselves to be involuntary actors in a play.¹⁴³ The judgment stands in stark contrast to evidence reported

¹³⁶ *Farben*, above n 125, 1107. ¹³⁷ See, eg, IMT Judgment, above 64, 480.

¹³⁸ See also, *Farben*, above n 123, 1200. ¹³⁹ *Farben*, above n 123, 1116.

¹⁴⁰ *Farben*, above n 123, Vol. VIII, 1114. ¹⁴¹ *Farben*, above n 123, 1117 (emphasis added).

¹⁴² For a sustained critique, see Dubois, above n 8, 338–56.

¹⁴³ This impression is raised in the private papers of Judge Hebert: see, eg, Paul Hebert, 'Draft Dissent', *Nuremberg Trials Documents* (1948), Louisiana State University Law Centre Digital Commons, <http://digitalcommons.law.lsu.edu/nuremberg_docs/1> (accessed 27 February 2013).

in the US Congress and presented during the trial.¹⁴⁴ Von Schnitzler's extensive admissions made in interrogations¹⁴⁵ eventually 'did not mean anything, not even against himself'.¹⁴⁶

On the slave labour charge, only in the Auschwitz context did the Tribunal find some evidence of the *Farben* defendants' initiative, but the area of criminal liability was still constructed very narrowly. Having considered many potential locations for a new synthetic rubber plant, on the recommendation of defendant Ambros, the small Polish village of Oświęcim was selected.¹⁴⁷ This became the site for *Farben*'s main manufacturing plant, as well as for the Auschwitz concentration and extermination camp. Ambros visited the camp at Auschwitz in the winter of 1941–2 in company with some thirty important visitors (perhaps the Himmler Circle), and 'he saw no abuse of inmates and thought that the camp was well conducted'.¹⁴⁸ Once again, in the face of the overwhelming evidence presented at the IMT and NMT in relation to Auschwitz (including, for example, that as of the beginning of 1942 'the smell of death emanating from the crematorium would pucker the nose of anyone within half a mile'¹⁴⁹), it appears odd for the judgment to adopt such description uncritically.

'Work-to-death labour'¹⁵⁰ at *Farben*'s Auschwitz factory is described by the Tribunal in its judgment euphemistically as '[t]hose [workers] who became unable to work or who were not amenable to discipline were sent back to the Auschwitz concentration camp or, as was more often the case, to Birkenau for extermination in the gas chambers'.¹⁵¹ Also, it is noted, '[t]he plant site was not entirely without inhumane incidents'.¹⁵² Nevertheless the Tribunal adds, '[i]t is clear that *Farben* did not deliberately pursue or encourage inhumane policy with respect to the workers. In fact, some steps were taken by *Farben* to alleviate the situation. It *voluntarily and at its own expense* provided hot soup for the workers on the site at noon'.¹⁵³ When utilizing free 'work-to-death labour', however, this appears little like generosity and even less an exculpatory factor for the *Farben* defendants. The fact remained, as stated by the Tribunal, that 'the labour for Auschwitz was procured through the Reich Labour Office at *Farben*'s request. Forced labour was used for a period of approximately three years, from 1942 until the end of the war'.¹⁵⁴ Only five of the twenty-four defendants were found guilty under count three. Dubois' final comment on the Tribunal's 'greatest exaggeration' in the case of defendant Ilgner was, '[t]he tribunal rewrote into innocence even the aggressive deeds he admitted, raising the clear implication that any society could be filled with such men with no danger whatever to the peace of the world'.¹⁵⁵ As well as falling into the current category of absurdism, the Tribunal also alludes to the next

¹⁴⁴ See, eg, Bernstein *Farben* Report, above n 7.

¹⁴⁵ See Osterloh, above n 19, 75.

¹⁴⁶ *Farben* Indictment, above n 123, 47–9; Dubois, above n 8, 339.

¹⁴⁷ *Farben*, above n 123, 1180.

¹⁴⁸ *Farben*, above n 123, 1181.

¹⁴⁹ Dubois, above n 8, 341.

