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THE NUREMBERG TRIAL OF THE MAJOR WAR CRIMINALS: REFLECTIONS AFTER SEVENTEEN YEARS

HERBERT KRAUS

IN HIS capacity as faculty director of the *De Paul Law Review*, Professor Morse has given me the honor of recording my recollections—particularly as a lawyer—of the Nuremberg Trial seventeen years afterwards by virtue of my observations, experiences, and opinions as counsel for the defense of Dr. Hjalmar Schacht at the trial.¹

The reason for my participation in the defense of Dr. Schacht, the former president of the Reichsbank, was that after consulting with him in regard to the charges preferred against him, I was convinced that he must be acquitted. In the end I was right. Admittedly, as I learned later, his acquittal balanced on the razor's edge. When a liaison officer called upon me to take over Kaltenbrunner's or Streicher's defense—two particularly repulsive cases—I declined. When he alluded that I could be compelled to represent them in their defense I replied that I would not do so, even if I were imprisoned. I was not.

I can no longer recall everything that I experienced in Nuremberg with sufficient clarity. This is particularly so in reference to the legal proceedings involved in declaring which organizations or groups were criminal in the opinion of the Tribunal and, in the case of the declaration of criminality, what consequences this should have for the members of such organizations. I was occupied with this problem only occasionally and marginally. And, I remember too little about this to adopt a definite attitude to the extremely complicated points bearing upon this matter for which there is no precedence. Apart from that it is not possible in an article of this sort to deal with the unusually large number of legal problems raised at this trial. Accord-

¹ Translated by Ford B. Parkes, Cleveland, Ohio. Cand. jur., University of Göttingen, West Germany. Abbreviations: London Agreement—Agreement by the Governments of the Four Leading Powers of 8 August 1945; Statute—Charter of the Military Tribunal; Tribunal—The International Military Court.

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ingly, I had to select those problems which I consider of paramount importance.

The legal proceedings unmasked an abyss of *moral abominations* of such gravity that the moral consciousness of any human being, in whom it has not yet died, must be very deeply shocked—today as much as then. Occasionally, we asked ourselves in Nuremberg whether the feelings and thoughts of certain National Socialist wielders of power were amoral or “anti-moral.”

Criminal procedures carried on later beginning with the twelve “subsequent cases” (*Nachfolgeprozesse*) against judges, medical practitioners, industrial leaders, generals, and others, and, then, the innumerable proceedings before domestic courts including those conducted in Germany brought to light further facts. These in part do not only supplement those ascertained at the trial, but surpass them in abominations.

Before the trial the atrocities committed during the National Socialist interim regime were almost entirely unknown to the counsels for the defense and the public. Himmler saw to it, by threatening the heaviest punishment, that absolute silence in regard to these practices was maintained. In addition to that, listening to foreign broadcasts was strictly forbidden, telephones were tapped, letters opened, and so on. I too was subject to such measures. One of my faithful former students, at that time in the SD,² had the great courage to call my attention to this. Only every now and then did individual cases leak out, and they met with scepticism. Very often Allied officials said to us that we really must have known about everything. I have been able to answer this assertion honestly in the negative.

The testimony of Rudolf Höss, a former commandant of the concentration camp in Auschwitz, who was later hanged in Poland, made a very strong impression on me. He testified that when he was introduced to his new post Himmler had explained to him that the “Führer” had decided upon the “final solution” to the Jewish problem before the Jews exterminated the German people. The “Führer,” Himmler continued, had chosen Auschwitz as a suitable liquidation-camp. Himmler also remarked that this information was top secret. When asked by a defending counsel what top secret meant Höss said that even the slightest suggestion about these practices would bring threats to life and limb. Höss actually observed this obligation until

² SD—Sicherheitsdienst des Reichsführers SS.

late 1942. At that time his wife was asked by another person about the extermination activity in Auschwitz. She inquired whether it was true that liquidations took place there and he confessed this to her. This, however, was his only breach of Himmler's order. At no other time had he ever spoken with anyone else about the mass murders.

