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SWISS ACTION GROUPS FOR
INTERNATIONAL DEVELOPMENT

Third World Action Group Berne

NESTLE-CASE WILL NOT CONTINUE - BUT DISPUTE GOES ON

Information for the Press No. 5

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Communiqué

NESTLE CASE WILL NOT CONTINUE - BUT DISPUTE GOES ON

As is known, the first-instance judgment in the Nestlé case (June 1976) only rejected Nestlé's penal responsibility, but clearly affirmed the company's moral responsibility for the death of or injury to infants.

In the past few months it has emerged, however, that Nestlé is not willing even to acknowledge the judge's criticism of its practices but plans to continue its momentous advertizing and sales practices unchanged.

Further court proceedings would not alter this in the least and could only take the form of a purely formal dispute on the semantic nuances of the word "killing". Although the judgment in several aspects is legally quite disputable, the Third World Action Group has consequently decided not to take the Nestlé case to a higher court.

As a precaution, the Action Group had appealed immediately after the judgment in June because, according to procedural requirements in Berne, an appeal can be made only within 10 days of judgment being pronounced.

It has emerged that it is not a court judgment in a defamation case but only public pressure that can lead to a curtailing of the milk companies' sales methods. For this reason we want to concentrate our forces on this level and to continue fighting relentlessly against lethal advertizing practices.

Meanwhile, the problem of processed baby foods finds increasing attention worldwide. Several governments and international organizations have had their attention drawn to the problem and are preparing appropriate measures. Thus, Britain and the Netherlands, for instance, intend to re-examine their milk aid policies; Algeria will prohibit all advertizing for processed baby milk and submit trade to state control.

Special attention will be aroused in the near future by the court proceedings against the American corporation Bristol-Myers, which is being sued by a Catholic order in the USA.

Nestlé: Stubbornly in the Same Old Rut

The view was heard here and there after the judgment in the Berne case criticizing Nestlé that the company now could not avoid adapting its marketing methods to the requirements of ethics and morals. But only a week after the end of the case these over-hasty assumptions were belied by Nestlé's top executive, Dr. A. Furer: Furer sent a verbose circular letter to all his employees (reproduced in the annex), which states among other things:

"(T)ens of thousands of infants ... would be doomed ... to die (without Nestlé milk). On the basis of this observation, our collaborators in Third World countries have fought to gain a place on the markets concerned. Doctors there appreciate us and babies benefit. Never have governments considered that they had to intervene ..."

After the lie contained in the last sentence, Furer refers to holders of other opinions as "certain people, who preferred to engage in a sterile debate". He himself had investigated all the markets in question to find out whether the advertizing methods could be criticized or considered immoral. "I was able to see that they were normal and usual advertizing methods, used by manufacturers of such products all over the world. Even a long time ago, our companies had taken additional measures to give mothers better information."

"I have given instructions to persevere along these lines ..."

At the end, very much in contradiction to the court judgment, Furer gives his corporation an ethically immaculate bill of health: "We must affirm that we have full confidence in the ethical basis of our actions."

Nestlé's business policies will continue to be shaped accordingly: The advantages of the Nestlé products continue to be drummed into mothers via radio and television (in August 1976, for instance, we counted 62 commercials in Malaysia) and the hospitals continue to be flooded with leaflets with shrill headlines and colour pictures of bottle babies. (Of late, as an alibi, the phrase "Breast Feeding is best, but ..." is added in very small print.) Furthermore, Nestlé's own nurses act as "objective and neutral advisors" as Nestlé calls it. (See below the photograph of a Nestlé nurse's company car in Kuala Lumpur. What neutrality is worth can easily be seen from what is painted on the car ...)

At the same time, public education about Nestlé's activities also continues and is more necessary than ever.



Caption

Nestlé nurse's company car in front of a hospital in Kuala Lumpur.

Milk Companies on the Defensive

For some time it has been possible to note a change of mood as concerns baby foods in developing countries:

- Even two years ago, members of the Third World Action Group in personal conversations with (sometimes very illustrious) pediatricians heard only too often that it was high time the Action Group made a fuss; unfortunately, however, taking this, that or the other into account, one could support it only inofficially and not very publicly ...

This has changed. The advertizing of the milk multinationals is quite openly criticized. WHO, UNICEF, FAO and other important organizations have adopted resolutions on this subject and discussions were and are taking place in many medical publications.