¹⁵⁰ Dubois notes worker deaths amounted to over 50,000: Dubois, above n 8, 342.

¹⁵¹ *Farben*, above n 123, 1183.

¹⁵² *Farben*, above n 123, 1184.

¹⁵³ *Farben*, above n 123, 1185 (emphasis added).

¹⁵⁴ *Farben*, above n 123, 1185.

¹⁵⁵ Dubois, above n 8, 355.

category, that of finding the defendants had simply, innocently, been doing as they were told, or carrying on 'business as usual' in unusual circumstances.

(3) Howling with the wolves: Necessity used as a defence contrary to Nuremberg principles

Flick described his ostensible agreement with Nazi ideology as self-protective 'howling with the wolves'.¹⁵⁶ The Tribunal accepted the view that the defendants (except Flick and Weiss) acted under necessity,¹⁵⁷ forced by the 'reign of terror' employed by the Nazi regime:

The Reich, through its hordes of enforcement officials and secret police, was always 'present', ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.¹⁵⁸

This blanket interpretation of necessity could well be used to excuse any crime committed under order or decree of the Nazis. The *Flick* judgment in this aspect stands in sharp contrast to other non-industrialist decisions of the NMT.¹⁵⁹

The generous use of necessity as a complete defence in these cases appears to be aimed at circumventing the bar on use of the 'superior orders' defence as a fundamental principle at Nuremberg.¹⁶⁰ CCL10 states, '[t]he fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation'.¹⁶¹ At the IMT, 'the true test [for such mitigation], which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible'.¹⁶² *Farben* defendant Schneider had told interrogators that no one in government forced Farben to build the factories at Auschwitz or to operate them.¹⁶³ The rubber quota had been set by Krauch himself and Farben produced in excess of government requirements.¹⁶⁴ Yet, the Tribunal found '[t]here can be but little doubt that the defiant refusal of a Farben executive to carry out the Reich production schedule or to use slave labour to achieve that end would

¹⁵⁶ Telford Taylor, 'Nuremberg Trials: War Crimes and International Law', *International Conciliation*, 450 (1949), 304.

¹⁵⁷ The NMTs do not employ a uniform understanding of the concept of necessity, which is also at times used interchangeably with 'duress'. For an overview, see, E. Van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (The Hague: TMC Asser Press 2003), 279–83.

¹⁵⁸ *Flick*, above n 51, 1200.

¹⁵⁹ For example in the Einsatzgruppen case necessity was understood to require an 'imminent, real and inevitable threat' (*US v Ohlendorf et al. VII Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 91).

¹⁶⁰ Nuremberg Charter, Article 8. See, for example IMT Judgment, above n 65: 'Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification': at 493 (in relation to Keitel).

¹⁶¹ CCL10, Article II4(b).

¹⁶² IMT Judgment, above n 64, 447.

¹⁶³ Dubois, above n 8, 341.

¹⁶⁴ Dubois, above n 8, 341.

have been treated as treasonous sabotage and would have resulted in prompt and drastic retaliation'.¹⁶⁵

In his dissent on the charges of slave labour, Judge Hebert disagreed with the necessity finding in the strongest terms, concluding that Farben directors had initiated rather than followed orders, and that Farben directors' will coincided with the government. Hebert called the Tribunal's finding of a Nazi threat to Farben 'pure speculation'.¹⁶⁶

In the *Krupp* case we can see a remarkable variation of the IMT's reasoning on economic imperialism. Here, the Prosecution did not argue that the *Krupp* defendants were part of the 'Nazi conspiracy' in the meaning of the IMT decision, but that they had been part of a '*Krupp conspiracy*'. This was a manifestation of something altogether bigger:

Nazism was, after all, only the temporary political manifestation of certain ideas and attitudes which long antedated Nazism, and which will not perish nearly so easily. In this case, we are at grips with something much older than Nazism; something which fused with Nazi ideas to produce the Third Reich, but which has its own independent and pernicious vitality.¹⁶⁷

