Political Justice

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ERRATA IN

POLITICAL JUSTICE,

BY OTTO KIRCHHEIMER

Page 45, note 50, should read: "After some earlier hesitations—Watkins v. United States, 354 U.S. 178 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957)—the following recent 5:4 Supreme Court decisions have given a new lease on life to inquisitorial expeditions followed by contempt citations: Barenblatt v. United States, 360 US 109 (1959), Uphaus v. Wyman 360 US 72 (1959), Braden v. United States, 5 L ed 2d 653 (1961) and Wilkinson v. United States, 5 L ed 2d 633 (1961).

Page 90, note 74, line 9: "June 29" instead of "July 29"

Page 90, note 74, line 10: "1,799" instead of "799"

Page 90, note 74, line 11: "16,500" instead of "1,650"

Page 103, note 91, line 6: "1960" instead of "1936"

Page 115, note 105, line 2: "Françaises" instead of "Française"

Page 152, note 61, line 1: "BGBL, I" instead of "BGBL, II"

Page 163, line 8: "*legge truffa*" instead of "*legal truffa*"

Page 185, line 4: "but has also weakened the council considerably" instead of "but has also emancipated the council completely"

Page 201, note 55, line 4: "Herlan" instead of "Harlan"

Page 228, note 4, line 4: "Huber" instead of "Huben"

Page 376, note 48, line 9: "extradition" instead of "extradiction"

Page 394, note 10, line 1: "Intrinseca" instead of "Instrinseca"

Page 409, line 22: "Jeffreys" instead of "Jeffries"

Page 415, note 65, line 1: "Vol. 30" instead of "Vol. 36"

Page 419, at end of quotation: "Pensées" instead of "Pensèes"; "Brunschvicg" instead of "Brunschwicg"

Page 434, Appendix B, line 4: "ès" instead of "eux"

Page 436, note 4, line 2: "Maugis" instead of "Mangin"

Page 440: "Déroulède" instead of "Deroulede"

Page 441: "Jeffreys" instead of "Jeffrys"
"Lansbury" instead of "Landsbury"
"Liebknecht" instead of "Leibknecht"

Page 442: "Niemöller" instead of "Neimoller"

Page 442: "Painlevé" instead of "Painleve"

POLITICAL JUSTICE

The Use of Legal Procedure for Political Ends

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of dissenters of easy incentives to challenge the regime, by allowing the average camp follower to stay on the sideline, by a policy of graduated disqualifications and rewards, and by strategic individual acts of submission. Transferring loyalty conflicts from the ranks of the regime into those of the foe might, other factors being equal, help to hold the outer defense perimeter and obtain outward conformity rather than multiplying the opportunities for martyrdom; the more spectacular task of reclaiming lost souls would be left as the penultimate hope and aim. The reservoir of potential followers of the foe of the regime fills and empties in accordance with the tidings of the battle. If the right kind of key is used, these followers are rarely locked completely from either side.[3]

The differentiation between followers and leaders, facilities for which are found in criminal codes, enforces a certain amount of passive obedience and keeps the machinery of enforcement from breaking down or becoming a mere apparatus of registration. If it does not help a regime on the downgrade to survive catastrophes due to deeper and more encompassing causes, it saves it from wasted motion and embarrassment. If this differentiation, which permits followers to move to the sidelines, is dismissed without simultaneous resort to crude, sweeping, and often bestial forms of "disqualification," such as deportation or execution, according to "objective" criteria of race, social status, religion or nationality, the regime is confronted by a dilemma. Mass prosecutions follow unavoidably from the failure to differentiate between leaders and followers in a politically hostile organization.[4]

[3] See Appendix A.

[4] It was this type of dilemma which the American occupation authorities conjured up in their quixotic insistence on making their German charges initiate denazification proceedings against a potential 3,669,230 people. This vast multitude became theoretically liable to the proceedings—a sort of cross between a criminal court and an administrative agency. After a trial equipped with the customary safeguards, they were to be classified into one of five categories, according to their involvement in NS politics, and thereafter to be visited with corresponding sanctions.

This attempt to institute bona fide court proceedings on a conveyor belt system (which was imitated by the other allies only with extreme prudence and so long as it fit their political plans and interests) was from the outset destined to bog down under its own weight and become a meaningless paper shuffling. Far from isolating major National Socialist figures, it created a firm bond among the disparate crowd of potential victims of denazification, from the master brains who had directed the political and economic sectors of national life to the last village teacher and postal clerk. In due course, its originators had to smother their own brain child in a cascade of scarcely face-saving "amnesties," and with it any serious attempt to expose the responsibility for the regime's culpability. This culpability arose from the peculiar association between many of the upper strata of German society and its declassé elements.

This inept attempt at proceedings against whole segments of the population shows

tion (the last in the long procession being the 1960 Turkish and South Korean regimes) with delving into its predecessor's record, holding it up to contempt, and instilling into the public feelings of loyalty and gratitude toward those who have delivered them from the evil. In doing so, however, the regime faces the ticklish problem of casting its pedagogical goal into a suitable legal form. It must attempt to minimize the partisan element which inevitably mars such proceedings and to differentiate between accountability for mere political misjudgment and responsibility for criminal and inhuman behavior committed during such political action.

The more inclusive and the less clearly definable are the rules which separate licit from illicit political behavior, the more important is it who guards such rules.[5] The history of political jurisprudence turns to some extent on the principles affecting the selection of those who will render judgment. The wide variation in the character of jurisdiction shows that in perfecting their legal tools, those in power are subject to everchanging momentary preoccupations. But larger considerations

[5] The state's interest being everybody's interest, could every citizen, in case of danger, act on his own to secure the survival of the state? An ancient doctrine translated into a legal enactment in Athens as early as 410 B.C. vindicates as everybody's right the slaying of one who is about to change or has already changed the political status of the polis. (See Arthur Bonner-Smith, *The Administration of Justice from Homer to Aristotle*, Chicago, 1938, Vol. 2, p. 47; for Lord Mansfield's espousal of the doctrine, justifying the military suppression of the Gordon rioters without previous authorization from civilian magistrates, see S. Maccoby, *English Radicalism, 1762-1785*, London, 1955, p. 329.)

The mere act of rising against the regime extinguishes one's citizen status and makes him into an enemy. This doctrine, which has had a sturdy life, has meaning and justification when the attack actually rather than theoretically prevents the competent authorities from functioning; this is the pristine core of any martial law doctrine. If extended far beyond this situation, it invites an unwarranted shift in the constitutional distribution of functions in favor of the executive at a time when safeguards against such shifts are most needed. The classic case is Cicero's ordering the execution of Catilina's friends without waiting for the exercise of the right of *provocatio* to the Centuriate Assembly. This doctrine may also open the door altogether to political anarchy, serving as cloak for partisan murder in the reputed interest of the fatherland; this happened, for example, in the Weimar Republic in the early 1920's.

It is a test of a functioning state organization that it be equipped to handle its foes according to previously determined lines of jurisdiction, without being swamped by the problematic support of uninvited partisans, thus maximally excluding the merging of partisan advantage and public necessity. In analyzing the types of political jurisdiction, we shall therefore exclude the outright partisan in search of a title. This incident is more frequent in rudimentary public organizations (such as the barbarian kingdoms of the early middle ages), which approach a mere sanctioning of the results of a never-ending stream of private feuds. But we shall also exclude the modern executive acting without any title but its own certificate of necessity and convenience; this was the style of Hitler during the so-called Röhm Putsch in the spring of 1934.

The fourth, the balancing principle of our present-day society, starts from the omnipresence of the professional, the learned judge, who brings special education and experience to his job. Professionalization, specialization, tenure privileges, and invocation of the law—a seemingly neutral point of reference that produces a counterdemand for political, meaning today democratic, controls. The first echelon of democratic control is the association of selected members of the public with some parts of the decision-finding process.[8] The popular element is weaker than the professional in this mixed popular-professional type of jurisdiction; this is so because of the juror's lack of professional training and the jury's attenuated representative character. In contrast to the assembly type of political jurisdiction, this specially selected cross-section of the people assisting the professional judiciary expresses opinions current among the people. But it has not the opinion-absorbing character of the full-fledged political representative.

In special political jurisdictions (whether instituted for special political offenses, whoever commits them, or only for political offenses by exalted political dignitaries), either the political or the professional element might predominate. At one end of the spectrum is the French-style revolutionary tribunal of 1793, comprising five professional judges and twelve jurors, all appointed by the same Convention. At the other is the contemporary Western European constitutional or supreme (federal) court, where the political element dwindles to some parliamentary participation in the process of cooptation of professional judges. Between these two extremes there have been many intermediary forms.

On the surface, the constant see-saw battle seems to have ended temporarily with something like victory of the bureaucratic-professional over the democratic-political element. The professionals staff the courts, either excluding the nonprofessional or, at best, leaving the lay members in a marginal position. Yet, despite the triumph of the professional in personal and staffing terms, changes which have intervened during the last century and a half have put a different inter-

balance in favor of the aristocracy—a change soon to be replaced by the *principatus*. In both Strafford's and Laud's case, the reverse was true: the lower house substituted a bill of attainder after the Lords had refused to act on the impeachments as proposed to them by the Commons. This revolutionary action indicated the passing of the traditional balance in favor of political justice by fiat of the democratic assembly.

[8] Continental practice excludes the jury from pretrial judicial investigations and by now associates the professionals with the laymen in the findings of all elements of the judgment. Both continental and Anglo-American practice leave the direction of the trial in the hands of the professional judge. Anglo-American law leaves questions of law as well as sentencing to the professional.

and mass organizations, the judge stayed strictly within the limits of his job. In doing so he fulfilled the expectations of neither the officialdom, who wanted him to help domesticate the Hydra of what today is called subversion, nor of the regime's foes, who wanted him to help expose what they called the baseness and depravity of those in power.

In the dynamics of the nineteenth century domestic power struggles, the judge, who was just escaping the political tutelage of the executive establishment, might have considered himself acting at times as an arbiter between the official establishment and society at large.[10] When he administered the state's law, he did so under the watchful eye of public opinion which had itself outgrown the role of mouthpiece of the authorities and was now becoming the voice of the community, directed toward the educated minority. Some of the most intelligent organs of public opinion believed ardently in the perfectibility of human institutions. Consequently, they wanted to restrict coercion to its very minimum and were quick to criticize existing institutions, including the courts, for any attempt to silence discordant voices. Others, anxious about the need to uphold traditional values against the onrush of the disorderly and covetous masses, felt that everlasting political and social progress was a delusion. They looked at the courts as an integral part of the defense system of traditional society, a kind of second line of defense with orders to protect the first line, the officialdom and especially the army, against intellectual and political foes.