The German public was also left in the dark about various enemy proclamations that war criminals would be called to account, in particular, the Moscow Declaration of October, 1943, signed by Roosevelt, Churchill, and Stalin. Assuredly, these threats were known to National Socialist leaders and there is much to be said for the assumption that this was one of the reasons for continuing the war after it had been irremediably lost. I have never believed the statements of some of the defendants that the National leaders had placed their confidence in a "wonder weapon," which would ultimately give Germany victory. Roosevelt's demand for unconditional surrender, which he directed at Germany during the Casablanca Conference, served to prolong the war as well.

After the atrocities became known in Germany following the capitulation of the German military forces, the German people also—with the exception of a small group of "unteachables," who will never learn—shared the same feelings as the rest of the world. But, I admit, the Germans have not been informed to a necessary extent. Also, this information has been distorted in part. Even today the amount of enlightenment leaves much to be desired and, again and again, one runs up against deficient knowledge about what happened during the National Socialist period.

To my mind the *rebellion of moral feelings* in the entire civilized world was the chief reason for this and other trials. Moreover, one of the objectives of these trials was to show to what extent the National Socialists had destroyed the existing European order by criminal means. The attempt by a counsel for the defense to establish that this order had already been disturbed by the Treaty of Versailles, which was the root of all evil without which National Socialism could have never taken hold, was rejected by the Tribunal.

Morally reprehensible acts, however, justify punishment only when penal and criminal procedural laws in force have been broken. Worthy of note in connection with this is the following sentence in an acquittal: "The Charter does not make criminal such offenses against political morality however bad these may be." To be sure, there are many

cases in which moral prohibitions and dictates are at the same time law. In the absence of ethical foundations, law is like a bell without a clapper. This is particularly true of penal law.

If, however, there is a case involving law in force, attention is called to Immanuel Kant's tenet from his essay "Perpetual Peace": "The rights of man ought to be religiously respected, should sovereigns in rendering them make the greatest sacrifices."³

Law is written or customary.⁴ Thirdly, fundamental rules, which are essential component parts of every civilized legal order, are a part of this as well. Their nature is peremptory; they are "regal provisions" with precedence before all other law. Generally, their substance has become a part of customary or written law. However, if not the case, they are nevertheless binding and take precedence over all law of inferior rank. The following basic rules of law are to be taken into consideration: encroachments on the administration of justice, the creation of exceptional courts, the denial of due process of law, the infraction of the principle *ne bis in idem* and of the duty to act according to equity and good faith (*Treu und Glauben*), the prohibition of excesses (*Übermass*), self-defense and its legality in the case of an illegal attack, personal necessity as ground for exculpation, *audiatur et altera pars*, non-punishability when guilt has not been proven (*in dubio pro reo*), the disregard of equality before the law (discrimination), *ex iniuria non oritur jus*, and, lastly, disregarding the rule *nullum crimen sine lege, nulla poene sine lege*.

The violation of such fundamental rules of law is wrongful and non-binding *pseudo-law*. Reference is made to a decision of the First Criminal Senate of the German Federal Court (*Bundesgerichtshof*) on February 12, 1952, in the case of the former Regierungsdirektor in the Reichs Security Head Office (RSHA) and Standartenführer Huppenkothen. This decision contains the following statements:⁵

³ Perpetual Peace, Immanuel Kant, U.S. Library Association, Inc. at Westwood Village, Los Angeles, Cal., 1932, p. 68; German first edition 1795, p. 91.

⁴ See later concerning the application of international or national law by the Tribunal.