To ensure Krupp's own continually increasing profitability, it was said to have driven the state and military to colonial expansion.¹⁶⁸ Dismissing the charge, Judge Wilkins considered that Krupp's expansionism since the 1920s merely meant Krupp had acted *in the firm's financial interest* as behoves a businessman.¹⁶⁹ From the condemnation of the state-corporate economic imperialism in the IMT (see above) to this decision, it appears the NMT came full circle: Krupp's 'conspiracy' was simply business as usual.¹⁷⁰

The *Krupp* Tribunal then considered the remaining spoliation and forced labour charges. The Tribunal found, in contrast to the *Farben* decision (above), in terms of *knowledge* with regard to the Krupp firm's activities at Auschwitz that the persecution of Jews by the Nazis was 'common knowledge not only in Germany but throughout the civilised world' and that the firm's officials, could not *not* have known.¹⁷¹

¹⁶⁵ *Farben*, above n 123, 1174.

¹⁶⁶ *Farben*, above n 123, 1306 (Judge Hebert's Dissenting Opinion on Count Three of the Indictment).

¹⁶⁷ See *Krupp*, above n 124, 412 (Judge Wilkins' Separate Opinion on Counts 1 and 4).

¹⁶⁸ Kröll connects this with Max Weber's 'Wilhelminismus': 'die Allianz zwischen Großindustrie und Pseudoaristokratie mit der Folge der Derationalisierung der deutschen Weltpolitik': F. Kröll, *Fall 10: Der Krupp-Prozeß*, in G. Ueberschär, *Der Nationalsozialismus vor Gericht: die alliierten Prozesse gegen Kriegsverbrecher und Soldaten 1943–1952—Nazism up in court: the Allies' trials against war criminals and soldiers from 1943 to 1952*, (Frankfurt am Main: Fischer Taschenbuch Verl, 1999).

¹⁶⁹ *Krupp*, above n 124, 412. See also, Taylor, above n 156, 309.

¹⁷⁰ Likewise, the *Farben* Tribunal considered that company a 'simple prototype of "Western capitalism"': Dubois, above n 8, 355.

¹⁷¹ *Krupp*, above n 124, 1434.

(4) 'Sentences light enough to please a chicken thief'

Compared to sentences in cases where similar facts were alleged and established, the industrialists in *Flick* and *Farben* received, as Dubois put it in his comment on the *Farben* judgement, 'sentences light enough to please a chicken thief'.¹⁷² Flick was sentenced to seven years' imprisonment, Steinbrinck to five, and Weiss to two-and-a-half, while the other three defendants were acquitted on all counts.¹⁷³ In his report, Taylor calls the *Flick* judgment 'exceedingly (if not excessively) moderate and conciliatory'.¹⁷⁴ In the *Farben* case, Krauch was sentenced to six years, Ambros to eight, and the others received sentences between one-and-a-half and eight years. Four were acquitted. The defendant Ilgner was considered innocent even of the aggressive deeds he had admitted.¹⁷⁵ By comparison, in the *Justices* case, that same week, four life sentences were imposed, and in the *Pohl* case against the SS Economic and Administrative Office (who had handled the logistical and administrative side of slave labour) four death sentences were imposed, and no prison sentence below ten years with four of twenty or more.¹⁷⁶ Dubois surmises, 'no doubt [the *Farben* judges] were influenced somewhat by our foreign policy'.¹⁷⁷

The comparatively heavy sentences in *Krupp* ranged between six and twelve years for ten defendants, and three years for one, and included the forfeiture of Alfried Krupp's real and personal property.¹⁷⁸ After the IMT's 'Krupp snafu', Taylor had commented that 'Alfried Krupp was a very lucky man, for, had he been named, he would almost certainly have been convicted and given a very stiff sentence by the International Military Tribunal'.¹⁷⁹ With this in mind, the Krupp defendants' trial seems 'amicable' indeed.¹⁸⁰

The NMT also convicted one banker, Rasche, the director of the Dresdner Bank, as part of the *Ministries* case.¹⁸¹ His trial also featured the four factors of the NMT *théâtre de l'absurde*.¹⁸² The popular German conception of his role is encapsulated in the saying, '*Wer marschiert da hinter dem ersten Tank? Das ist Doktor Rasche von der Dresdner Bank.*'¹⁸³

The NMT trials of the industrialists left both prosecutors and judges with much agonized soul-searching, evidenced in their writing on the matter.¹⁸⁴ According

¹⁷² Dubois, above n 8, 339. ¹⁷³ *Krupp*, above n 124, 1223.