- Several governments have become attentive to the problem and are preparing appropriate measures.
- In some countries action groups are dealing with the baby bottle issue.

A few examples:

Algeria from 1977 plans to subject the baby foods trade to state control. Advertizing for it is to disappear and breast feeding is to be promoted at the local level.

In Malaysia an information and publicity campaign took place in September 1976 under the auspices of the Office of the Prime Minister. Malaysian consumer organizations are now investigating the milk companies' advertizing (including Nestlé's) and are attempting to bring these companies to the negotiating table.

In the Netherlands the Ministry for Overseas Development plans to subject its milk aid policy so far to critical examination. (As can be shown, this is a direct consequence of the Berne Nestlé case.)

In the USA the advertizing and sales methods of American baby milk producers in developing countries (above all the companies Abbott, Borden, Bristol-

Myers and Wyeth) will be the subject of congressional hearings, probably early in 1977. Corresponding bills have been introduced by the well-known Democratic Congressman Michael Harrington.

The Baby Milk Action Groups have strengthened their international cooperation. Representatives from eight countries met in Berne to coordinate further cooperation. A joint fund has made research trips in different Third World countries possible.

The Baby Milk Case in the USA

At the moment, the first stage of the court proceedings are under way in the USA in a startling case that is likely to have even wider repercussions than the Nestlé case.

A church-oriented group of shareholders of the milk and pharmaceutical company Bristol-Myers had demanded information on advertizing and sales methods from the company management; in this it was supported by the Ford Foundation and the Rockefeller Foundation. (Bristol-Myers conducts an extremely aggressive sales policy, above all in the Caribbean and in East Asia.) The information given subsequently by the management was highly incomplete and in part blatantly untrue.

On the basis of American shareholder legislation, one shareholder, the Catholic order of the Sisters of the Precious Blood, has now sued the company. In so doing the nuns seek that in the long term the business policy of this multinational company be changed.

The first day of the proceedings in December 1976 brought an initial success: the judge of the South New York district, after examining more than 1000 pages of incriminatory evidence, rejected the milk company's move to quash the proceedings.

The action of the Sisters of the Precious Blood is being coordinated by the Interfaith Center on Corporate Responsibility, a subsidiary organization of the National Council of Churches of the USA. The Third World Action Group Berne has already been in close cooperation with this organization for two years, especially in the field of information gathering.

Nestlé's Withdrawal of Charges

Shortly before judgment was pronounced Nestlé withdrew three of its four counts of the charge:

1. that the activity of Nestlé and other companies was unethical and immoral;
2. that by its selling practices Nestlé was responsible for the death of, or the permanent mental and physical injury to thousands of infants;
3. that the baby food sales personnel in developing countries were camouflaged as nurses.

Nestlé's withdrawal of these three counts means that these three charges can continue to be made against the company without their being punishable or forbidden.

The only count maintained by Nestlé was:

1. the charge contained in the title of the brochure and the article "Nestlé tötet Babys" (Nestlé Kills Babies).

Judgment was pronounced solely on this count.

Quotations from the Judgment

Quotations from the Court's Written Opinion

(for more extensive excerpts see Appendix A)

"The fact-finding procedure has shown that the incorrect use of powdered milk can lead to the death or to the serious illness of infants."

"It is considered proved by evidence that the Nestlé company uses health nurses who have an advertizing task and who, by their activity, have an advertizing effect."

"Hence, the need ensues for the Nestlé company fundamentally to rethink its advertizing practices in developing countries as concerns bottle feeding, for its advertizing practice up to now can transform a life-saving product into one that is dangerous and life-destroying. If the complainant in future wants to be spared the accusation of immoral and unethical conduct, he will have to change his advertizing practice."

"The adequate causal connection between the sale or any other type of distribution of powdered milk and the death of infants fed with such products is interrupted by the action of third parties, for which the complainant, in terms of criminal law, cannot be held responsible. In this sense, there is no negligent or even intentional killing."

(This is an unofficial translation made by the Third World Action Group Berne)

Critique of the Judgment

Condemning the 13 accused of defamation to fines of frs. 300.- each is not justified, because persons are thus punished for daring to pillory unethical and life-impairing business practices of a large corporation. The judge's written opinion on the judgment, which is based above all on a certain interpretation of the title, "Nestlé Kills Babies", as well as on the negative assessment of the proofs of truth and of good faith, is often contradictory and legally contestable.