When the various skirmishes between the authorities and their foes merged and submerged into a conflict of such depth and such clearly drawn lines—a sort of legal Armageddon to make the reduction of the conflict to its lowest legal denominator impossible—the judiciary found itself in difficulties; any position it took made it appear partisan in the eyes of many in the community. Under such circumstances, the courts might suffer in their own ranks the contretemps of the deep division of public opinion (witness the Dreyfus affair). Even with the modest and very provisional degree of social, as distinct from legal, finality which a court's judgment in a political case is usually able to

[10] The French *magistrat* of the Third Republic was from the outset in a somewhat less favorable position than his brethren working under the conditions of the constitutional monarchy. When society and official establishment merge completely, as they did under the conditions of the parliamentary republic, the judge will bear down with redoubled energy on the "enemies of society" (an attitude which became especially apparent during the various anarchist trials), with the latter paid back in kind. See, for example, Elisée Réclus, *L'Évolution, la Révolution et l'Idéal Anarchique*, Paris, 1898, p. 101.

the limited usefulness of political trials in establishing meaningful interpretations of the past.

1. *The Political and the Criminal Trial*

Throughout the modern era, whatever the dominant legal system, both governments and private groups have tried to enlist the support of the courts for upholding or shifting the balance of political power. With or without disguise, political issues are brought before the courts; they must be faced and weighed on the scales of law, much though the judges may be inclined to evade them. Political trials are inescapable.

A truism, is it not? And yet many a jurist is likely to deny that there is such a thing as a political trial; to say that the thing exists and often entails consequences of importance is, in the eyes of such men of Law Immaculate, equivalent to questioning the integrity of the courts, the morals of the legal profession. These standard-bearers of innocence are apt to contend that where there is respect for law, only those who have committed offenses punishable under existing statutes are prosecuted; that alleged offenders are tried under specific rules determining how to tell truth from falsehood in the charges preferred; and that intercession of political motivations or aspirations is ruled out by time-honored and generally recognized trial standards, which guide administration of justice among civilized or, to use a now more popular term, free nations.[1]

In this view there is no basic difference between a murder trial involving the demise, under odd circumstances, of a doctor's wife in Cleveland, and one concerned with the shooting, following a hotly contested election, of a politician in Kentucky; between a perjury trial dealing with testimony in alimony proceedings, and one that revolves around statements made under oath before a congressional committee probing into the membership of groups hostile to the established order; between a libel suit prosecuting a competitor's derogatory statements about the solvency of a business concern, and one based on a campaign speech by a cabinet minister in which a member of the opposition was alleged to have taken money from a foreign government; or between

[1] The ambiguity of such basic definitions of present-day political systems has not escaped the attention of students of opinion formation and political semantics. Originally meant to characterize the democratic structure of the political community, the term "free nations" has come to denote freedom from subservience to the Soviet bloc only; it no longer refers to absence of domestic despotism or to *any* foreign chains. On the other side of the fence, the term "people's democracy," a tautology, has but a negative relationship to meaningful protection of popular rights or democratic freedoms.

CHAPTER VIII

TRIAL BY FIAT OF THE SUCCESSOR REGIME

Unparteilichkeit im politischen Prozess steht ungefär auf einer Linie mit der unbefleckten Empfängnis; man kann sie wünschen, aber nicht sie schaffen.

—THEODOR MOMMSEN, *Römisches Strafrecht*, 4. Buch*

Introduction: Special Political Jurisdictions

WHILE the logic of the Communist system leads to a revamping of the sum total of conditions under which the judiciary operates, more traditional political orders have reserved their special attention mostly to organizing jurisdiction in politically tinged trials. Before plunging into discussion of a particularly intensive type of political trial, the trial by fiat of the successor regime, we shall analyze briefly the various types of special jurisdiction established by a number of regimes to handle political cases quickly and effectively.

When Charles I and Louis XVI met their fates, there was, as they and their counsels spoke of amply, little doubt as to the complete irregularity of both jurisdiction and procedure. Those who framed the indictment and those who judged the case were practically indistinct from each other. As their cases and their ultimate disposal were at the same time the constitutive acts of a new era, the decisions on the cases and the principles applied formed identical manifestations of the same political will. But did the fifteenth, sixteenth, and seventeenth century sovereigns act much differently when their own political interests were at stake? The British king might not only order a command performance of his judges, questioning the tenor of and reasons for their prospective judgments, but he might also dismiss them should their opinions give him sustained reason for displeasure. The French king would have

* "Impartiality in political trials is about on the level with Immaculate Conception: one may wish for it, but one cannot produce it."

found it difficult to dismiss his judges, for it would have involved a costly refunding operation for the charges they had bought from the Crown. But from the days of Jacques Le Coeur to those of Cinq-Mars, Fouquet, and Mademoiselle de Montespan, the king might entrust instruction and judgment of his enemy's cases or any other delicate matter to specially appointed extraordinary commissions, in which learned friends of the king or cardinal and open enemies of the persons to be judged might find a strategic place. The eighteenth and the beginning of the nineteenth century saw the generalization of the judge's appointment "quamdiu se bene gesserint," and the prohibition against withdrawing cases from the judge to whom the law had assigned jurisdiction.

But these secular moves did not solve the problem of jurisdiction in political cases. As we mentioned previously, such prosecutions often take place at the strategic juncture when the old regime has been replaced and the incoming one prepares to sit in judgment over it. As a result of such change, the whole court system might well be reorganized; at the very least, the regime will fashion its own system of juridical defense against its political foes, manning strategic legal bastions with its own men of confidence. But even under a long established regime there might arise a number of special occasions, such as prolonged riots bordering on civil war, where the traditional court organization will not suffice. Constitutional lawyers interpreting constitutional documents that prohibit *ad hoc* jurisdictions might haggle endlessly over whether the ban on such jurisdictions only excludes resort to courts selected and manned for a specific case, or whether it also intends to protect against establishment of a new line of jurisdiction to meet situations of some duration. In one form or another—and there exist many subterfuges—the second practice, of setting up special courts for an indefinite time and for special, mostly political, offenses, has been a frequent practice in many countries.

Apart from the political needs of a new regime and of a government hard-pressed by its foes, there exists a long historical tradition of special political jurisdictions. Archbishop Laud, the Earl of Strafford, and Warren Hastings before the House of Lords, Justice Chase and President Johnson before the United States Senate, Polignac, the conspirators of 1843, Caillaux (treated more exhaustively in Chapter III), and Malvy before the Senate—all have become integral parts of their countries' historical lore. The present system of regular, that is, constitutionally or traditionally sanctioned, political jurisdictions operates

been found to enforce the political responsibility of a straying cabinet minister or possibly even a president before the inevitable, catastrophic change in political climate that leads to parliamentary impeachment.

In more serious political offenses by less exalted persons, the second type of jurisdiction seems to be a contemporary trend. Some countries (such as France or Italy, as cited in Ch. II) will leave it to established lower court jurisdiction to deal with political offenses, permitting themselves leeway to shift choice cases to military jurisdiction, there invoking intelligence with the enemy and demoralization aspects. Other countries, such as the German Federal Republic or Switzerland, will concentrate jurisdiction over political cases to some extent in their highest civil court. From the viewpoint of the defendant, the latter procedure has obviously the same disadvantage as historical upper house or high court proceedings. The federal court might become the final judge of both law and fact; the possible benefit of a change of political perspective is thus excluded in those types of cases where it may come strongest into play, not to mention the fact that the quota of reversible errors has never tended to decrease when proceedings are granted immunity from review.

The third type of jurisdiction, in vogue after the war, is the constitutional court, now existing in the German Federal Republic, in Austria, and in Italy. It functions mostly as a kind of arbiter between the highest organs of the state within the constitutional system, especially important in a federal structure, as a guarantor of individual rights embodied in the constitution, and as a general guarantor of the constitutionality of all legal and administrative enactments. But the court has also been entrusted with functions similar to those traditionally exercised by upper house jurisdictions. The president—in some countries the cabinet ministers, too—might be indicted by parliamentary majorities before the court for "intentional violation of the constitution," again a doctrinal and somewhat impractical echo of Benjamin Constant's preoccupations under a constitutional but preparliamentary system.[3] The German Constitutional Court, as discussed in Part Three, also exercises a quasi-repressive function, allowing the broad operation of political repression clothed as penal action. The government may, at its discretion, start proceedings before this court for banning a political party, the tendencies of which endanger the constitutional order.

Established as a self-evident matter with the inception of a new regime, or—as experience with regular American juries in this century

[3] See below, n. 10.

would suggest—as a possibly unnecessary precaution by an established regime, or simply as an historical and somewhat anachronistic survival, political jurisdictions function in many countries. Special jurisdictions have frequently been created for trials instituted by successor regimes against the personnel of their predecessors. Discussing this trial category, we shall dwell on the yardsticks used by successors for measuring the political responsibility of the predecessors' personnel. Which are the value structures that transcend the lifetime of a political regime against which acts of predecessors can be measured? Further, how is the attitude of the individual to be related to the sum total of the record of the regime he served? Is the concept of a *régime criminel* a useful tool for such an enterprise? Where is the more or less precise point at which action in the service of a political goal turns into criminal conduct? If the obstacles to a successor's justice are admittedly substantial, which of them are germane to the particular situation of this kind of trial and which should be counted among the general and unavoidable risks involved in any major trial?

1. *The Quest for a Yardstick*

The legal formulas under which trials by fiat of a successor regime take place might show a close resemblance to those of the run-of-the-mill criminal law categories. Nevertheless, from the viewpoint of both their instigators and their victims, such trials have a different significance from those that occur under the authority and rule of a long-established regime. They constitute more than just a link in a chain of tribulations and maneuvers through which a regime either achieves greater solidity or marches toward its final disintegration. Setting the new regime off from the old and sitting in judgment over the latter's policies and practices may belong to the constitutive acts of the new regime. In charting the course of action toward its predecessor, any successor regime, whether purporting to achieve moral and political regeneration, or intent, in addition, on consciously remodeling the whole social fabric, faces two contradictory sets of pressures.

Its staunchest adherents and those who might have suffered most from the oppressive hands of the old regime cry not only for revenge, but for the construction of a permanent, unmistakable wall between the new beginnings and the old tyranny. In the passionate language of St. Just asking the Convention to make short shrift of Louis XVI, they all seem to clamor: "Une loi est un rapport de justice: quel rapport de justice y-a-t-il donc entre l'humanité et les rois? Qu'y a-t-il de commun

trapped only those who had compounded the remote crime of having murdered the king with the imprudence of having rallied to Bonaparte's cause during the One Hundred Days.