¹⁷⁴ Taylor, above n 156, 187.

¹⁷⁵ Dubois, above n 8, 355.

¹⁷⁶ *United States v Josef Alstoeffer et al. (Justice)* in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. III; *United States v Oswald Pohl et al. (Pohl)* in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. V.

¹⁷⁷ Dubois, above n 8, 357.

¹⁷⁸ *Krupp*, above n 124, 1450.

¹⁷⁹ Taylor, above n 4, 94.

¹⁸⁰ This is the term used in Jeßberger, 'Die I.G. Farben vor Gericht', above n 1 and Jeßberger, 'On the Origins of Individual Criminal Responsibility', above n 1.

¹⁸¹ *United States v Ernst Weizsaecker et al (Ministries)* in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. XIV.

¹⁸² Heller comments on the 'unprincipled lenience' of the tribunal towards Rasche, based on his status as a private businessman (Heller, above n 22, 5, 288–9).

¹⁸³ 'Who is that marching behind the first tank? That's Dr Rasche of the Dresdner Bank' (my translation). I am grateful to Fabian Schellhaas, PhD Candidate, Humboldt University Faculty of Law for this phrase.

¹⁸⁴ See, generally, Taylor, above n 156; Dubois, above n 8; Sasuly, above n 104.

to Dubois, Judge Hebert had been writing a dissenting opinion on the Farben aggressive war charge up to the very last day, stating that 'by the time we reached the end [of the trial] I felt that practically every sentence of the indictment had been proved many times over'.¹⁸⁵ According to Dubois, Hebert probably changed his mind about submitting his dissent out of fear of communism, considering the trend of events in 1948.¹⁸⁶ Taylor also considered the evidence against Farben, especially on the aggressive war charge, to have been the strongest of all the industrialist trials.¹⁸⁷ In the opinion Hebert eventually filed, six months after the majority judgment, he states: 'The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggression possible.'¹⁸⁸

What I have tried to show in this section is how international criminal law was shaped and manipulated to produce outcomes that were materially desirable—resulting in, at times, absurd contradictions. The outcomes of the trials are not the result of some putative 'autonomous' legal process, but rather, follow the logic of capitalism and bear the imprint of the changing facts and relationships of the material base. Yet, the contradictions inherent in the fact that these trials took place at all, their outcomes, and salient details such as the fact that throughout their trial detention the accused's companies were still running (with the help of powers of attorney and board meetings in prison cells)¹⁸⁹ were to give rise to something bigger, international criminal law's effective deployment in the service of capitalism's victor's justice.

(V) Aftermath: Capitalism's Victor's Justice

Elsewhere I have compared the US trials to the little-known post-WWII trials on the Eastern front. Although the US and USSR governments had also stated that the Eastern front war had been a joint military-industrial war for markets and resources (again revealed in the documentation),¹⁹⁰ the International Military Tribunal in Tokyo omitted to indict any of the leaders of the Japanese *zaibatsu*. While later Allied military trials of camp guards also revealed the extent of forced labour employed by the *zaibatsu*, the US occupation authorities opted to abandon prosecution plans and instead to utilize the industrial elites (in a 'shock doctrine' economic reform programme) to mobilize against a Japanese turn to communism.¹⁹¹

¹⁸⁵ Dubois, above n 8, 347.

¹⁸⁶ Dubois, above n 8, 355.

¹⁸⁷ Taylor, above n 156, 314.

¹⁸⁸ *Farben*, above n 123, 1212 (concurring opinion of Judge Hebert on charges of crimes against peace).