According to the written opinion, the title meant in a "legal-technical sense" that "Nestlé killed infants - intentionally or negligently". This interpretation is wide of the mark, as the title was not formulated by the criminal judge but by development policy activists engaged in journalism who, by this means, gave expression to Nestlé's responsibility for the death of or permanent mental or physical injury to thousands of children. That the "unbiased hearer or reader ... will give a more narrow interpretation to the charge of killing in the sense of a premeditated act" is an incorrect statement by the judge, for the title was never published in an absolute or isolated way but always in connection with the concrete reproaches addressed to the company, which showed the link between irresponsible business practices and their destructive consequences.

The interpretation of the title is essential for assessing the question of whether proof of truth was established or not. Yet even if one demands, as the judge did, proof of the adequate causal connection - namely, that Nestlé's conduct was leading to harmful effects within the natural and foreseeable course of events - it can be considered that this was in fact established. For, as the written opinion states, the manifold advertizing methods of the company - "posters in hospitals", "colour brochures" with "main emphasis on the bottle", "health nurses who have an advertizing task and who, by their activity, have an advertizing effect", "radio, press and poster advertizing" - are directed to "a mother or expectant mother domiciled mostly in urban slums ... who is susceptible to advertizing slogans". And all this despite the fact that "these products must be provided only if instruction, supervision and hygienic requirements are at hand", which is not very likely to be the case

in slums. Consequences that arise from such methods in such social conditions, however, are foreseeable and must be clarified with especial care by an enterprise with marketing power and which is equipped with the necessary means for research and clarification.

Nestlé's responsibility for its doings was also stated by the judge: From the aforesaid "the need ensues for the Nestlé company fundamentally to rethink its advertizing practices in developing countries as concerns bottle feeding, for its advertizing practice up to now can transform a life-saving product into one that is dangerous and life-destroying. If the complainant in future wants to be spared the accusation of immoral and unethical conduct, he will have to change his advertizing practices".

The truth of the accusation that Nestlé was responsible for the death of or injury to innumerable infants thus cannot be disputed. Therefore, it is rather formalistic to fail to consider at the same time that the truth of the statement contained in the title was also proven.

Whether the members of the Action Group were convinced in good faith of the lethal conduct of Nestlé or not, the judge made his assessment on the basis of the circumspection they used when publishing the brochure. This duty of circumspection, according to him, which "must be rigorously pursued here", was neglected by "a formulation as spectacular and sensational as possible".

The judge, in turn, neglected completely that, according to Federal Court jurisdiction, the requirements for proof of good faith are all the lower the more narrowly the proof of truth failed. He also overlooked another criterion, recognized in jurisdiction, for the measure of circumspection to be applied, namely the question of how the utterance at issue justified the interests pursued. In our case, what was at stake were the vital interests of innumerable children. This matter of evaluating interests is raised only at the end of the written opinion by the question of whether the accused had acted in a situation of emergency. The judge does not agree that this was the case; however, he recognizes that there is a "true core" to the emergency theory, as by means of the title of the brochure "they (the accused) obtained a publicity that they could not have achieved otherwise". If, however, such publicity is the only way of curtailing destructive business practices by public pressure, then factually there is a state of emergency. In this case it is

difficult to understand why the judge did not at least acknowledge the good faith of the accused.

The contradictoriness and contestability of the judgment would no doubt justify taking the case to a higher court. As, however, continuing the case would not change Nestlé's business practices, the Action Group sees itself obliged to withdraw its appeal and concentrate its work on other levels of activity, which in the fight for breast feeding and against the bottle offer better promise of success.

Excerpts from the Court's Written Opinion

(What follows is an unofficial translation made by the Third World Action Group Berne to inform its many English-speaking supporters of the court's findings. It does not have any official status. If reproduced in whole or in part, this should be made clear.)

ON THE BACKGROUND

- "1. In May 1974 a 32-page brochure of the 'Swiss Action Groups for Development Policy' was published. It was entitled 'Nestlé tötet Babys' and was available from the 'Third World Action Group Bern' at the price of frs. 3.50. The text stated, in particular, that the Nestlé company was responsible for the death of or the permanent injury to thousands of children and that it was using unethical and immoral methods in the Third World, in particular advertising methods.
2. The company attacked in this brochure, Nestlé Alimentana SA Vevey, represented by counsel H.P. Walter, on July 2, 1974, brought charges in the Untersuchungsrichteramt Berne against person or persons unknown for defamation (Ehrverletzung) by the printing press (Art. 173 ff. of the Swiss Penal Code (Strafgesetzbuch)) and for infraction against the press laws (Art. 322, P.C.), allegedly committed by the publication of said brochure."