The declared intentions of a new regime may not always determine the course of political repression. Original political intent may be deflected by supervening pressures. Modification in the structure of the new regime, reinforced by obstruction from the administrative and judicial corps, may wash out and redirect repressive policies. Italian repression of Fascism, as set out in the decree of July 27, 1944, seemed all-embracing on paper. The members of the Fascist government, the purveyors of violence, whoever had through his action contributed to keeping Fascism in power, as well as the collaborators with the German invaders—all fell under the spell of the wide, imprecise, and retroactive definitions of the ordinance. Yet a jurisprudence that was as narrow in its interpretation of the decree as it had been liberal regarding the 1946 amnesty, helped along by the maintenance of the judicial and administrative cadres of the Fascist regime, quickly ended any attempt to eradicate the political heritage of Fascism.[5]

If the practice of dealing with one's predecessors shows great variations, so do the formulas applied. Momentary needs and strategies, including anticipated defense mechanisms against the portents of the future, intertwine with *ad hoc* legal procedures. Rarest seems the open or even implied admission that the new regime is taking an unprecedented course. At times, though, this may be inevitable. The trial of Charles I rested on the juxtaposition of two radically different constitutional theories. Starting from the premise of traditional constitutional law, Charles' refusal to recognize the jurisdiction of the High Court is irrefutable: "No impeachment," he says, "lies against the King; they all go in his name."[6] But if he continues to ask his accusers to show him the basis of the new law, they have a readymade answer, implied in the very manner in which they drew up their charges and the verdict. Their detailed stories of his manifold hostile acts presuppose the existence of an authority, Parliament, fully empowered to make

[5] The legal and political elements in the failure of purge attempts are exhaustively narrated in Achille Batagllia, *Giustizia e Politica Nella Giurisprudenza* in Dieci Anni, cited above. Luigi Villari gives the Fascist version of this legislation (*The Liberation of Italy, 1943-1947*, Appleton, 1959, Ch. 25). But even in this thoroughly ex parte account, the author admits (p. 219) that what he calls injustices committed by the various governments succeeding one another after July 25, 1943, have been corrected either through the action of the judiciary or through changes of heart by some of the more influential members of the cabinet and officialdom.

[6] S. R. Gardiner, *The Constitutional Documents of the Puritan Revolution*, 3rd ed.; Oxford, 1951, p. 375.

Penal Code, this treason, in line with the treason of Article 51 of the Charte Constitutionelle of 1814, remains undefined. From the viewpoint of present powerholders it thus implies a judgment on erroneous and nefarious policies rather than commission of a definite criminal offense. The actions exposed to judicial scrutiny were to have a double aspect. From the viewpoint of the German authorities who took a sustained interest in the Riom proceedings, they were to serve the purpose of having official France sanction the thesis that the men of the defunct Third Republic were responsible for the outbreak of the war. For the Vichy regime, interest concentrated on the asserted negligence of those who had left France without adequate preparation to conduct military operations. Both the act of accusation and the accompanying propaganda were carefully planned to avoid discussion of military operations; they concentrated instead on all those elements which would show up the shortcomings and lack of judgment of the leaders of the Third Republic in the years immediately preceding the outbreak of the war.[13] Before inquiries had advanced enough to lead to the opening of the trial, however, Pétain, anxious for the condemnation of the leaders of the Third Republic, convoked an *ad hoc* Council of Justice in August 1941. By the very formula of the July 30 decree, the Council was to report on the sanctions to be taken. It promptly did so, with the result that four political and military leaders of the defunct Republic were put in a fortress without their having been questioned in the course of these administrative proceedings. With the subsequent trial thus prejudged—in spite of the contrary assertions of the president of the Supreme Court of Justice—public proceedings began in Riom on February 19, 1942. While the court accepted the treason definition of the July 30, 1940 enactment, it discarded the count relating to the German-inspired search for those responsible for having started the war. It retained proceedings only against those defendants who could be held responsible for gaps in the organization and equipment of the French military forces.

As usually happens with arguments of constitutionality and retroaction in the courts of the victors, the court rejected the procedural argument of the defense; their argument had rested on the lack of a constitutional basis for the proceedings and on the fact that the newly-

[13] Among the literature on the trial, probably the most revealing are Maurice Ribet (Daladier's lawyer), *Le Procès de Riom*, Paris, 1945, together with Léon Blum's own tale in *L'Oeuvre de Léon Blum*, Paris, 1955, Vol. 2, esp. pp. 220-30. Ribet also brings out the interesting orders given to the press (p. 38); they clearly indicate the regime's desired goals and what problems it tried to avoid both in court and certainly in public.

created offenses had not been in existence when the reproached act had been committed.[14] Thereupon the defense took to contesting the lack of proper war preparations, laying many of the shortcomings directly at the doorsteps of the pre-*Front Populaire* Minister of War, Marshal Pétain. Neither the Germans, who had been cheated out of the expected inquiry into the war guilt issue, nor the Pétain regime, whose authority was jeopardized by the course of the Riom debates, would evince any further interest in the enterprise. As the course of future French history was entirely open in spring 1942, Vichy propaganda had a difficult time opposing the interpretations of Blum and Daladier, the masters of the defunct regime. With convincing enough counterarguments they defended their own record by attacking the tactical mistakes and the spirit of defeatism exuding in the thirties from the circle of those now in power. German displeasure with the course of the trial was brought home to Vichy by a special visit of Dr. Friedrich Grimm, the Third Reich's foreign trial specialist. It became clear that the antecedents and the course of the Vichy regime were beset with too many question marks to serve as a propitious background for an open settling of accounts with Vichy's predecessors. The Riom debates were therefore suspended by government fiat on April 14, 1942, though as a matter of form the court was asked to complete pretrial investigations. The government thus abandoned its attempt to get judicial confirmation of the executive measures it had taken.

The political wheel turned in summer 1944. The new regime, General de Gaulle's Provisional Government, as well as the re-established constitutional governments of Belgium, Holland, and Norway, did not recognize the legal existence of the Pétain or Quisling predecessors. The clearer it was that members of such regimes were functioning as native auxiliaries of the enemy invader, the easier it became to apply such treatment; the regime could consider them as traitors, excluding debate on the feasibility and justifiability of their course of action, which would have necessitated discussion of their aims and programs. But even in such countries as Holland, Norway, and Belgium, the relative simplicity of the treason–foreign invader formula, while it took effective care of the problems of the ranking collaborators, left a considerable legacy of borderline cases. Where, for instance, is the line between merely keeping office in order to administer to the current needs of the population and action which implicitly involves recognition of the invader's title?[15] What is the form and style of obedience

[14] Ribet, *op.cit.*, pp. 41-50.

[15] Interesting examples of how to draw the dividing line may be found in Henry L.

which reflects acknowledgment of the power of coercion but avoids any move toward helping to transform naked power into authority? Many a contemporary would be happy to know the answer.

Under the impact of complete and voluntary submission to a foreign invader, which from the outset stamps as traitors those nationals who become full-fledged collaborators, the patriotic norm may serve as a guidepost. The problem—legal texts to the opposite notwithstanding—becomes more difficult and complex in France and Italy. In neither case would denial of the legal character of the predecessor regime and constructs of treasonable relations with the enemy work out too smoothly. We have already mentioned the debacle of the Italian legislative attempt to establish the criminal responsibility of the major figures and abettors of the Fascist regime after it had lasted over two decades. The attempt of the April 22, 1945 decree to establish the criminal responsibility of those who had collaborated with the Germans and held office under Mussolini's short-lived Social Republic of Saló, installed in northern Italy after his rescue, foundered equally as quickly in the courts. A number of poor devils held the bag, while the principals were able to show that they had worked both the Fascist and, clandestinely, the anti-Fascist racket—practitioners of *doppo gioco*, as the Italians called it.[16] In Italy collaboration with the Germans had been the policy of a government which had been in power for twenty years. Both the regime and its policies became increasingly unpopular from 1942 on. There might have been a national consensus in the crisis years 1942-1944, consisting in the attempts of many combined forces, old-line political personnel, Catholic Church, the independent and the Communist resistance, to guide Italy back toward independence from its German overlords. But this consensus, too fragile and narrow, and too uncertain in its ultimate effect, could not serve as a patriotic norm of such unquestionable strength that it would support criminal sanctions for reprehensible political action, unless aggravated by acts of special brutality.

In the Vichy regime foreign domination and a certain amount of home-grown initiative to replace the institutions of the Third Republic with a new authoritarian model became inextricably mixed. By some

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Mason, *The Purge of Dutch Quislings*, The Hague, 1952, esp. pp. 85ff. The unenviable record of the Dutch High Court during the German occupation has been dealt with in detail, from the viewpoint of the destruction of the court's authority-building image, in Gerald I. Jordan, "The Impact of Crises on Judicial Behavior," paper read before the American Political Science Association meeting in New York, September 8-10, 1960.

[16] Details, especially the legislation's vain attempts to transform participation in the Saló enterprise into a nonrebuttable presumption of collaboration, are dealt with by G. Vasalli and G. Sabati in *Il Collaborazionismo e l'Amnistia Politica*, Rome, 1946.

obeying, which were not necessarily always determined by the German overlords, could be skirted, at least officially.

Due to the rapid change of political alignments, the "intelligence with the enemy" concept has been allowed to fall into oblivion since the beginning of the fifties. To put it differently, it has been reduced from an official tenet of policy to a piece of intellectual property of the extreme left. But during the immediate postwar period it fulfilled a psychological, political, and juridical function. No cognizance needed to be taken of the fact that among many strata of society the patriotic norm of the traditional state had been eroded. These assumptions, however fictitious they might have been, created a legal basis that allowed the courts to circumvent discussion of the nature and goals of the Vichy regime, measuring its performance instead by a narrower yardstick: its attitude toward the German enemy.

Of course, not even the "intelligence with the enemy" thesis, and even less the hypothesis of retrospective subverting of the constitutional government, could eliminate one fundamental ambiguity which leaves questions about some, though by no means all, of the trials against the Vichy personnel.[18] In conflict are two interpretations of history. One, made with the benefit of hindsight, rests on the knowledge that Vichy's policy of collaboration was doomed to eventual defeat and hence to the detriment of France. The other interpretation and its consequent choice of action were made at a time when the future course of history was a matter of conjecture. Even if we, like the court in Pétain's case, brush aside the defense argument of "double jeu,"[19] a carefully worked-out system to simulate adherence to the German cause while in substance trying to work itself free from German domination; even if we admit that Vichy had, at least since Laval's return to power in spring 1942, been set on the German card, can we determine whether this was a mistake or a crime?

Under two suppositions this policy may be called a crime. The first is interesting but need not detain us here. It leads back to the successor

[18] As usual, there exists an enormous body of partisan literature, written more often than not to justify the cause of the various defendants; despite its useful biographical information, I would classify José Agustin Martinez, *Les Procès Criminels de l'Après-Guerre*, Paris, 1958, in the same category.