⁵ Published in "Entscheidungen des Bundesgerichtshofs in Strafsachen," vol. II, 1952, p. 177 ff. German text of the decision: "Denn die Machthaber des nationalsozialistischen Staates haben, wie offenkundig ist und auch damals schon allen Einsichtigen klar war, zahlreiche Vorschriften erlassen und Anordnungen getroffen, die mit dem Anspruch auftraten, 'Recht' zu setzen und dem 'Recht' zu entsprechen, die aber trotzdem der Rechtsnatur ermangelten, weil sie jene rechtlichen Grundsätze verletzten, die unabhängig von jeder staatlichen Anerkennung gelten und stärker sind als ihnen entgegen-

“For the wielders of power in the National Socialist State enacted—as is well-known and was already evident to all reasonable human beings at that time—numerous provisions and regulations, which claimed to establish and conform to the law, but were nevertheless devoid of legal character because they violated those legal principles, which are valid irrespective of all national recognition, and because they are stronger than those governmental acts impairing them, which seem to be compatible with the text of loosely worded statutory provisions. Governmental regulations, which do not even strive for justice—deliberately disclaim the conception of equality and grossly disregard the legal convictions common to all civilized peoples about the worth and dignity of human personality—do not establish law, as elaborated by the Criminal Senate in its publication of the decision from January 29, 1952 (1 StR 563/51). Acts corresponding to this remain unlawful (compare OGHSt 1, 321, 324; 2, 271; BGHZ 3, 106/107). In connection with this, one needs only to refer to the ‘final solution of the Jewish question’ and the mass murder of insane persons during the war. These acts did not become lawful because they rested upon a declaration of Hitler’s will.”⁶ If such wrongful acts are legally

stehende obrigkeitliche Akte, die mit dem Wortlaut weitgefasster gesetzlicher Vorschriften noch vereinbar zu sein scheinen. Obrigkeitliche Anordnungen, die Gerechtigkeit nicht einmal anstreben, den Gedanken der Gleichheit bewusst verleugnen und allen Kulturvölkern gemeinsame Rechtsüberzeugungen von Wert und Würde der menschlichen Persönlichkeit gröblich missachten, schaffen—wie der Senat in dem zum Abdruck bestimmten Urteil vom 29.1. 1952—1 StR 563/51—näher ausgeführt hat—kein Recht, und ein ihnen entsprechendes Verhalten bleibt Unrecht (vergleiche OGHSt 1, 321, 324; 2, 271; BGHZ 3, 106/107). Es braucht in diesem Zusammenhang nur auf die ‘Endlösung der Judenfrage’ und auf die Massentötung von Geisteskranken im Kriege hingewiesen zu werden, die dadurch kein ‘Recht’ wurden, dass auch sie auf Willenskundgebungen Hitlers beruhen.”

⁶ Compare also the radical decision of the Grand Criminal Senate for Criminal Cases (Grosser Strafsenat für Strafsachen) of February 17, 1954, published in “Entscheidungen des Bundesgerichtshofs in Strafsachen,” vol. VI, p. 46: “Rules of moral law are in themselves valid. Their strongly binding nature is based upon the pre-existing order of values, which must be borne, and upon those principles of duty governing mutual human relations. They are valid no matter whether those people to whom they address their claim of observance actually follow and acknowledge them or not. Their substance can not be altered just because opinions concerning what is valid change.” German text: “Normen des Sittengesetzes gelten aus sich selbst heraus. Ihre Verbindlichkeit beruht auf der vorgegebenen und hinzunehmenden Ordnung der Werte und der das menschliche Zusammenleben regierenden Sollenssätze: Sie gelten unabhängig davon, ob diejenigen, an die sie sich mit dem Anspruch auf Befolgung wenden, sie wirklich befolgen und anerkennen oder nicht. Ihr Inhalt kann sich nicht deswegen ändern, weil die Anschauungen über das, was gilt, wechseln.”

not binding, they can become criminal only when punishment has been provided for their commission by law.