"KILLING" = A PUNISHABLE ACT?

"How is the incriminatory title, 'Nestlé Kills Babies', to be understood? In a legal-technical sense, the charge implies that Nestlé killed infants - intentionally or negligently.

What is decisive in this connection is the meaning that an unbiased hearer or reader in the circumstances was to give to the incriminatory utterance (Federal Court Decision 92 IV 86 f.). He will give a more narrow interpretation to the charge of killing in the sense of a premeditated act. The charge is formulated categorically, must correspondingly be understood in a narrow sense and does not admit of any attenuation. The incriminatory utterance goes far beyond the charge of moral responsibility and unmistakably accuses the Nestlé company of punishable doings. Thus, the complainant is accused of particularly dishonourable conduct (cf. Schwander, Schweiz. Strafgesetzbuch, No. 605), hence suffers a violation of the repute to which he has a legitimate claim (Stratenwerth, Schweiz. Strafrecht, Vol. I, 107).

According to an extended definition, honour is the repute which its holder may claim ethically and socially (Stratenwerth, p. 109).

The accusation of deliberate or negligent killing touches on the ethical sphere and is defamatory. It is a question of a defamatory factual statement, i.e. the killing of infants."

AGAINST BETTER KNOWLEDGE?

"Is the defamatory factual statement against a third party, 'Nestlé kills Babies', libel (üble Nachrede) according to Art. 173 P.C. or calumny (Verleumdung) according to Art. 174 P.C.?"

"Calumny and libel are premeditated offences (Vorsatzdelikte). To delimitate the facts of the case it suffices to say that for libel possible intent (Eventualvorsatz) is enough whereas this is not the case as concerns calumny (F.C.D. 76 IV 244 ff.; Stratenwerth, p. 126). The distinguishing feature is acting against better knowledge, which is required for calumny."

"According to the findings, proof cannot be furnished to the effect that the accused of the 'Action Group' made the charge of killing against their better knowledge. It is true that their main aim was to draw public attention to the problem they described by means of a title that was as effective as possible and to pillory the Nestlé company, in its capacity as a Swiss enterprise, for using, in developing countries, advertizing practices said to be unethical and immoral for powdered milk for infants, because the accused regarded these advertizing practices as the root cause of keeping mothers from breast feeding and inducing them to resort to artificial feeding of their babies. This, for hygienic and financial reasons, is said to have the result that babies fed in this way are more prone to fall ill and die than breast-fed babies. The causal chain construed by the accused, which is said to begin with Nestlé's advertizing methods for processed infant foods and to end with the physical injury to or the death of infants fed with powdered milk, shows that, subjectively, the reproach of killing was intended particularly in a moral sense. The accused believed themselves justified in drawing this conclusion from the information and documents available to them, in particular from the original English brochure, and felt obliged to concentrate on the Nestlé company, because, as members of a Swiss organization for development policy (cf. object of the association), they felt they had the moral obligation to stand up for the affected infants of underprivileged classes in developing countries and to draw public attention, especially in Switzerland, to the corporate conduct of this Swiss company. On the basis of this subjective situation, the accused cannot be reproached with making the charge of killing against their better knowledge, at least they were not aware of the untruth of their statement, which, in turn, would be the prerequisite for meeting the conditions of calumny."

THE PUBLIC INTEREST

"If, as in this case, somebody is accused or suspected in front of a third party of dishonourable conduct or of other facts likely to damage his reputation without the utterance being made against better knowledge and if the accused furnishes proof that the utterance made or disseminated by him corresponds to the truth or that he had good reason to hold it, in good faith, to be true, he is then not punishable (Art. 173, subparagraph 2, P.C.).

However, the accused is not allowed to furnish the proofs of exoneration concerning truth and good faith and is punishable for utterances made or disseminated with the intent to accuse a person of bad conduct rather than to safeguard public interests or an otherwise substantiated cause (subparagraph 3)."