¹⁸⁹ Dubois, above n 8, 37; Schanetzky, above n 30, 77.

¹⁹⁰ See further Baars, above n 125, esp. Chapter 3B (175–210) and also generally, Yuma Totani, *Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, MA: Harvard University Press, 2008).

¹⁹¹ Baars, above n 125, 175–210.

In Germany, the other Allies also tried industrialists in their respective zones of occupation. Each of the Allies' own political priorities finds its reflection in these trials. For France, for example, it was important to find a balance between a 'business-friendly' judgment and creating a precedent that would enable expropriation of business assets from those who had collaborated in the War.¹⁹² The Saar magnate Hermann Röchling and several associates were tried by the French military tribunal for, among others, participating in the war of aggression.¹⁹³ Their indictment stated that:

[i]f the 'Directors of German Enterprises' ... plead that they only attached themselves to Hitler in order to oppose communism or 'Social Democracy', there exists no doubt that the profound reason for their attitude can be sought in their desire, long before the coming of national socialism, to extend their undertakings beyond the frontiers of the Reich.¹⁹⁴

Hermann Röchling was accused of, *inter alia*, urging Hitler to invade the Balkans so as to appropriate the Balkan enterprises.

While convicted of waging aggressive war in the first instance, on appeal in 1949, the Supreme Court of the French Military Government in the French Zone of Occupation¹⁹⁵ acquitted Hermann Röchling. According to the French court, the IMT had set the bar for this charge very high by acquitting Speer of this charge and holding that only those involved in policy-making and planning could be convicted.¹⁹⁶ The *Röchling* defendants' sentences were significantly reduced in their appeal,¹⁹⁷ showing a softening of French attitudes also.

For the British, the main motivator for zonal trials was prosecuting those who had killed or otherwise harmed Allied nationals and British servicemen in particular.¹⁹⁸ Despite British unwillingness to try industrialists,¹⁹⁹ in a 'minor, insignificant' case,²⁰⁰ Tesch and his colleagues, the suppliers of Zyklon B produced by Farben to the death camps, were tried. Two were sentenced to death, while a third defendant was later pardoned by Prime Minister Eden.²⁰¹ The Brits also tried Professor Wittig of the Steinöl company, which had benefitted from camp labour supplied through Pohl's office. While the Neuengamme camp inmates consisted almost entirely of Allied nationals and POWs, Wittig escaped a death sentence.²⁰² The British appeared to have tried these businessmen not as members of their class or professional group, but conversely, as part of a series of scapegoats for harm to British national interest. The war crimes trials were unpopular with the

¹⁹² Bloxham, above n 73, 24.

¹⁹³ *The Government Commissioner of the General Tribunal of the Military Government of the French Zone of Occupation in Germany v Hermann Röchling et al (Röchling) Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. XIV 1062.

¹⁹⁴ *Röchling*, 1062.

¹⁹⁵ Under CCL10 each occupying authority was entitled to set its own rules of procedure for military trials. The French—unlike the Americans—allowed defendants to appeal against conviction.

¹⁹⁶ *Röchling*, above n 193, 1109–10. ¹⁹⁷ *Röchling*, 1142–3.

¹⁹⁸ Bloxham, above n 73, 106. ¹⁹⁹ Bush, above n 1, 1134.

²⁰⁰ *In re Tesch & Others (Zyklon B Case)*, British Mil. Ct. 1946, in 1 UN War Crimes Comm'n, *Law Reports of Trials of War Criminals*, 93 (1947).

²⁰¹ UK National Archives, File No. WO 235/283.

²⁰² UK National Archives, File No. WO 235/283.