The German Federal Court's judgment equates a *concrete superior order* with law whereas the Statute provides for the following: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires." The Tribunal disagreed with this sweeping provision and declared: "The true test, 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." Therewith, the Tribunal recognized personal necessity as grounds for exculpation although it never made allowance for this standpoint in favor of any of the defendants. It cannot in fact be expected that the receiver of a criminal superior order, which is recognized by him as such, does not have to execute it if he must reckon with the loss of his life in the case of non-execution for refusal to obey an order. His Holiness Pope Pius XII termed it legal nonsense if a subordinate must fear for his life and goods and chattels if he does not carry out the command given, and that he can expect the same for executing the order, namely after the war when the injured party is victorious and brings proceedings against him as a war criminal.⁷

Furthermore, Article 7, of the Statute provides that "*the official position of defendants*, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment." With the exception of one reservation I can agree to this provision according to my former and present legal convictions. There are no sufficient reasons for not punishing an official or a Nazi functionary because he committed a crime by abusing his authority. The defense of the act of state is to my mind incorrect. In any case, an act of state must also be examined to see whether it is criminal or not. No legal order contains a provision to the effect that crimes committed in office are exempt from punishment. On the contrary, such offenses are particularly grave. On the other hand, the provision in the Statute mentioning Heads of State gives rise to doubt, for according to customary law Heads of State are

⁷ The original source of this quotation was not available to me. I have quoted this from Fuhrmann's book, "Der höhere Befehl als Rechtfertigung im Völkerrecht," 1963, p. 21.

immune from punishment. The Tribunal's reference to Article 227 of the Treaty of Versailles, under which the former Kaiser Wilhelm II was to be put on trial in a criminal court, cannot be used here as a precedent. Kaiser Wilhelm was to be tried by a "Special Court" for a "supreme offense against international morality and sanctity of treaty. In this decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." This provision should arouse the objection of all lawyers and has done so to a large extent. It is a model for mixing law, politics, and morality. But, this provision had no practical significance for the Nuremberg Trial. Hitler was dead when the Statute was issued and it was not applicable to Admiral Dönitz, even if one wished to assume that he was Chief of State for a short time. In my opinion he was not; however, it is not worthwhile to dwell on this question in this article.

The Statute provided for trial for the commission of three types of crimes in Article 6: Crimes against Peace, War Crimes, and Crimes against Humanity. The prosecution added a fourth crime-type and placed it in front of the other three. This was the participation as "leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of Crimes against Peace, War Crimes, and Crimes against Humanity." The Tribunal punished only conspiracy to unleash wars of aggression, but not conspiracy to commit War Crimes and Crimes against Humanity. I am unable to share the view that participation in a conspiracy to unleash a war of aggression makes any person responsible under criminal law for all acts committed in the execution of the same. In my mind this is contrary to the fundamental rule that punishment requires the proof of personal guilt. In connection with the discussion concerning the declaration of organizations as criminal and the declaration of criminal liability of all members of such organizations, the Tribunal stated that it is a well-settled legal principle—and one of the most important—that criminal guilt is personal. Nevertheless, it must be especially stressed that punishment was not provided for membership in a criminal organization, but for crimes committed by other members.

In the following I shall discuss the charges of War Crimes and

Crimes against Humanity leaving out criminality based on Crimes against Peace and conspiracy until later.

Under the Statute *War Crimes* are the following acts (it must be noted that these acts are only examples): "Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

War Crimes can be perpetrated only during a war. The Tribunal agreed justly that the law of war is in force "so long as there was an enemy in the field attempting to restore the occupied territories to their true owners." A glance shows that the alternatives specified in the Statute are criminal under the law of all civilized countries. Formerly, only the right to shoot hostages was doubtful. The waging of a war not kept within these bounds must lead to the barbaric slaughter of human life. Especially criminal is the extinguishment of human life by gassing, injections of deadly poisons, starvation, and medical experiments. The National Socialists attempted to justify approximately 200,000 murders as *euthanasia*—a cynical abuse of this term. At the same time it remains open to question whether and when euthanasia can be lawful, if at all. These murders were, as a matter of fact, measures taken in the interest of the realization of the National Socialist program. Their purpose was the annihilation of "useless eaters," insane persons, individuals considered to be asocial elements, and above all the "final solution to the Jewish question." War Crimes of equal gravity are the killing and ill-treatment of prisoners of war and all other atrocities specified in Article 6b of the Statute.