"According to the very broad interpretation given here and also in F.C.D. 101 IV 294 to the safeguard of public interests as a case of legitimate motivation, the right of the public to be informed about business methods of a company of the size and the importance of the complainant must be affirmed. The accused intended, by means of a consciously provocative title, to draw public attention to the contents of the translated brochure, i.e. to the business conduct and, in particular, to the advertising methods said to be unethical and immoral of the Nestlé company as concerns infant foods in developing countries and the related consequences."

THE PROOF OF EXONERATION

"The proof of exoneration is used by a person accused of libel or of insult (Beschimpfung) to convince the adjudicating court that the utterance made or disseminated by him corresponds to the truth or that, in good faith, he considered it true and, as it were, acted bona fide. According to the type of proof, it can have different functions:

1. By establishing proof of truth the perpetrator wants to show that the person affected by the utterance cannot, in this respect, lay claim to repute; if the stated fact is true, honour cannot be violated. If the addressee of the utterance benefitted from a (too) good reputation without good reason, the defamation suit assumes the strange function of unmasking a false man of honour, i.e. the complainant.
2. Proof of good faith, on the contrary, is a proof of circumspection: The perpetrator wants to show that he took all reasonable steps to satisfy himself that the utterance was true."

1. Concerning the Proof of Truth

"a) Death of Infants

The fact-finding procedure has shown that the incorrect use of powdered milk can lead to the death or to the serious illness of infants. In the suburban slums and also in rural areas of de-

veloping countries, the hygienic prerequisites for preparing bottle milk in accordance with the producer's instructions are often absent. The use of unclean, non-sterilized bottles and teats, of dirty and unboiled water, can lead to infectious diseases and to the death of infants. Furthermore, it is known that for economic reasons powdered milk is often 'stretched'. Feeding over-diluted powdered milk can cause marasmus, a wasting deficiency disease due to protein and calorie deficiencies; this and other diseases, to which the debilitated infant is more prone, can lead to death.

In this connection, reference is made to the voluminous material of the Defence as well as to the testimony given by Prof. Jelliffe and Dr. Ebrahim.

The quality of Nestlé's powdered milk is not contested. Insufficient quantities of the product, contaminated water and lack of hygiene in the preparation of the feeding bottle are causes of the death or of the serious injury to the health of infants. Thus, it is not the product itself that leads to the death of infants in developing countries.

b) Nestlé's Baby Foods

These baby foods are admittedly good and in certain cases urgently needed, certainly in the case of orphans and of the mother being unable to breast feed. It is, however, contested in many cases where they are preferred to breast feeding where this would be possible in adequate quantities, for mother's milk is definitely better than bottle food (cf. in particular the testimony given by Prof. Jelliffe, Dr. Ebrahim and Sr. Silvia Probst). This is acknowledged even by the complainant himself and he claims that attention is drawn to this.

c) Advertizing

The material submitted shows that the Nestlé company in its leaflets, brochures, posters, etc. does refer to cleanliness and breast feeding. However, the question arises in this connection whether these references are adequate for conditions prevailing in developing countries. No answer could be obtained from the complainant's counsel as to whether the Nestlé company used the same advertizing methods in developing countries as it did in Europe. According to the evidence, the judge is of the opinion that the company went considerably further there than it does hereabouts. Advertizing is done, to the extent that the proceedings have shown, by posters in hospitals, by the distribution of colour brochures whose main emphasis concerning nutrition is on the bottle. The reference made to breast feeding in these brochures may be adequate to the western level of knowledge but it is in no way appropriate for mothers in developing countries.

It is considered proved by evidence that the Nestlé company uses health nurses who have an advertizing task and who, by their activity, have an advertizing effect. This was impressively demonstrated by the witness Dr. Ebrahim by means of a so-called gift parcel, which advertizing method he described as the most terrible. It consists of the free gift of a tin of NAN powdered milk, together with a bottle and teat and an illustrated brochure.

According to Dr. Ebrahim, the inducement to artificial feeding in the place of breast feeding can result, in as little as three days, in the drying up of the breast as a milk source due to the absence of the sucking process and to the disturbance of the hormonal stimulation, the mother thus becoming a prey to bottle milk (p. 957). (Cf. also the letter of Dr. L. Oberndorfer to the 'Action Group' of 30.5.1976, evidence no. 830 of the Defence.)

Moreover, reference is made to radio, press and poster advertizing, varying in each country and adapted to the respective conditions.