[19] Trochu, former president of the Paris Municipal Council, testifying as a defense witness for Pétain, expressed himself in the following way: "Le double jeu, il y a beaucoup de gens qui l'invoquent; mais le double jeu d'un particulier est zéro, tandis qu'un chef d'état et un ministre des affaires etrangères ont quelque fois le dévoir de jouir le double jeu!" Haute Cour de Justice, *Procès du Maréchal Pétain*, Paris, 1945, p. 181; for the court's refusal to accept the argument, see the verdict, p. 386.

regime's judgment of the political worth of its predecessor. It is indeed possible to conclude from all the available evidence that German collaboration was not only sought to improve France's national position, but was in conformity with the desire to foreclose return to democratic institutions. The implications of the second supposition will detain us longer. At least since mid-1942 the Vichy authorities must have been aware that collaboration with Germany implied part acquiescence to, part active collaboration with, policies that far transcended a regime's traditional effort to keep itself in power: collaboration with German programs of forced labor and Jewish extermination.

2. *"L'État Criminel" and Individual Responsibility*

We are facing a question that transcends the successor's always problematic judgment on the qualities and policies of their predecessors. Beyond the evanescent yardsticks of successor regimes, with their conflicting principles of organization, belief systems, and interest configurations, we are searching for a fundamental notion to which all groups and nations must at least submit, if not always subscribe. Respect for human dignity and rejection of the degradation of human beings to mere objects comes to mind. To define such a notion is easier than to determine its meaning in the individual circumstance. There is a temptation to conceive an ideal normal state which, in its legal pronouncements and organizational devices, meets the minimum requirements of respect for human dignity and is opposed to the image of an *état criminel*. On the basis of its attitude toward and treatment of the human material under its domination, such a state could not ask that credence be given to its acts nor expect the actions of its servants to be clothed with the presumption of legality. But is there such a state, one that is somehow analogous to the criminal organization construct of the London War Crimes Statute?

During a somewhat less complicated period of history, one of the most intelligent scoundrels of all time, Prince Talleyrand, tried in his own inimitable way to conceive an answer, and it is one that is no less interesting for its being tailored to a specific situation. In 1823 Savary, Napoleon's Minister of Police, accused Talleyrand of having been instrumental—in 1804, while Napoleon's minister of foreign affairs—both in the seizure of the Duc d'Enghien, scion of the Bourbon family on the territory of the Grand Duke of Baden, and in d'Enghien's subsequent execution in the Vincennes fortress. In the aide-memoire which Talleyrand submitted to Louis XVIII, he argued—contrary to all evidence that has come down to us—that his part in the events was de-

cidedly minor; he was sort of a diplomatic agent doing a routine job, strictly within the limits of his office, with all vital decisions emanating from Napoleon himself. But for good measure, Talleyrand added a more far-reaching argument:

"If a man, by the force of circumstances, is forced to live under an illegitimate regime, the decision of what to do when ordered to commit a crime should depend on the following circumstances: if the crime should draw the country into great danger, into social disorganization, contempt of law, he should not only resist the order, but do all in his power to do away with the enemy of the country. However, if the crime should remain an isolated one and have no other consequence than to stain the reputation of the individual who committed it, then one might be given to grievance over the admixture of greatness and weakness, of energy and perversity, yet the respective distribution of glory and the elements of infamy must be left to the justice of future ages. Anyhow, when the act only compromises the good name of the principal, with the law of nations, the general state of morality unaffected, the servant of the state has a right to continue in office. Were it otherwise, government jobs would be deserted by the more capable and more generous of men. Terrible results would derive if this principle were neglected. It should be adhered to as long as the defense of the social order and moral right are preserved intact."[20]

Talleyrand's theorem has been echoed in dozens of variations, often embellished in the immediate postwar period by the contention that the job was kept by the individual in question only to stave off worse tragedies.[21] It would be acceptable only if its logical presupposition, the distinction between an easily perceptible cleavage between the occasional operation of a normal state organization and the contemptible and inhuman doings of the criminal state—the dead-end street of an entirely vicious political setup—corresponded to reality. The argument does not improve by its being turned upside down. Professor Hermann Jahreiss, laying the theoretical foundation for the Nuremberg defense, readily admitted that Hitler, in contrast to Talleyrand's picture of a Napoleon who only occasionally deviated from the social norm,

[20] *Memoires of the Prince de Talleyrand*, New York, 1891, p. 216.

[21] When proferred by Franz Schlegelberger, acting minister of justice (Justice case transcript, 27 and 30 June 1947, pp. 4347 and 4384-87), the argument was rejected by the Military Tribunal No. 10 (Vol. 3, p. 1086). The rejection has been explicitly approved by Gustav Radbruch, "Des Reichsjustizministeriums Ruhm und Ende," *Süddeutsche Juristenzeitung*, Vol. 3 (1948), pp. 58, 63. Configurations where the "preventing worse evil" argument might find a foundation in a particular situation are discussed in H. Jeschek, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht*, Bonn, 1952, p. 398.

was the evil incarnate. He thereupon used this admission to demonstrate that inasmuch as all decisions were concentrated in Hitler, all agents below his level, unable to affect his will, were devoid of responsibility.[22] Between the occasional aberration within the framework of the social order and the effortless affirmation of the existence of an evil incarnate, elevated to the rank of an abstract mechanism of imputation, the principle of personal responsibility evaporates.

No pure *état criminel* exists in practice. There is no criminal genius who would be able to cajole, seduce, or force a whole people into absolute obedience. As everywhere else in human society, the elements of freedom and coercion, of enthusiastic, matter-of-fact, resigned, or reluctant obedience, of underhanded obstruction and rebellion are inextricably mixed. A modern state organization cannot be run like a concentration camp with the overwhelming majority of the population as its inmates. In order to be workable, even a despotic state organization must serve the basic needs of a sizeable number of the population. Hence the necessity to organize a great number of "neutral" services closely corresponding to those of any other modern state.[23] But it is not only in their common pursuit of necessary societal functions that a normal and criminal state are indistinguishable. The very notion of their separability accounts for only part of our contemporary experience. It originates with the Third Reich, whose goals, the forcing into subservience of the people of the European continent, were as evil as the means of killing and enslaving millions of its real or fictitious, present or future enemies.

The goals need not be abhorrent or repulsive. Collectivization and accelerated industrialization within the administrative framework of the Soviet state are also, though by no means exclusively, motivated by the desire to eventually raise the living standard of the population. And in the last decade, within the framework of their policy to maintain France's predominant position, the French in Algeria have certainly worked toward raising the cultural and material standards of the in-

[22] *IMT*, Vol. 17 (1948), pp. 458-94. (The *IMT* abbreviation refers only to the trial before the International Tribunal, not the American Military Tribunals sitting in Nuremberg.) For a measured refutation of Jahreiss' argument, see H. Donnedieu de Vabres, "Le Procès de Nuremberg devant les principes modernes du droit pénal international," *Récueil des Cours de l'Academie Internationale de la Haye*, Vol. 70, No. 1 (1947), pp. 483, 570.

[23] The same point has recently been made in a judgment of the German Constitutional Court (2 BV.R 234/60, Entscheidungen des Bundesverfassungsgerichts, Vol. 11 [1961], p. 150: "Even an unjust system cannot but solve problems of daily community life in a way which, on the surface at least, comes close to the ways of the traditional legal order."

digenous population. In both cases the framework in which these policies have been carried through by those in power has involved untold misery for large numbers among the population, including those who have not dared to resist the official promptings. Yet official policies may be subject to many oscillations and to varying degrees of implementation. Other segments of the population or of the official apparatus might try not only to check or soften measures of implementation, but to reorient the very goal structure. This might lead, as it has in France, to the curious situation of two segments of society existing side by side: the normal sector, following the traditional rules of a state, where state-individual relations are organized within a legal framework, and a military and police order, geared to maintain French domination over Algeria and utilizing for this end any means from persuasion and indoctrination to open terror.

But this is only an extreme and especially vivid illustration. Each society has such islands where the rule of law is at best uncertain, conjectural, and often nonexistent. These islands may connote identifiable geographic areas or specific group relations; in other cases they may be nothing more than predispositions of certain groups ready to enter the field if the sociopolitical configuration changes and restraining influences remain weak. The decisive difference, in separating a normal from a criminal state, involves the degree to which such islands are kept under control and whether they are encroaching on wider and wider fields of social activities.[24]

In the problematic enterprise of couching political responsibility in legal terms, it may be considered futile to even begin to try and differentiate between political responsibility for a policy that failed and political responsibility for a policy whose criminal character rests in its inherent violation of the basic rules of human conduct. One might argue, for example, that the means of destruction utilized in any future war are so horrible, the consequences so disastrous, that whoever engages in a major warlike enterprise must necessarily become a criminal, regardless of his goals and motivations. Any power holders and their major subordinates who would apply violence exceeding the amount compatible with maintaining the present state of civilization would automatically acquire the status of criminals.[24a] Such a course is altogether likely, even though the word "criminal," connoting an institutionalized type of handling, might be out of place; the action against the criminal would probably be closer to the way the Italian partisans disposed of Mussolini after his final capture. But still there might be violence in one country or in a region and with tacitly or openly agreed upon restrictions to conventional weapons. This might allow, or even make it advisable for, successor regimes to sort out the motivations, goals, and action patterns of those who saw their cause defeated.

[24] For a discussion, under a related heading, of the beginning years of the NS state, see Ernst Fraenkel, *op.cit.*

[24a] As Guenter Lewy put it succinctly in his recent "The Dilemma of Military Obedience in the Atomic Age," *American Political Science Review*, Vol. 55 (1961), pp. 3, 21: The question awaiting answer is, where does legal warfare end and humanity begin?

At any rate, it might be useful for us to see how much the difference between responsibility for political failure and for inhuman conduct is more than a utopian construct or, worse, a hypocritical formula put up to enhance the prestige of a specific type of successor operation.

3. *Nuremberg: The Prerequisites of a Trial*

A. THE NATURE OF THE CHARGES

What does the Nuremberg war crimes trial before the International Military Tribunal, the most important "successor" trial in modern history, teach us about the relation between traditional political charges and those concerning the total destruction of human dignity and personality?[25] The trial differs in one important respect from other successor trials: instead of a domestic successor regime, a syndicate of four foreign powers handled the trial. Whatever the differences over legal formulas by which to construct this fact, these powers in 1945 became the provisional, yet firmly established successors of the Hitler regime.

The charges preferred in the Nuremberg indictment show throughout a hybrid character. The trial originated as an inquest of the victor-successors, charging the preceding National Socialist regime with its major policies; aggressive warfare aimed at subjugating the continent. Due both to the nature of the parties concerned with the prosecution, a victorious foreign power syndicate, and their declared aim, to stamp out aggression, the type of political charge changed: instead of an inquest into the reasons for losing the war, the men in the dock faced responsibility for having started it. From the outset this fact determined the entire trial configuration. Mismanagement of the nation's affairs and the history of subversion of the constitutional establishment, the usual fare of successor trials against the preceding regime's top-ranking personnel, receded behind the grievances of those who had suffered from National Socialist Germany's wanton aggression.