Crimes against Humanity violate *human dignity*, the *quidditas qua homo est quod est*, in the same way as violations of the law of war if they are perpetrated on individuals. Once again, I would like to quote Immanuel Kant in his work *Metaphysics of Morals*: "Human nature has dignity in itself for man can never be used by another human being (neither by others nor even by himself) solely as a means, but at the same time must always be used as an end. And it is just this in which his dignity (his personality) consists, by which he rises above

all other cosmic beings—which are not human beings and, nevertheless, can be used—and, consequently, above all things.”⁸

However, violations of human dignity are crimes only when a penalty has been imposed upon them before the commission of the act and corresponding with its gravity.

The Statute for example specifies in Article 6c the following Crimes against Humanity: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of domestic law of the country where perpetrated.”

A great number of the Crimes against Humanity, which are specified in the Statute, range under War Crimes *mutatis mutandis tuo*, for example: murder, enslavement, deportation, and so on. Extermination (genocide), that is, denying certain groups of people the right to exist, is declared only as a Crime against Humanity, but can also be a War Crime. Various standards are used in defining such groups of people. The chief criteria were nationality, cultural and ethnical background, and race. Among others, the following measures to be carried out were chosen: deportation of children, birth prevention, and the creation of living standards leading to physical ruin. Enslavement was also mentioned in the Statute. In law, enslavement is a particularly grave form of deprivation of liberty. It consists of the imposition of forced labor. Its illegal substance is especially grave if it is combined with deportation.

The *deportation* of any civilian population is a measure violating the “*Recht auf die Heimat*.” There is no corresponding designation for the term “*Recht auf die Heimat*” in foreign languages. This right is violated when human beings are uprooted by force from the surroundings in which they were born and reared and to which they feel that they have inner ties. Also, it is violated when the civilian population is driven into exile or into other parts of its own country.

⁸ Immanuel Kant, “Metaphysik der Sitten,” 2. Teil: “Metaphysische Anfangsgründe der Tugendlehre,” publication of the Preussische Akademie der Wissenschaften, vol. VI (1907), p. 462. German text: “Die Menschheit selbst ist eine Würde; denn der Mensch kann von keinem Menschen (weder von anderen noch sogar von sich selbst) bloss als Mittel, sondern muss jederzeit als Zweck gebraucht werden, und darin besteht eben seine Würde (die Persönlichkeit), dadurch er sich gegen alle anderen Weltwesen, die nicht Menschen sind und doch gebraucht werden können, mithin über alle Sachen erhebt.”

The construction of a special Crime against Humanity caused much confusion and met with opposition. One reason for this is the clause appearing behind the phrase "persecution on political, racial, or religious grounds." The clause reads: "in execution or in connection with any crime within the jurisdiction of the Tribunal. . . . The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter. But from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity."

Both types of crimes are therewith closely linked to one another. The question arises as to why Crimes against Humanity could not have been disregarded as a special type of crime and War Crimes alone could have been made punishable. In fact, only two of the defendants were convicted exclusively of Crimes against Humanity although their crimes could have been construed as War Crimes. Insofar as other defendants were convicted of Crimes against Humanity—three if the persons on trial were not so convicted—this was done in connection with other acts, which violated law in force. Only War Crimes came into question as such other acts, not Crimes against Peace and Conspiracy.

The introduction of Crimes against Humanity can give way to the reproach that this was an attempt at enlarging the acts constituting the crimes handled at the trial.

THE LEGAL FOUNDATIONS OF THE TRIAL

I now wish to take a critical stand on the legal foundations of the Statute.

The Tribunal took the London Agreement and the Charter as the basis for its judgment. It declared: "The law of the Charter is decisive and binding upon the Tribunal."