What is decisive here is at whom this multiple advertizing is directed. In developing countries, the person reached is a mother or an expectant mother domiciled mostly in urban slums, a woman with little education who is unable to differentiate and who is susceptible to advertizing slogans.

The witness Prof. Jelliffe rejects the bottle and Dr. Ebrahim regards it as nothing but a murderous weapon. The witness Sr. Silvia Probst, who has gathered her many years' experience in rural areas in Uganda, in particular, confirms this possibility and the need for intensive instruction and counselling and the controlled distribution of bottle milk as a substitute and supplementary food. According to her, it could be a blessing where it was necessary, provided its distribution was controlled.

Summarizing, it can be said that powdered milk, whose quality is not contested, is necessary as a substitute or a supplementary food for infants who cannot be or adequately be breast fed. However, these products must be provided only if instruction, supervision and hygienic requirements are at hand. These prerequisites for the use of powdered milk in developing countries are repeatedly cited in the documents submitted, such as for instance in the quoted letter from Dr. Leni Oberndorfer to the 'Action Group' of 30.5.1976 (evidence of the Defence no. 830).

Hence, the need ensues for the Nestlé company fundamentally to rethink its advertizing practices in developing countries as concerns bottle feeding, for its advertizing practice up to now can transform a life-saving product into one that is dangerous and life-destroying. If the complainant in future wants to be spared the accusation of immoral and unethical conduct, he will have to change its advertizing practices.

This does not, however, establish proof of negligent or intentional killing. The adequate causal connection between the sale or any other type of distribution of powdered milk and the death of infants fed with such products is interrupted by the action of third parties, for which the complainant in terms of criminal law, cannot be held responsible. In this sense, there is no negligent or even intentional killing."

2. Concerning the Proof of Good Faith

"In the documentation and the information on which the accused based themselves at the moment of translating the brochure into German and of formulating the title, i.e.

- original study in English
- article in the 'New Internationalist'

- several articles in the national and foreign press
- personal information and observations of individual members themselves,

the Nestlé company was never directly or indirectly accused of killing infants. The accusation, 'Nestlé Kills Babies', was made for the first time by this new formulation. The choice of this title was, above all, destined to be a 'peg' to draw public attention to the contents of the brochure. Whether this new formulation was justified or not was taken into account only to the extent that the alternative suggestion 'Nestlé Murders Babies' was eventually considered going too far. The duty of circumspection, which consists in taking all reasonable precautions so as to make sure of the truth of the utterance, in the opinion of the Court is conditional on:

- the circle of addresses
- the type of the accusation
- the human and specialist knowledge of those making the utterance
- the standing of those making the utterance.

Accordingly, the duty of circumspection must be all the greater the more serious the accusation and the wider its dissemination.

No doubt, the charge of killing is very serious, and the circle of addresses was very large considering that the publication had wide repercussions, also in the press. As for the accused, they are not any Tom, Dick and Harry who have thoughtlessly disseminated the defamatory utterance. On the contrary, they are people with a generally high level of education who put a high ethical value on the work they do in development research and information and who want to be taken correspondingly seriously.

By addressing as wide a public as possible by means of a formulation as spectacular and sensational as possible, the duty of circumspection, which, because of the grave charge of killing must be rigorously pursued here, was neglected. If an adequate measure of circumspection had been used, this formulation would not have come about. It was not, however, chosen against better knowledge - otherwise it would be a question of calumny - but it was chosen carelessly; in other words, the accused used too small a measure of circumspection when they decided to use the formulation 'Nestlé Kills Babies'. On the basis of the documents available to them when formulating the title, they were not justified in simply inferring this formulation.

In summary, it must be said that a defamatory statement was made and that the proof of exoneration failed, in other words that this defamatory statement is not true and proof of good faith is not established.

Objectively and subjectively, the conditions set out in Art. 173 P.C. are met. Whoever makes the charge of killing must know that it is defamatory. The utterance to a third party was intentional (Stratenwerth, p. 116). Thus, are found guilty:

- Dällenbach Christine, Enderli Andreas, Enderli Esther, Gurtner Bruno, Jenni Fritz, Jenni Viktor, Kurth Christoph, Rothenbühler Konrad, Strahm Rudolf, Loderer Brigitte und Schmocker Hans

of libel (üble Nachrede), continuously committed in May 1974 in Berne and Zurich, against the firm Nestlé Alimentana SA by the

utterance 'Nestlé Kills Babies' in the brochure of the 'Third World Action Group Berne' and in the 'safep' circular letter no. 1/74, as well as

- Püntener Richard and Wyss Walter

of libel, committed in May 1974 in Zurich, against the firm Nestlé Alimentana SA by the utterance 'Nestlé Kills Babies' in the 'safep' circular letter no. 1/74."