British establishment, for several reasons including widespread anti-semitic and anti-communist attitudes among the UK leadership.²⁰³

For the Soviets, the zonal trials appeared to be about *Systemkritik*, or an opportunity to publicly condemn capitalism (as the cause/source of fascism) and its amoral agents. Among the estimated 70,000–72,000 persons tried by the Soviets under CCL10²⁰⁴ were the directors and functionaries of Töpf & Sohne, who supplied ovens to Auschwitz and were sent to perform hard labour.²⁰⁵

Lawyers like Dubois and Sasuly, and to a lesser extent Taylor, left Germany frustrated and enraged.²⁰⁶ On coming home, the case they had been fighting was now taboo. The tables had turned, the capitalists emerged as victors and the prosecutors became persecuted. Tellingly, Kuehne, in his final statement to the *Farben* Tribunal, cited the *New York Herald Tribune* of 4 October 1947, from a report on a speech held by the Secretary of Defence, Forrestal, as follows: 'Mr. Forrestal denied that there was any historical validity for the Marxist theory according to which industrialists desired war for the sake of material gains. Mr. Forrestal said that there was no group anywhere that was more in favour of peace than the industrialists'.²⁰⁷

The point on which the Allies had agreed before, and at the IMT, was now a 'Marxist theory'.²⁰⁸ On their return to the US, several members of the American prosecution team and OMGUS staff were investigated for possible 'bolshivist' sympathies by McCarthy's regime.²⁰⁹ The preface to the German edition of Sasuly's book, states that this text, for political reasons, has not been available in the US for many years.²¹⁰ The legacy of this has been the 'legal amnesia' through which the industrialists' trials were forgotten until relatively recently.²¹¹

On 21 September 1949 John McCloy replaced General Clay as civilian supervisor (High Commissioner) of what was now the Federal Republic of West Germany. By September 1950, the US was at war with Korea. McCloy and Acheson strongly advocated that West Germany be rearmed.²¹² According to Maguire, '[o]nce it became

²⁰³ A. Rogers, 'War Crimes Trials Under the Royal Warrant: British Practice, 1945–1949', *ICLQ*, 39 (1990), 780–800.

²⁰⁴ A. Hilger, 'Die Gerechtigkeit nehme ihren Lauf? Die Bestrafung deutscher Kriegs- und Gewaltverbrecher in der Sowjetunion und der SBZ/DDR', in N. Frei (ed), *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg* (Göttingen: Wallstein Verlag, 2006), 191.

²⁰⁵ 'Protokolle des Todes', 'Verhörprotokolle der Auschwitz-Ingenieure Prüfer, Sander und Schultze', *Der Spiegel*, 47:40 (1993), 151–62, <<http://www.spiegel.de/spiegel/print/d-13679718.html>> (accessed 27 February 2013) and <<http://www.spiegel.de/spiegel/print/d-13679727.html>> (accessed 27 February 2013). See also generally Hilger, above n 204. Hilger argues that the release of German prisoners in 1953–6 signified a breach with the Stalinist policy of collective punishment for Germany's 'unjust war' (at 245).

²⁰⁶ This is evident in the tone and content of their post-war writing: Dubois, above n 8; Taylor, above n 156; Sasuly, above n 104.

²⁰⁷ *Farben*, above n 123, 1073 (Final Statements of Defendants: Kuehne).

²⁰⁸ US Senator William Langer called the industrialist cases part of a communist plot (Maguire, above n 75, 169).

²⁰⁹ See, eg, Bush, above n 1, 1232; Interview with Bernard Bernstein, above n 84. See also a letter by Telford Taylor to Philip Young (successor to McCarthy) demanding a note on Taylor's file flagging 'unresolved question of loyalty': Letter from Telford Taylor to Philip Young, 'Telford Taylor Papers', Arthur W. Diamond Law Library, Columbia University Law School, New York, NY, TTP-CLS: 10-0-3-45.

²¹⁰ Sasuly, above n 104, 5.

²¹¹ Bush, above n 1, 1240.