A few of the objections against provisions of the Charter have already been mentioned for the sake of coherence. Apart from them there are a number of questions requiring clarification concerning whether the Charter as well as the Tribunal has complied with laws in force and has assessed facts correctly.

a) The Tribunal attempted to base the competence of the Four Leading Powers for adopting the Statute upon the *unconditional surrender* of the former German Reich. Actually, no such thing took place. Instead, only the *German armed forces capitulated*. Parts of

them had already surrendered. The declarations of surrender in Rheims and, then, in Berlin were signed by officers of the German military forces. The title of each document is "Act of Military Surrender." They were signed "on behalf of the German High Command," as stands below the names of the German plenipotentiaries. The German officers would have exceeded their authority if they not only had made a declaration of surrender on behalf of Germany's armed forces in the air, on the land, and on the seas, but also on behalf of the German Reich.

b) As is generally recognized, the *Occupying Power* is empowered and obliged to exercise judicial and administrative functions and to enact laws binding all persons living within the territory, which it occupied without the authority of treaty. The total occupation of the prostrate German Reich caused and necessitated the Occupation Powers to exceed to some extent normal occupational law in force. Still, here too there were limits to their authority. However, this is not the place to discuss whether they went too far or not, particularly in reference to the Berlin Declaration of July 5, 1945. In any case they had to comply with basic rules of law. For that reason, for instance, they did not have the authority to create retroactive law or establish exceptional courts. These are judicial courts created for certain individual cases in the past. The Tribunal itself has all the characteristics of an exceptional court.

c) The Tribunal tried persons under international law; this was not quite correctly expressed. In reality, persons are subject only to national, not international law.⁹ To be sure, there are numerous provisions in international law, which empower or bind states to transform its substance into national law. However, only when international law of this kind has been transferred by domestic enactment into national law is it binding upon the individuals concerned. If national and international law are in contradiction to one another, only national law is binding upon persons. I have held this view since I began teaching international law in 1913. A lecture, which I had to deliver prior to my habilitation (formal admission as an academic lecturer), dealt with this subject. Also, after my experiences in Nuremberg, I cannot change my view on this.

In support of the correctness of its opinion the Tribunal referred

⁹ It is not necessary here to go into particulars about a few international organizations, which have been vested with the authority to establish laws directly binding upon persons.

in particular to the following from the *Quirin Case*^{9a} on October 29, 1942, before the Supreme Court of the United States of America: "From the beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights, and duties of enemy nations as well as of enemy individuals."^{9b} Examination of this judgment, however, shows that it is based upon American national legal provisions, which were passed in virtue of rules of international law. The maxim that "international law is part of the law of the land" is not contradictory to this either. This incorrect language-usage may be overlooked here. However, the opinion of the Tribunal "that international law imposes duties and liabilities upon individuals as well as upon states has long been recognized" must be challenged energetically. Shortly thereafter, it even voiced the opinion that "the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state." The opinion of the Tribunal misconstrues basically the relationship between international and national law.

d) Very strong doubts arise as a consequence of the Charter declaring *Breaches of Peace* criminal. A "motion adopted by all Defense Counsels of 19 November 1945" was directed against this opinion.¹⁰ It included the following: "The present trial can, therefore, as far as Crimes against Peace shall be avenged not invoke existing international law, it is rather a proceeding pursuant to a new penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which by Hitler's Germany has been vehemently discountenanced outside and inside the Reich. This principle is to the effect that only he can be punished who offended against a law in existence at the time of the commission of the act and imposing a penalty. This maxim is one of the great fundamental principles of the political systems of the signatories of the Charter for this Tribunal themselves, to wit, of England since the Middle Ages, of the United States since their creation, of France since its great revolution, and the Soviet Union. And recently when the Control Council of Germany enacted a law to assure the return to a just administration of penal law in Germany, it decreed in the first place the restoration of the maxim, 'No punishment without a penal

^{9a} 317 U.S. 1.

^{9b} *Id.* at 27.

¹⁰ The prosecution put out a list of pertinent treaties in Appendix C of its indictment.

law in force at the time of the commission of the act.' This maxim is not merely a rule of expediency but is derived from recognition of the fact that a defendant must consider himself unjustly treated if he is punished under an *ex post facto* law."