THE PENALTY

"Art. 173 P.C. provides a penalty of up to six months'imprisonment or a fine.

In accordance with Art. 63 P.C. the penalty is to be adjudged in conformity with the extent of guilt taking into consideration the motivation, the background and the personal circumstances. Objectively, there is grave guilt considering the charge of killing is serious, considering it reached a large circle of addresses and was directed at such and had been calculated to find a wide echo, also in the press, and considering the accused were aware that this utterance was defamatory.

Subjectively, however, other observations must be made.

The construction erected by the Defence that emergency conditions prevailed according to Art. 34 P.C. is untenable and cannot be accepted. Objective criticism is appropriate even when it is aggressive; careless and non-objective exaggeration, on the other hand, is not justified. Nevertheless, the theory of emergency concerning the accused has a true core. The members of the 'Third World Action Group Berne' are isolated with their concern and have difficulties in reaching the public; they remain within a small circle. This is the reason for running to the forefront. By means of the exaggerated, unjustified title they obtained a publicity that they could not have achieved otherwise. For the majority of them at least their concern is sincere. They recognize the problem and attempt to solve it in their own way. This way is unfortunate but does not in any way change their motivations.

The accused are all in good repute. No significant previous convictions are on record. Even if for some of the accused revolutionary considerations tending towards changing society may have played a part in the formulation of the title, it is inadmissible to totally dismiss the accused as leftist revolutionaries. What comes from the far left does not have to be bad as such. Development work is necessary, information more imperative than ever before. There must be objective criticism; it may even be aggressive, but it must keep within limits. These limits were exceeded by the accused when they chose the title of their brochure.

In consideration of all the factors relevant for adjudging the penalty, a fine of frs. 300.- each seems appropriate."

Appendix B

Letter from A. Fürer (Managing Director)

to Nestlé's Staff

The following is an unofficial translation made
by the Third World Action Group Berne.

July 2, 1976

Sender:

Fu/mj

Distribution:

All Staff

Berne Trial

On June 24, I informed you of the conviction pronounced by the criminal court judge against the 13 authors of the brochure Nestlé tötet Babys, the editors of Konzept being acquitted because they said that the title of their article "Die sanften Killer" [The Gentle Killers] was directed not against Nestlé but against the baby's feeding bottle.

In view of the fact that most of you are or will be questioned, by your families, your friends or your acquaintances on our reaction to the grounds for the judgment and, even more, on the comments in the press, I consider it necessary to state what follows.

As we said in our press communiqué upon receiving the judgment, our company notes with satisfaction that justice has been done: in spite of the leniency of his judgment and the comments he deemed fit to make on Nestlé's advertizing, the judge made good the wrong which the defamatory statements inflicted on all company members and, in particular, on those who cooperate in the manufacture and promotion of our dietetic products all over the world.

All during the trial, everybody acknowledged the excellent quality of our dietetic products, even the judge did so last Thursday. The proof was established that, without them, tens of thousands of infants, whose mothers do not have a sufficient quantity of their own milk - or who cannot breast-feed at all - would be doomed to suffer the disastrous consequences of malnutrition or even to die. On the basis of this observation, our collaborators in Third World countries have fought to gain a place on the markets concerned. Doctors there appreciate us and babies benefit. Never have governments considered that they had to intervene but, on the contrary, they increasingly ask us to manufacture these products on their territory.

This fundamental aspect of the problem - namely, the necessity of supplying these countries with products that allow the lives of numerous babies to be saved - has not been understood by certain people, who preferred to engage in a sterile debate on questions of marketing and on the difficulties - real enough, incidentally - that arise for infant nutrition because of often precarious conditions of hygiene in the Third World.

The reproaches made by some against the use of products for infants are a matter of scientific controversy, to which it would be difficult to respond in a more objective way than was done by Professor Debré in the latest issue of Nestlé's Research News [] attached for Nestlé staff [].