²¹² Maguire, above n 75, 167–9.

official that West Germany would be rearmed, questions pertaining to the war criminals took on new significance as West German leaders from all political parties pointed to America's paradoxical role as occupying ally.²¹³ German industrialists united in reconstituted trade associations again began to exert their influence, including for the release of their colleagues.²¹⁴ US and German leaderships shaped two American policies vis-à-vis the war crimes convicts: a public one to defend the validity of convictions from German attack, and a private one aimed at releasing war criminals as quickly and quietly as possible.²¹⁵ On 31 January 1951 clemency boards constituted by McCloy carried out 'extrajudicial' re-reviews of sentences handed down by the Allied occupation courts.²¹⁶ McCloy commuted twenty-one death sentences, reduced the sentences of sixty-nine other individuals and released thirty-three other war criminals, including Alfried Krupp. The *Flick* and *Farben* defendants had already been released or had completed their sentences by this point.²¹⁷ This review greatly upset Taylor, who wrote to Eleanor Roosevelt in protest. Among the main problems Taylor found was that the clemency board based its decision on a reading of the judgments and hearing of fifty defence lawyers but not a review of the evidence nor hearing anyone from the prosecution.²¹⁸ Moreover, the authority (or legality) of the reviews per se was questioned.²¹⁹ Similarly in the UK, 'immediately on his return to Downing Street [in 1951] Churchill moved to release all remaining Germans'.²²⁰ Wittig was released in 1955.²²¹ The early releases are criticized as completely discrediting the original trials²²² and 'confirm[ing] the failure of Nuremberg'.²²³ Jeßberger writes (specifically about the IG Farben managers—but this could apply to the industrialists in general), '[the industrialists] had a soft fall, from the ranks of the Wehrmacht into the warm bosom of the Western powers'.²²⁴

So, while '[t]he masses of peoples liberated from the yoke of fascism demanded the trial of the most evil cartel leaders, in Nuremberg',²²⁵ even those who had received sentences were soon to be freed again, and by 1952 many were already

²¹³ Maguire, above n 75, 168.

²¹⁴ Schanetzky, above n 30, 80.

²¹⁵ Maguire, above n 75, 162.

²¹⁶ 'Landsberg: A Documentary Report', *Information Bulletin*, Office of the US High Commissioner for Germany Office of Public Affairs, Public Relations Division, APO 757, US Army, February 1951, 2–8, 55–67.

²¹⁷ 'Landsberg: A Documentary Report', above n 216, 6. For Clay's original review and confirmation, see *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. XV, 1144–5; Taylor, Final Report, above n 109, 95–7; Heller, above n 22, 332.

²¹⁸ Letter to Eleanor Roosevelt dated 19 June 1951, 'Telford Taylor Papers', Arthur W. Diamond Law Library, Columbia University Law School, New York, NY, TTP-CLS: 14-4-3-53 (Taylor Letter to Roosevelt).

²¹⁹ Heller, above n 22, 356–8.

²²⁰ Bloxham, above n 73, 116.

²²¹ UK National Archives, WO 235/283.

²²² Taylor Letter to Roosevelt, above n 218.

²²³ Maguire, above n 75, 178. 'Instead of discussing the shocking atrocities committed by many of the high-ranking convicts, American officials were forced to defend the basic legal legitimacy of the trials': at 207.

²²⁴ Jeßberger, 'On the Origins of Individual Criminal Responsibility' above n 1, 802.

²²⁵ IG Farben: Mächtiger und Gefährlicher denn je, Institut für Marxismus-Leninismus und der Technischen Hochschule für Chemie Leuna-Merseburg, 1960.

back in power at their companies.²²⁶ Indeed, the IG Farben 'parts' BASF, Bayer, and Hoechst quickly became leading companies in their sector.²²⁷ These soon began to produce military materials again which were used by the US in their war against Korea.²²⁸ Further, former manufacturer of German military uniforms Neckermann became a fashion mail-order giant, symbolizing the rising consumer culture, while the former Reich ambassador to Italy became CEO of the Coca Cola Germany, a symbol of US–German reconciliation.²²⁹ While German industry was rebuilt, the Cold War deepened, the UN, the European Coal and Steel Community, the General Agreement on Tariffs and Trade regime and the Bretton Woods institutions took shape.²³⁰ From this perspective, Nuremberg was not a failure. Rather, by producing capitalism's victor's justice it played an important part in this process of further congealing capitalism and institutionalizing international law.²³¹