[25] Except when specifically referred to, the discussion does not pertain to the trial before the Far Eastern International Military Tribunal, nor to trials before United States military commissions operating in the Far East.

But this political charge was tied to other ones, directed toward making the defendants accountable for inhumane conduct in the pursuit of their political goals. To complicate the picture still further, part of the war crimes charge concerned not the acts of unprecedented cruelty, such as killing millions of Jews and prisoners of war, or enslaving the population of entire countries, but the uncertain and shifting boundary lines of the laws of warfare—practices in the taking and killing of hostages, for example, and similar problems in partisan and submarine warfare. Of course, the fact that these practices happened often at the explicit orders of a regime which had planned aggressive war and was committed to the physical destruction of nations and races blurred the picture to some extent. It was not always easy to differentiate between typical incidents, coming up under conditions of any modern war, and action which originated from and related to Hitler's preconceived campaign plans.

This kind of hybrid prosecution, which mixes political accountability for planning and initiation of aggressive war with criminal responsibility for inhumane conduct, has to our eyes a politically justified element. Full-fledged warfare in contemporary society must almost necessarily lead to inhumane results. Therefore, establishing a precedent for penalizing aggressive warfare could justifiably be regarded by Justice Jackson as the paramount political goal of the Nuremberg proceedings. Had the noble purpose of the crime against peace charge succeeded, had it helped to lay a foundation for a new world order, the uncertain juridical foundation of the charge would now be overlooked and the enterprise praised as the rock on which the withdrawal of the states' rights to conduct aggressive warfare came to rest. As the coalition pursuing the Nuremberg enterprise broke up before the ink on the Nuremberg judgment had time to dry, the dissensions among the wartime partners threw a shadow over the whole affair. Exceptions taken to the charge of crime against the peace—one of the trial's integral charges but legally the most problematic one—have often been used as strategy to discredit the enterprise as a whole.

Discussion of this new variant among successor trials might well admit both the difference in structure and legal conclusiveness between the crimes against peace and the legally unnecessary conspiracy charge,[26] closely coordinated with the former in the findings of the court, and the war crimes charges proper. The crime against peace charge was a political charge in a double sense: it incriminated a certain type of

[26] Donnedieu de Vabres, *Le Procès de Nuremberg* (Cours de doctorat), Paris, 1947, p. 254, calls it "la construction intéressante mais un peu romancée de l'acte d'accusation."

political conduct, namely the National Socialist attempt to subjugate Europe by all available means, including the launching of aggression; and the degree of illegality of the incriminated course of action remained as conjectural as in some of the previously discussed proceedings.

While the outlawry of aggressive warfare had been enshrined on parchment in 1929 and duly ratified by the major states, it was not until the London War Crimes Charter, perfected six years after the Nuremberg trial had begun, August 8, 1945, that what had been a charge of international illegality was converted to the status of international punishability. In preparing the charter, both the French and to some degree also the USSR members of the London conference had anticipated the difficulties which this type of charge would raise.[27] However, together with their governments they bowed to the missionary zeal of the American representative Justice Jackson, who was eager to undertake the job of a "commission of codification."[28] In doing so he had to overlook that a codification commission must either confirm firmly implanted practices—which certainly did not exist in this field—or restrict itself to announcing rules for future behavior rather than maxims by which to judge past performances. Experience shows that every successor regime feels intensely that in condemnation of the predecessors' practices is the key to humanity's future. In spite of all justified scepticism against successors' evaluations of their predecessors' efforts, and because we know what we do of the likely shape of future wars, we must admit that Justice Jackson's position, though it has the inevitable share of hypocrisy, possesses an element of inherent logic: the need to create a precedent which can form a barrier, however weak, against future aggression.[29]

[27] The record of this conference, in many ways as interesting as the final judgment of the IMT, may be studied in *International Conference on Military Trials*, London, 1945 (Dept. of State Publication 3080, Washington, 1948), esp. 335, 378, 379, 385.

[28] *Ibid.*, p. 335. The objections to the (unnecessary) crime against peace counts were vigorously stated at the time by Erich Hula, "Punishment for War Crimes," *Social Research*, Vol. 13 (1946), p. 22.

[29] The one member of the IMT who had been a lifelong student of international criminal law, the Sorbonne professor Donnedieu de Vabres, though not hiding his reservation against the charge, has vigorously stressed the function of the judgment as an "incomparable precedent." *Op.cit.* (see n. 22 above), p. 577. The incomparable precedent would backfire, however, if it induced the leaders of a future war to fight to the bitter end rather than surrender and face the possible fate of war criminals.

See also the arguments of Robert K. Woetzel, *The Nuremberg Trials in International Law*, London/New York, 1960, pp. 170-71, 242, which rest on the charter's and judgment's confirmation by the international community. Given the after-history of the international community, a frank attempt to break the fetters of legal positivism,

If the crime against peace charge was a legal novelty, in that it created the offense of aggressive warfare,[30] it was also a typical successor regime concern, establishing the responsibility of the governing ranks of the predecessor for the policy course they had taken. With the war crimes charges and the related crimes against humanity charges we are directly concerned with the quality of human action regardless of the hierarchical level at which it occurred.[31] The newly coined "crimes against humanity" concept (Article 6c of the charter) corresponds to a deeply felt concern over the social realities of our age: the advent of policies intent on and leading to debasing or blotting out the existence of whole nations or races. But if the social and political mechanism employed in such cases is unfortunately very clear, the legal formulas to cover and repress such actions remain problematic. In the absence of a world authority to establish the boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state, the French government and its Algerian foes, the South African government and the representatives of the downtrodden negro and colored population, not to mention the Hungarian regime and its adversaries and victims, might continue to have a very different viewpoint on the meaning of the concept. While the IMT, in the particular instances which it had to judge, might have had little doubt about the concrete meaning of the classification, it nevertheless appreciated both the looseness of some of the terminology of Article 6(c) and the novelty of the charge. It therefore preferred, whenever feasible, to convict the defendants on the basis of the war crimes charges, which embraced all the traditional common crimes, while underemphasizing as much as possible the charges of crimes against humanity. Only in two cases,

especially if the latter serves as "value-blind guarantees for any kind of status protection," seems preferable. Such an attempt is outlined by Helmut Ridder, "Nuernberger Prozesse," *Staatslexicon*, 6th ed.; Freiburg, 1961, Vol. 5, pp. 11, 131-135.

[30] But strictly speaking, legally, the charge that this "novelty" violated the *nulla poena sine lege* principle is not well taken. Although most advanced constitutional systems contain this protective rule, positive international law does not know it. Woetzel, pp. 111-17, shows the impracticability of the rule, for both the development of international law and the absence of injustice where violated obligations are recognizable.

[31] It may well be that policy and lower level action are closely connected. The reprehensible goal, the subjugation of Europe by aggressive war, and the criminal means, the inhuman treatment of the underlying populations, form part of one and the same pattern. But the evidence would suggest that it might have been possible to accept the premises of power politics, including wars of aggression, without originally perceiving how closely such policy was geared to inhuman means. See the characteristic testimony of Feldmarschall v. Paulus, *IMT*, Vol. 7, p. 284.

Julius Streicher and Baldur von Schirach, did the conviction rest exclusively on a crimes against humanity charge, though even in these cases the court made an effort to find related war crimes aspects.[32]

Thus the main weight of the conviction—for what the French prosecutor François de Menthon aptly characterized crimes against the human status, with this status an image of the constitutive elements of any civilized society[33]—must rest on the war crimes aspect. Even if they were accepted as a category, crimes against peace would have to rest on the concrete possibility that major policies were furthered; just like the older successor trials, therefore, trials based on crimes against peace would involve mostly top-ranking personnel. But the individual fact situation brought under war crimes charges might involve responsibility way below the top echelons.

There exists, as pointed out before, no pure *état criminel*. Even when the London charter tried much more mildly to have the court determine the criminal character of organizations to which various defendants belonged, the court's recommendations, which form an integral part of the judgment, closely circumscribed the possible results for the members of these organizations, if, indeed, they did not completely vitiate those results. There remains nothing but to search for individual responsibility for inhumane conduct. In this search for the commission of common crimes, undertaken in connection with totalitarian political programs by various war crimes tribunals and, in a more haphazard and incidental way, by indigenous German courts, some defense arguments retain more than technical interest. We want to consider four of these arguments.

B. FOUR REJOINDERS

I. The Sanction of the Legal Order. In the first argument, a judge or another official attempts to invoke the sanction of the existing legal order. The defendant may assert, as in the "Justice" case, for example, that the incriminated act was carried through in pursuance of legal enactments whose validity went unchallenged at the time of the trial. Such a plea raises a point of principle. Not every piece of legislation enacted by a government in conformity with its own rules acquires, by the mere fact of enactment, the quality of binding the lower echelons. If it shows on its face the character of inhumanity, as did the decree

[32] See de Vabres' critical evaluation of the crime against humanity charges, *op.cit.* (n. 22 above), pp. 243-46.

[33] *IMT*, Vol. 5, pp. 406-07. "It [the human status] signifies all those faculties the exercising and developing of which rightly constitute the meaning of human life."

court sentenced to death a Polish farm laborer who had had altercations with his employer and had also made advances to his employer's wife. When the military tribunal in the "Justice" case asked how the case of a "racial German" would have been treated if submitted to the German Reichsgericht on the identical fact situation, the judge replied: "This is a very interesting question, but I cannot even theoretically visualize the case, as the decisive elements cannot be transferred to a German."[37] The basic fact that the way he handled his job violated the minimum standards of decency and equality before the law to which all human beings are entitled did not occur to the judge. Should he therefore escape punishment?[38]

II. Binding Orders and Necessity. The second argument draws its strength from the concrete condition under which individuals below the highest level exercise their function. The London charter, in Article 8, had somewhat sweepingly done away with the invocation of binding orders except in mitigation of punishment. This problem, which comes up time and again, is most frequently discussed in terms of military hierarchical relationships. Authors of many nations, especially in the wake of the Korean conflict where no side has been strong enough to insist on the punishment of their adversaries' alleged war crimes, have commented on the conflict of loyalties which the policy of the London charter would create. They have denied that the rejection of binding orders could ever be squared with the social reality of hierarchical com-

[37] Justice case transcript, December 4, 1947, p. 10625.