The reproaches made by others - on the lack of education among mothers in the Third World, who, by the way, have a greater feeling of responsibility than was suggested - could not possibly be directed solely to those who are engaged in the distribution of infant products. This is a question of a very complex sociological problem, which we have been tackling for more than 100 years, with the collaboration of the medical profession and of local authorities, and whose solution goes beyond the possibilities of an industrial enterprise, no matter how big it is.

We did not have to wait for defamatory tracts in order to realize the scientific or sociological problems I have just mentioned, or to have our attention drawn to the specific problems of developing countries, where we have been established for a long time. Only recently did all these problems rightly take on primordial importance in the eyes of the public in the same way as they always did in our eyes, for the lives of children are at stake.

The dossier which we gave at the end of the trial to journalists - who have been better informed on all these problems than some of them let it be understood - included among other things a synthesis of our arguments that you will find annexed [] attached for Nestlé staff [].

Finally, I would like to comment briefly on the criticisms made against us for having decided - by withdrawing three charges - to concentrate on the main accusation, which suggested that the men and women working for Nestlé all over the world were "killing babies". At that time, the three charges were added to the main charge in order better to substantiate our accusation. When we realized the difficulties that would arise from examining the additional charges and the very complex questions they entailed, both as regards problems of the Third World and marketing methods as well as dietetic products in general, we finally decided to withdraw the three charges with the aim of speeding up proceedings so as to avoid the 4-years limitation (starting with the date of publication of the brochure in question). From then on, our counsel concentrated his efforts on the sole point that remained to be considered by the judge, namely whether or not the defendants had defamed Nestlé by claiming that it killed babies.

The conviction of the defendants for defamation clearly answers the main question and such a result was indispensable.

Two years ago I investigated all the markets in question to find out whether the disputed advertizing methods could be criticized or - to use the defendants' terms - could be considered immoral. Had I found that this reproach was justified, I would immediately have suppressed everything that was indefensible. For, as I have said repeatedly, we want to do business in an honest way and with a clear conscience. I was able to see that they were normal and usual advertizing methods, used by manufacturers of such products all over the world. Even a long time ago, our companies had taken additional measures to give mothers better information.

I have given instructions to persevere along these lines and to adapt advertizing even more to the special conditions of the countries in question.

Our products are indispensable to many children. Consequently, we cannot give up effective advertizing. For mothers must know what is available to them in the many cases when mother's milk is wanting. Otherwise they might use products that are less suitable for babies' needs, and the less educated among them might use methods of preparing them not more hygienic than those that were criticized in the course of this trial. The problem will not be solved like this but, on the contrary, by using advertizing - even on the radio or on television, if it is justified - to inform and help and, at the same time, to draw attention to the risks of preparing them in a way that is contrary to the rules of hygiene and to the prescriptions of the manufacturers of these products.

In countries where there are but few medical and pharmaceutical facilities, it is an illusion to expect this information task to be done by the medical, paramedical or pharmaceutical professions alone.

We must affirm that we have full confidence in the ethical basis of our actions. We must see that everybody understands that we are open and willing - as has always been the case - to change our methods according to scientific and social progress in all the countries in which we operate. This undertaking requires your support and the cooperation of all.

(signed)

A. Fürer

Nestlé Sets Its Spies on Action Group

The private "Group for Critical Contemporary Analysis" (Cincera Bureau), headed by Lieutenant-Colonel Ernst Cincera, is an organization of the extreme right in Zurich that deals in investigating suspicious persons and hunting down subversives. As shown when its archives were cleared out in November 1976, it established index cards on several thousand Swiss citizens and apparently also established files on the basis of illegally obtained information.

Vice-Director Klaus Schnyder of the Nestlé head office addressed this organization with a request for information on the 13 accused members of the Third World Action Groups in Berne and Zug.

Below: Dispatch Form from the archives of the Cincera Bureau

150 photocopies/4 days' work on information for Nestlé on the individual members of the Third World Action Group.

GZA / Auftrag / durch:

CI/HS

Name, Vorname, Titel:

Dr. Klaus Schnyder

Strasse, Nr.:

Nestlé Alimentana, Finanz-Direktion

PLZ, Ort:

7800 Vevey

Tel Privat:

Tel Geschäft:

wünscht Auskunft / Material über:

div. Personen (13)

*erledigt! & Aussendungen mit Total
150 Fotokopien*

Zweck:

4 Tage Aufwand

Prozess