The Tribunal dissented in lengthy observations from the standpoint of the motion. The decisive sentence in the Judgment reads: "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." Contrary to those of the motion, the Tribunal's opinion is not convincing. On the one hand, it employs purely moral instead of legal considerations in its arguments. On the other hand, the view that the maxim *nullum crimen sine lege* does not limit sovereignty shows a lack of appreciation for the fact that this ever contracting, theoretical dogma has diminished more and more in comparison with law including essential rules of law.

As a consequence, the admissibility of punishment for participation in a conspiracy to commit Crimes against Peace becomes void. Furthermore, it is no longer necessary to go into particulars about the statement of the Tribunal that wars committed in violation of treaties may render individuals liable to punishment. Treaty violations of this kind are only punishable when this has been laid down beforehand. When the Tribunal refers in this connection to the Kellogg-Briand Pact of August 27, 1928, in particular, it does not realize the significance of the fact that this pact does not contain any provisions for punishment and that the addressees are exclusively states, not individuals. This is also the case for all other pertinent treaties.¹¹

Furthermore, the motion refers to the peculiarity of this trial, "which departs from the commonly recognized principles of modern jurisprudence (*Rechtspflege*). The Judges have been appointed exclusively by States which were the one party in this war. This one party of the proceeding is all in one: creator for the Statute of the

¹¹ See later remarks. On December 12, 1945, the Tribunal refused to accept this motion. It was, however, published in Volume I of the Official Documents and the Tribunal advanced its dissenting opinion concerning it.

Tribunal and of the rules of law, prosecutor, and judge. It used to be until now the common legal conception that this should not be so." This can cast no shadow upon the judges, who were persons of integrity guided by the idea of administering law impartially. This is shown by the fact that they interpreted the Statute very narrowly in favor of the defendant in several cases mentioned in this article and did not follow the views of the prosecution.

Nevertheless, the objections of the defense appear to be suitable for use as arguments against the Statute. That is why it is understandable that the defendants eagerly (*erregt*) appropriated the aforementioned arguments in the motion, especially that the Statute contained retroactive law. I have in my possession a poem of one of the defendants, which expresses these sentiments clearly. Translated it reads as follows:

LEGAL ASCERTAINMENT

They administered law quite strangely
 And held a queer trial too:
 Because we broke a law,
 Which they invented new;
 But for those who break it now
 It's in force and real;
 "Us" they could find "guilty" only
 Under post-factum law. . . .¹²

Another defendant had a guard hand me a note in the courtroom with the following comment:

This trial has only one single, actual foundation, not the law, but the old power-maxim "*Vae victis!*"¹³

¹² German text:

JURISTISCHE FESTSTELLUNG

Haben seltsam Recht gesprochen
 Und Prozess gemacht:
 Weil wir ein Gesetz gebrochen,
 das sie neu erdacht;
 Doch für sie, die's selbst heut' brechen,
 Ist's in Kraft und echt—
 "Uns" konnt man nur "schuldig" sprechen
 Nach post-factum Recht. . . .

¹³ German text: "Dieser Prozess hat nur eine einsige tatsächliche Grundlage, nicht das Recht, sondern den alten Machtgrundsatz 'Vae victis!'"

CLOSING REMARKS

In catching the defendants in a close-meshed net—and thereby anticipating future hypothetical developments—the Statute and the prosecution did not sufficiently give heed to Talleyrand's admonition: "*surtout pas de zèle.*" This is particularly the case in reference to the introduction of Crimes against Peace, Crimes against Humanity, and conspiracy.

If judgments based only on law in force had followed, the guilty parties could not have complained. They would have received their due and the basis for just criticism of the judgments would have been almost completely removed. Furthermore, it would have been very desirable if German law (naturally not Nationalist Socialist sham law) had been applied instead of a law confusing not only to the defendants but to the defense counsels as well. Finally, it is particularly unfortunate that only representatives of the four great world powers sat on the bench.