[38] The most persistent critic of the Nuremberg trials, especially those before the American Military Tribunals, August von Knieriem (*The Nuremberg Trials*, Chicago, 1959), tried to exculpate those who framed the decree of December 4, 1941, with the argument that referring the case to such a tribunal was preferable to the method chosen thereafter: killing Poles and Jews without benefit of any trial (p. 279). This is a somewhat specious application of the lesser evil argument. Does the fact that others invented devices to kill speedily millions of people exculpate those who put a somewhat less efficient machinery into motion, only killing hundreds? In Radbruch's judgment of such arguments in the Schlegelberger case: "For the man of the law seeing that a frontal attack against an evil situation appears impossible, the only way is to acknowledge that in legal terms there remain no remedies except those with which he would stain his own reputation" (*op.cit.*, p. 62).

While in Knieriem's mind the first argument serves those who framed the legislation, its application by a judge, constituting the putting into practice of "valid" law, was no offense if the judge did not know that he acted wrongly (p. 284). Knieriem overlooks that the Federal Court considers that the application of excessively severe punishment in cases clearly not warranting such action is a crime, even though the law under which the judge was operating would authorize such sentence. Bundesgerichtshof, Entscheidungen in Strafsachen, Vol. 3 (1952), pp. 110, 118; Vol. 10 (1958), pp. 295, 301.

mand relations.[39] The harsh judgment is not unwarranted. However, a differentiation imposes itself.

Military command relationships on the lower level, where strict discipline and complete subjection of the individual judgment to that of the commanding officers may be the price of survival, are quite different from the social reality of higher level command relations. Except for their outward forms, higher level military command relations are more like relations within what might be abbreviated a power elite, and should correspondingly be judged in these terms.[40] In contemporary bureaucratic establishments only the lower level, doing a more or less repetitive, partly mechanical job, finds both work routine and assignment externally determined, with a minimum of its own control over rhythm and conditions of work; for many jobs this involves difficulties even in asking for reassignment. In contrast, the executive groups, whether public or private, find their assignments rely much less on explicit, formal rules than on traditions and goals of their organization. The more important their place in the organization, the more intimate their knowledge of its ways, and the more strategic their role in the system of intra- and interorganizational coteries and alliances, the better their chance to evaluate the force and speed of outside demands on the organization and of the ways and means to cope with them. None of the higher executives could adequately perform his job or reach some measure of personal security if he did not try to become as conversant as possible with the action patterns of related and superior organizations which could harm his own setup. If the whole political regime changes, he might flatter himself for a time on his ability to safeguard the integrity of his own organization while outwardly going along with policies which he knows to be unacceptable by the standards of human decency. But in every case there will come a point when the illusion that one's own influence can arrest more general developments will be dis-

[39] See, for example, Pierre Boissier, *l'Epée et la Balance*, Geneva, 1952, esp. pp. 89, 140; Jean Pierre Maunoir, *La Répression des Crimes de Guerre devant les Tribunaux Français et Alliés*, Geneva, 1956, with interesting material on the possible effect of the 1949 Geneva Red Cross Convention on Korean war practices.

[40] There is an instructive German discussion in Beilage zu Des Parlament, July 17, 1957, on "The Criminal Order," dealing with the legal implications of and the attitudes toward the so-called "Commissar Befehl" by high level German officers; see esp. the comments of the prosecutor Hölper (p. 438), emphasizing the relation between command position and degree of knowledge, and of Freiherr von Gersdorf, which relates a commanding general's reaction when asked to participate in a common protest to Hitler against the illegality of the "Kommissar Befehl": "If I do that, Hitler will send you Himmler as commanding general" (p. 439). (He visualizes Hitler's retaliatory action in terms of his replacement, not his punishment!)

pelled. At this moment there arises the conflict of open resistance or silent withdrawal. No successor regime can legitimately judge the elite of its predecessor according to its willingness to engage in active resistance. Active resistance will always remain a highly personal decision. However justified resistance might be, to whatever degree constitutional settlements may make a show of recognizing the right to resist oppression, any existent regime will consider resistance a sacrilege. Its justifiability will only be vindicated in the courts and market places of a strong successor regime.

If active resistance to the oppressor is therefore an illusory yardstick, withdrawal from significant participation in public life of the defunct regime, industrial command posts included, is a legitimate yardstick. It could be otherwise only if the individual in question established proof that such withdrawal would have been tantamount to a serious threat to his life. A large body of experience teaches us that many men show a fatal proclivity toward pushing themselves, or allowing themselves to be pushed, into positions where they know in advance the honors and rewards will entail corresponding entanglement and responsibility.[41] But vague assertions to the contrary,[42] it is much less certain that incumbents who under some pretext did drop out incurred major risks. Only when a regime is nearing its final agony will last-minute deserters be uniformly treated without mercy by those whom they desert and those whom they seek out. Otherwise, terroristic regimes will discount the value of those who vacillate and will ridicule the scruples of those too weak to serve. Too irresolute either to resist or to serve, they may, from the viewpoint of the regime, just as well withdraw into obscurity.

[41] The recent book by Herbert Schorn, *Der Richter im Dritten Reich*, would confirm this position. Its comments on p. 114 demonstrate (a) that with enough perseverance it was possible for a judge to have a nomination to a "special court" withdrawn under some pretext; and (b) that there were enough judges available who thought it would enhance their career prospects to work on the bench of a "special court" that was handling cases in which the regime took a special interest. There is a conclusion that Schorn refrains from drawing: a silent strike of the profession, with its great majority refusing to serve on such courts, would have embarrassed the regime, lowering its prestige with the population at large.

[42] Knieriem, *op.cit.*, p. 263; but see Donnedieu de Vabres, *op.cit.* (n. 22 above), p. 570. The state of necessity pleas have been dealt with at various times in the decisions of American military tribunals in Nuremberg. The plea has been rejected —in somewhat extreme terms—in the Krupp judgment (German trial record, pp. 13,396-97); here as well as in others, among them the so-called Wilhelmstrasse judgment, the rejection of the plea rested on the absence of proof of an imminent danger to life and limb; Wilhelmstrasse trial record, p. 27,468. In contrast, the court in the Flick case (trial record, p. 10,736), without going into any details, has accepted the plea in regard to three of the defendants.

But for exactly the same reason—a modicum of danger to their personal security—willingness to disappear into oblivion is a standard which may be rightfully imposed by those sitting in judgment over the elite personnel of a regime which, during its course, gave rise to many practices constituting crimes against the human condition.[43]

III. The Prejudicial Court. The last two arguments are of a wider nature, and while they were utilized by the critics of Nuremberg for all they were worth, they could be leveled with equal force against all political trials, and especially against all trials by successor regimes. The third argument concerns the partisan quality of the court. It has been asserted very often that the judges in Nuremberg were the judges of the victors. It is alleged that the defendants should have been tried either before a tribunal composed from the ranks of victor, neutral, and German judges or, still better, before an exclusively German tribunal. The latter, it is said, would have guaranteed the application of familiar German substantive and especially procedural rules, rather than the hodgepodge of retroactively applied foreign *ad hoc* substantive law and the mostly Anglo-American procedure to which the defendants and their German lawyers saw themselves exposed.

As to the court of the victor argument, the rebuttal is simple and unavoidable. It goes straight to the very nature of political trials. In all political trials conducted by the judges of the successor regime, the judges are in a certain sense the victor's judges. Whether their jurisdictions have been newly formed, or whether they have been confirmed, with whatever modifications, by the victors, they will be working on the basis and within the framework of the legal organization created by the political system of the victor. In a somewhat wider sense, all judges, not only those of a successor regime, are working under the conditions of the existing legal and political system which they are dutybound to uphold. Could John Lilburne decline the judges of Charles I or of the Long Parliament; could Gracchus Babeuf make his rejection of the Haute Cour of the Directoire stick; General Mallet refuse to have truck with Napoleon's military commission; or did Daladier and Léon Blum and three years later Pétain have more luck with their attempts to contest the jurisdiction of the various high courts installed by the respective regimes of the day?[44]

[43] See also Appendix B. Guillaume du Vair: The Case of a Successful Loyalty Shift.

[44] A recent incident sharply illuminates the extent to which jurisdictional complaints are now considered a necessary property of any major political trial. At the very opening stage, when public attention is greatest, these complaints give the trial an air of legal finesse and propriety without ever putting the regime that is staging the trial in any untoward danger. The rejection of the jurisdictional objection is a foregone conclusion.

In April 1960, *in absentia* proceedings opened before the High Court of the DDR against the West German Minister of Expellee Affairs Theodor Oberländer, for his participation in war crimes. The DDR court provided two defense lawyers, including the chairman of the East Berlin Lawyers' Cooperative, and the defendant himself took no notice of the proceedings. The lawyers proferred written objections against the jurisdiction of the DDR court. These were rejected, with great learning, by a professorial member of the bench (*Neues Deutschland*, April 21, 1960). Thereafter, the prosecution began to produce experts and witnesses from the DDR and other eastern states, connecting Oberländer with the elaboration of war crimes policy. Local inhabitants, too, identified the defendant as having been personally present at and in command of the commission of atrocities. The trial reporting does not mention any attempt by the official lawyers to question the story of the identifying witnesses, even leaving a perfunctory "Are you certain?" kind of query to the president. (See the testimony of the witnesses Kuchar and Hübner in *Neues Deutschland*, April 23 and 24, 1960.)

Jurisdictional objections give the performance the atmosphere of a trial; otherwise, the scenario is arranged to cast as few doubts as possible on the perfection of the propaganda image to be produced by the trial. Analysis of the judgment, distributed as a supplement to *N.J.*, Vol. 14 (May 20, 1960), No. 10, would confirm this impression. An almost simultaneous preliminary investigation of the Bonn district attorney's office, based on the testimony of witnesses located in Western lands, led to a *nol pros* fully rehabilitating Oberländer in regard to his alleged participation in atrocities. In neither of the two proceedings was there an opportunity for the two sets of witnesses, from East and West, to confront each other. But the rulers of the DDR were at a tactical advantage: they had proposed a joint investigation which, as they knew beforehand, the Federal Republic would be unwilling to accept.

In the London discussion on organizational form, law, and procedure of the future International Military Tribunal, there were apparently two theses on the function of the judges and the character of the future trials. With a realistic appreciation of the historical role of the forthcoming trial, but with a lack of subtlety quite understandable against the background of the political trial formulas of the Stalin period, General Nikitschenko, the USSR representative, emphasized that the speedy procedure he wanted adopted should guarantee the execution of the decisions regarding the chief war criminals; these decisions, which he called "convictions," had been previously announced by the heads of the Allied establishments.[45] Justice Jackson thereupon took to underline the traditional Western position on the distinction between the executive power to set up a tribunal and organize the prosecution, and the independent role of the trial judges evaluating the evidence presented to them.[46] Both the cynical realism of the USSR representative and the apparent traditionalism of Justice Jackson overstate their respective cases.