(VI) Conclusion

A qualitative change came out of the contradictions of Nuremberg: the way in which the war was understood had altered. The 'economic case' all but disappeared from the mainstream narrative of WWII, which today focuses almost entirely on what Frei calls the 'Hitler-factor'.²³² The 'economic case', once central to the Nuremberg prosecution, while persisting in the German Democratic Republic and Soviet literature, is now described as propaganda by Western scholars.²³³

International criminal law was born out of the great contradictions that existed in the aftermath of WWII. Its potential as a powerful way of shaping narratives—highlighting some relations and 'spiriting away' others; concealing what must remain hidden—was soon realized. Through Nuremberg, international criminal law as 'commodified morality'²³⁴ helped spirit away the material causes at the base of WWII. At the same time, something fundamental had changed on the ground in Europe, where economic actors came to be seen as essentially peaceful, and where economic development became synonymous with peace.²³⁵ Combined, these two moves cemented capitalism's victor's justice, functioning as a means of

²²⁶ Along with almost all other members of 'Hitler's elite': Norbert Frei (ed), *Hitlers Eliten nach 1945* (Munich: Deutscher Taschenbuch Verlag, 2003), esp. T. Schanetzky, 'Unternehmer: Profiteure des Unrechts' (at 87).

²²⁷ Schanetzky, above n 30, 87.

²²⁸ IG Farben: Macht und Verbrechen: Ein auf exaktem Material beruhender Beitrag zur nationalen Frage in Deutschland und dem Weg zu ihrer Lösung, Institut für Marxismus-Leninismus und der Technischen Hochschule für Chemie Leuna-Merseburg, 1962.

²²⁹ Schanetzky, above n 30, 88.

²³⁰ In an ironic turn, McCloy was appointed to lead the World Bank (Bush, above n 1, 1193).

²³¹ Grietje Baars, 'The Making of an International Criminal Law', in Christine Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction*, (Oxford: Routledge, forthcoming, 2014).

²³² Generally, Frei, above n 18.

²³³ Frei, above n 18, front inside jacket and 10; Osterloh, above n 20, 37.

²³⁴ Baars, above n 125.

²³⁵ See, for example, Thomas Friedman's 'Golden Arches Theory of Conflict Prevention', in *The Lexus and The Olive Tree* (New York, NY: Anchor Books, 2000).

creating a narrative that hides the economic story of conflict, and constructs what we would now call corporate impunity.

Post-Cold War and the global spread of capitalism, renewed impetus for international cooperation in the sphere of international criminal law, has not led to the application of that law to war's economic actors. Instead, international criminal law continues to draw our focus to individual deviancy rather than conflict produced by the mode of production, hiding economic grounds behind nationalist, racial, religious, etc explanations.²³⁶ Elsewhere I have employed Pashukanis' 'commodity form theory of law'²³⁷ to argue that law's function reaches beyond mere capitalist instrumentalism and is, by virtue of its form, an essential element of the capitalist mode of production.²³⁸ Thus, rather than suggesting 'corporate accountability in ICL' is a real possibility,²³⁹ the hidden history of Nuremberg may give us cause to investigate more deeply exactly how and why international criminal law constructs *de facto* 'corporate impunity' as a necessary ingredient of today's capitalist imperialism.

²³⁶ For a discussion of this effect in the context of the International Criminal Tribunal for Yugoslavia, and Rwanda see Baars, above n 125, 255–85. Bukharin also makes this point: Bukharin, above n 3, 117–18: '[The theory that war comes out of "the struggle of races"] is assiduously cultivated both in the press and in the universities, for the sole reason that it promises no mean advantages for Master Capital': at 118.

²³⁷ Pashukanis, above n 2, and China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto Press, 2006).

²³⁸ Baars, above n 125; Grietje Baars, 'Reform or Revolution?' Polanyian v Marxian Perspectives on the Regulation of "The Economic"', *Northern Ireland Law Quarterly*, 62 (2011), 415–31.

²³⁹ As some contemporary authors on Nuremberg do, see, for example, Bush, above n 1.