[45] *International Conference on Military Trials*, pp. 104-05.

[46] *Ibid.*, pp. 113, 115.

Occurring in the wake of a National Socialist defeat, the trial could not but take the defeat of National Socialist doctrine and practice as its starting point. But in the Western mind this self-evident fact did not exclude judicial freedom of appreciation of the role of the individual German leaders. This fact was expressed, among others, against the protest of the USSR member of the court, in the acquittal of three of the defendants in the proceedings before the IMT. The antithesis between *judicial tribunal* and *manifestation of power*, which pervades part of the war crimes discussion and also finds its way into some of the judicial opinion on the war crimes issue,[47] therefore misses the point. The appointment procedure and the nature and genesis of applicable texts do not in themselves decide the character of proceedings. When determining the type of credit and rating given to a successor trial, one must take equal account of the method of examining and evaluating submitted facts, for it reflects the tribunal's amount of independence from momentary outside pressures.

The IMT had been mandated to follow up the political eradication of National Socialism and the general revulsion from its inhumanity by a search into individual responsibility for National Socialist policy and action patterns. To this extent, the addition of judges from neutral nations, while psychologically possibly useful, would have created great inconvenience for Allies and neutrals alike. It would have forced these nations to underwrite the Allied policy on which the trial rested; and it would have made a semblance of unified conduct of the trial by prosecution and court, which was difficult enough, almost impossible. In essence it would have meant the anticipation of a world penal court which, despite all projects in this direction, has, in the absence of a unified world community, never been established. The proceedings before the Eastern War Crimes Tribunal have grown no less objectionable

[47] See the Indian judge Pal's dissenting opinion, which uses this point as one of his main arguments to brand the proceedings before the International Military Tribunal for the East as outside the province of genuine legal proceedings. *International Military Tribunal for the East*, dissident judgment of R. B. Pal, Calcutta, 1953. Justice Douglas, in his concurring opinion in Koki Hirota, Pet. v. General of the Army Douglas MacArthur et al., 330 U.S. 197, 205 (1948), turns the same argument into grounds for rejecting Supreme Court review of the proceedings of the Eastern IMT. "It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law." Douglas compares the American president's political decision made in conjunction with America's allies on how to treat the enemy leaders with the 1815 decision to banish Napoleon to Elba. However, the fact that similar proceedings could have been applied to the Japanese leaders by executive fiat does not control what standard and criteria should apply once an irrevocable decision in favor of a trial has been made.

by the Indian judge Pal's being given the opportunity to pen to them his fulminant dissent of principle.[48] Whatever its legal shortcomings, the charter that established the function of the IMT expressed the objective necessities of a political situation which in this case—possibly a rare but salutary coincidence—happened to conform with the moral consciousness of humanity at large.

To say that a German court, dealing with the defendants under German law, would have been more appropriate is more than an argument to impugn the fairness of the trial in technical terms; it wants to convey the opinion that an indigenous German trial would have been able to provide a greater amount of "objectivity." The reverse would be nearer the truth. The victorious Allies could be nothing but inimical to the National Socialist system as a whole. However, the cases of the individual defendants were for the judges nothing but news items. They had little, if any, relation to the judge's own life experience, and this guaranteed a maximum of fairness in the weighing of the individual charges. Unlike the German proceedings against German officers indicted for war crimes after World War I, which took place before the unregenerated bench of the Leipzig Supreme Court, a German successor trial in the second half of the forties would have taken place before German judges and with German prosecutors from the ranks of those untainted by service under the National Socialist regime; it might also have included both domestic foes and victims of Nazism. It is quite possible that such a trial would have covered different territory and have led to a closer and more vivid understanding of the action patterns of the defendants. From the viewpoint of the defendants, this might not have been an advantage. Equipped with the weapons of continental criminal procedure, the court would have concentrated the conduct of the trial in its own hands, rather than presiding impartially over a time-consuming contest between a great variety of prosecutors and defense lawyers. Without need to engage in prolonged wrangling over the admissibility of evidence according to rules originating in the practice of jury trials, and without need of cumbersome translations, it would have judged the documentary evidence against the background of its own knowledge, understanding, and experience of National Socialist policies and procedure. A German court if left its freedom would naturally have shown less interest in one of the most problematic aspects of the various Nuremberg trials: the definition of the

[48] The manifold and quite substantial objections to the proceedings of the Eastern IMT are discussed in J. A. Appleman, *Military Tribunals and International Crime*, Indianapolis, 1954, Ch. 38.

boundary lines of the rules of warfare under actual combat conditions. Instead of discussing crimes against peace, it would have concentrated on some of the domestic aspects of the regime, specifically omitted from consideration by the IMT. Whether the judgments and sentences of German courts would have evoked a more positive response from the German citizenry and thus helped the population to come to a sharper and less opportunistic appreciation of their immediate past; whether it would have led to a more rational pattern of dealing with a great variety of offenders against the concept of the human condition, and avoided the spotty, lottery-type trials now taking place over much too long a period of time before the regular German courts—this is another question.[49] But the claim that the juridical liquidation of the National Socialist heritage by the foreign "victors-successors" was less dispassionate than corresponding proceedings before indigenous German jurisdictions would have been in 1946 and 1947 is, to put it mildly, hard to believe.

IV. Tu Quoque. Successor justice is both retrospective and prospective. In laying bare the roots of iniquity in the previous regime's conduct, it simultaneously seizes the opportunity to convert the trial into a cornerstone of the new order. Against the inherent assertion of moral superiority, of the radical difference between the contemptible doings of those in the dock and the visions, intentions, and record of the new master, the defendants will resort to *tu quoque* tactics.

This fourth and last argument raises the objection that the new regime is guilty of the same practices with which it now tries to besmirch its predecessor's record. It is advanced as an estoppel against the victor's attempt to call into question the lawfulness of acts by the defendants. It was anticipated in the discussions of the London War Crimes Commission,[50] and it formed a weapon which the Nuremberg defense frequently tried to use and to which later critics returned frequently and invariably when assailing the Soviet Union's participation in the Nuremberg proceedings.

[49] Only in 1958 did the various judicial administrations of individual German states agree to put up a joint office which is systematically collecting information on and coordinating investigations of people suspect of participation in various forms of atrocities. Yet from May 1960 on, prosecutions for anything but first-degree murder have been excluded through the operation of the statute of limitations. Parliamentary attempts to defer the statute's coming into effect have been justifiedly defeated. German authorities had a full decade to get busy, and, official assertions to the contrary, could have undertaken many more prosecutions than they managed to do. At best, uncertain shifts in public appreciation are not a good enough reason to withdraw from anybody the benefits of the statute of limitations.

[50] *International Conference*, pp. 102, 304-06.

pected sins of commission and omission of his own side against the depredation of those whom the course of events has brought before him. But it would be foolish for a defendant to rely on what might at the very best be an unusual coincidence, the presence of a sensitive and fearless judge.

As to *tu quoque* in the trial before the Nuremberg IMT: both in its acquittals and gradation of punishment—which were by no means only mechanically related to the number of counts under which the defendants were found guilty—the court made an attempt to differentiate between the various incriminating fact situations. Of those misdeeds which we call offenses against the human condition, no comparable practices of any state of the world, whether represented on the bench or not, could serve in exculpation or mitigation, even if the court had allowed greater latitude in introducing proof of such misdeeds by victor nations. In cases where the *tu quoque* argument was salient and strong enough to raise doubts about the existence of a well-established body of law, as happened in regard to unlimited submarine warfare, the court disregarded the respective incriminations.[54] But in cases concerning the participation of the USSR in acts of aggression or their utilization of prisoners of war in danger zones, the court rejected the argument at hand. Obviously, the more nearly identical the asserted practices were with those which the court was asked to judge, the less moral ground the court's rejection had.[55]

C. THE QUALITY OF A COURT

The Nuremberg trial had its own peculiar dialectics. It constituted an attempt to enforce on a multinational basis criminal responsibility for political action whose implementation involved crimes against the human condition. The criminal action may have been planned from the outset as integral to the political planning, as in the liquidation of Jewry. Or it may have been improvised as the most efficient or least burdensome way to carry through the military and political program, as in the murdering and starving to death of millions of PWs. As the case was unprecedented, so was the pattern of the four-state prosecution, the criminal procedure, and the criminal law fashioned for the purpose by the statute elaborated at the London International Conference and by the Nuremberg court. Therefore, when compared with any homegrown

[54] See, for example, the motivation of the Doenitz sentence, *IMT*, Vol. 22, pp. 556, 559, and the Raeder sentence, Vol. 22, p. 561.

[55] A sweeping statement of the court rejecting the *tu quoque* argument may be found in *IMT*, Vol. 13, p. 521.

variety of law and procedure, the case will show any number of anomalies. If these anomalies are stated cumulatively, the proceedings might give the impression of gross irregularity, allowing the trial itself to be put on trial. What would then remain but a kind of morality play which, being refuted immediately thereafter by the course of history, would have nothing to teach? What is the answer?

Recent experience has familiarized us with enough proceedings which do not merit the name of trial to establish the difference between a trial—even though it may have the particular features of a political trial—and an action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results. A trial presupposes an element of irreducible risk for those involved. It derives from the judge's or jury's freedom and their preparedness to evaluate the unfolding of both the official and the defendant's story in the light of a conduct norm. Of this norm the defendants are by and large aware. The judge who mortgages his freedom in advance, whether out of fear or out of subservience, does not, as both German and French courts had occasion to insist, want to act as judge. "Who does not want to render justice cannot invoke the fact that he has observed the trappings of the law, because his fundamental attitude makes it evident that this was only an act of simulation."[56] A judge who is willing to assume the function of a presiding judge—after having assured the minister of justice pushing the proceedings that he can count on him—and sentences defendants to death on the basis of retroactively raised punishment (which the authorizing decree inserted into the law gazette in such a way as to mask its retroactive character) does not partake in the administration of justice.[57] As another example: a court-martial, composed of members handpicked for the case by the secretary general in charge of public order and meeting in the prison director's office, which, in the absence of any defense lawyers, sentences to death 28 defendants within four hours for participation in a prison riot "cannot be considered to have rendered a judicial decision."[58]

Even in the administration of injustice, however, there are gradations. In the courts-martial of the Vichy militia and the people's tribunals of the first liberation days, enemies, whose fate had been settled in advance, were butchered. The liberation type of cour de justice, with all its

[56] Bundesgerichtshof, Entscheidungen in Strafsachen, Vol. 10 (1957), pp. 295, 301.

[57] This incident of summer 1941 is narrated in detail in Robert Aron, *Histoire de Vichy*, Paris, 1954, p. 416. For a feeble attempt by one of the main participants to explain away his role in the case, see *France Under the German Occupation*, Stanford, 1959, Vol. 2, p. 595.

[58] *Cour de Cassation*, 1948, No. 133, p. 199.

prejudices, allowed for some primitive rights of defense.[59] Finally, there is the marginal case of an elaborate military commission set up by the United States for the trial of Japanese foes. The commission held months of formal hearings; the lingering doubts pertained mainly to the ways of handling evidence and to the question of the commission's *de facto* independence of the commander in chief.[60] In each case the tribunal sought the mechanical certainty of the result while trying to partake—illegitimately—in the creative suspense of a result which can legitimately originate only in the unfolding of the trial itself.

Viewed in this light, the Nuremberg trial before the IMT was not a simulated trial. If there was some measure of retroactive law applied, not only were the defendants, while acting, fully aware of the possible consequences of their action, but, as pointed out previously, their sentences could be explained without resort to the retroactive features. The jurisdictional problems of the trial, if compounded by the multinational character of the prosecution, were not particular to this trial. They are, as shown, common to political trials and inevitably connected with trials by successor regimes. As in all such trials, the general frame, though not the decisions reached for the individual defendants, was set by the political and military context in which the trial took place: to confirm the defeat of Hitlerism. Whatever pressure there was, was of the situation rather than of an organized group determined to have its way. It was no organized Montagne asking for the head of the king, no clamor of the street, as in Polignac's case. It was the language of the charnel houses, the millions who had lost their families, husbands, or homes. If isolation against this language was possible or even desirable for the calm of the judicial process, such calm was better guaranteed in the chambers of the Nuremberg Allied and American Temporary War Crimes bureaucracy than in the disoriented minds and bare courtrooms of the 1946 and 1947 Germans.

It has been shown how difficult it will be in the future to have recourse to violent political change on a state-transcending level without at the same time creating situations that lead to the very negation of

[59] For these gradations, see Robert Aron, *Histoire de la Libération de la France*, Paris, 1959, pp. 532ff.

[60] See the dissenting opinion of Justice Rutledge re Yamashita, 327 U.S. 48, 56 (1945), and Frank Reel, *The Case of General Yamashita*, Chicago, 1949, p. 162. In fairness to the commission, it must be pointed out that its judgment rested essentially on the defendant's responsibility for omitting supervision of the military forces under his command. The defense tried to show either that atrocities committed did not occur under the defendant's jurisdiction, or that he had had no power to prevent them. However, he submitted scarcely any affirmative proof that he had positively tried to prevent such occurrences.

the "human condition." And in wading through the evidence on mass annihilation and mass enslavement, those fact situations which we have since come to describe as genocide have established signs, imprecise as they might be, that the most atrocious offenses against the human condition lie beyond the pale of what may be considered contingent and fortuitous political action, judgment on which may change from regime to regime. The concrete condition under which the Nuremberg litigation arose and the too inclusive scope of the indictment may make it difficult for us to separate the circumstantial elements which it shares with all other successor trials[61] from its own lasting contribution: that it defined where the realm of politics ends or, rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity. In spite of the Nuremberg trial's infirmities, the feeble beginning of transnational control of the crime against the human condition raises the Nuremberg judgment a notch above the level of political justice by fiat of a successor regime.

4. *Trial Technique: Eternal Quest for Improvement*

Of all the shortcomings of the Nuremberg proceedings, none has been more consistently attacked than the inequality which existed between prosecution and defense. This inequality was grounded in the procedural law applied. In the absence of a court—it was established only after the indictment—the whole trial preparation was left to a prosecution working in conformity with Anglo-American rather than continental practices. Continental prosecution, at least in theory, means that a state organ sifts impartially all available evidence. The Nuremberg prosecution aimed at convicting the defendants. Beyond this, it was impossible for the defendants to resort to counsel in the pretrial stage.

[61] Not only successor trials. Because of the division of Germany, the judges of one regime, the Federal Republic, may be sitting in judgment over the (fugitive) judges of the courts of the DDR. See the decision of the Bundesgerichtshof of January 28, 1959, reported in *Recht in Ost und West*, Vol. 2 (1958), p. 204. The fugitive DDR judge who presided over a trial of five Jehovah's Witnesses was prosecuted and convicted of having deflected the law to the disadvantage of a party (par. 336, Penal Code). The conviction was quashed, with emphasis resting on the question of whether the judge, while acting as he did, was convinced that the law he applied was binding. However, the court must have realized that this argument might open up more questions than it was then prepared to tackle. (The same argument could obviously have been used, and was used, to defend the record of NS judges; Max Güde, *Justiz im Schatten von Gestern* [cited above, Ch. I, n. 4].) Thus the argument adds a number of more concrete grievances against the lower court judgment, including the compulsion under which the judge may have acted.

The second disadvantage was a great factual inequality between prosecution and defense. Powerful, if not highly organized, the prosecution could roam around freely, collecting its material and marshaling its witnesses. The defense had meager resources and, due to prevailing conditions, restricted freedom of movement outside the courtroom. Though always in evidence, however, this inequality affected the outcome of the trial less than it might have. The prosecution's case rested less on oral testimony than on the production of documentary evidence taken from original German files. Thus there was little of the uphill battle of a defense exposed to partisan witnesses of the victorious side and unable to marshal effective enough testimony in rebuttal. The defense's problem was an intellectual one: to explain why the responsibility for whatever had happened did and could not rest with their clients. Despite multiple handicaps, the defense was equipped to handle the problem.

All this is well known. What is less well known is the extent to which these disadvantages contain risk elements inherent in all criminal trials, not only in this specific trial. The following pages, therefore, will try to show that a) the risk deriving from factual inequality in trial representation is one of the most doubtful features in Anglo-American trial practice, and that b) the European trial procedure, recommended by many of the critics of the Nuremberg trial, has, for quite different reasons, as strong a built-in aleatory element as the Anglo-American practice.

How does trial organization affect the outcome of the political trial? Anglo-American and continental trial organization rest on two radically different assumptions. The Anglo-American trial remains essentially at the disposal of the parties, while the continental trial revolves around the judge's own responsibility to search for the truth. Anglo-American adversary procedure organizes the trial as a battle of wits between the prosecution and defense, with the judge acting as their referee, constantly deciding what line of questioning and what material should be allowed to enter the minds of the jury. Yet the judge's authority in this respect may be more official than real: a skillful lawyer will be able to make his point before his adversary can open his mouth to object. The resulting wrangling on admissibility and the judge's ritual exhortation in summing up what points to disregard—for example, the political loyalties of the defendant in an espionage trial—only make the forbidden fruit more tempting to the jury than all the rest.[62]

[62] Judge Jerome Frank refers to such warnings as "an empty ritual," and infers that the only remedy is to waive a jury trial. United States v. Rosenberg, 195 F 2d (CCA 2d) 582, 596.

Anglo-American procedure takes this chance as part of a deep-seated conviction that from the endless flow and counterflow of argument, centering on the prosecution's attempt to make the indictment stick, with both defense and prosecution mercilessly searching into and exposing the weaknesses and inconsistencies of each other's position, the truth or falsity of the indictment will finally emerge. This method is at its best when a revealing flash illuminates the whole situation. Even if it languishes under the seemingly uncoordinated chaos of themes and materials, now picked up, now discarded, according to the whims and hunches of the lawyers, a jury might not miss such a flash, especially as the lawyers will endlessly amplify it and drive its impact home relentlessly while summing up. If neither party is blessed with such luck, the lawyers will have to rely on thumbing methodically through the material—an ungrateful job under the circumstances of adversary procedure—and either put together isolated parts into a composite picture or tear them asunder before they are firmly joined.

To yield satisfactory results, adversary procedure rests on the implied premise of a strictly maintained legal equality between the parties, on their parity in research, resources, and preparations, and above all on forensic skill and general level of intelligence. If the defense lawyer lacks these prerequisites, may parity be restored by the judge's intervention? Many authorities will answer unhesitatingly in the affirmative, upholding the judicial practice not only to put to the witness additional questions that are liable to clarify an issue, but also to call additional witnesses, even expert witnesses, if need be; the latter the judge may do on his own.[63] The proposition sounds excellent on paper, but how would it fit into the system of adversary proceedings?

To take a concrete example from recent political trial practice: in the Rosenberg trial the only witness to the open act, David Greenglass, contended that he had delivered drawings made from memory to Julius Rosenberg. The circumstances under which copies of such drawings were made by Greenglass, while under detention, became therefore

[63] This position is held most strongly by Wigmore, *On Evidence*, 3rd ed.; 1940, Vol. 3, par. 151, and Vol. 9, par. 2484. See also the opinion of Justice Frankfurter, dissenting in Johnson v. United States, 333 U.S. 46, 54 (1948): "Federal judges are not referees at prize fights but functionaries of justice"; and the note, "The Trial Judge's Views of his Power to Call Witnesses—an aid to adversary presentation," *Northwestern University Law Review*, Vol. 51 (1957), pp. 761-74. There is a particularly instructive discussion by Judge Charles Wyzanski, "Freedom of the Trial Judge," *Harvard Law Review*, Vol. 65 (1952), pp. 1281-1304. However, it should be especially noted that Judge Wyzanski gives two telling examples from his own trial practice (p. 1284), showing that in political libel cases "the judge is not the commander but merely the umpire."

The American judge's interference with the arrangement of testimony—at best an exception in proceedings at the disposal of and under the responsibility of the parties—is necessarily limited. Unlike British proceedings, the frame within which federal judges and most state judges may comment on the evidence in their summing up is rather narrow.[68] Thus if one follows the activist school, the judge would be able to take a decisive part in the trial but be unable to evaluate the meaning of his interference: a somewhat contradictory situation. Moreover, one of the most fateful trial decisions, whether to put the defendant on the stand or not, must remain entirely outside his province. Judicial activism and adversary principle are not easily compatible. But the Rosenberg case, where a smoothly functioning prosecution, abundantly equipped with resources, manpower, intelligence, and self-confidence, confronted a struggling lawyer who had little confidence in his own ability, vividly illustrates the inherent limitations of the trial by combat principle. Just because the case as built up by the prosecution was logically consistent and might well have reflected rather clearly the actual sequence of happenings, at least as far as the Rosenbergs were concerned, the absence of a more powerfully presented defense was felt all the more.[69]

But what about the continental procedure? While under Anglo-American procedure the prosecution tries to establish proof of the contentions made in the indictment, with the defense trying to refute same, in continental European practice the act of accusation only offers the court a preliminary version of the historical happenings. It is the job of the court to find that reconstruction of the historical incident which will serve as an adequate basis for the verdict. In this job of reconstruction the judge is not bound by the assertions and offerings of either party; rather, both prosecution and defense, although given a number of procedural prerogatives, among them to call witnesses and experts, remain auxiliaries of the court.[70] The court, sitting mostly with some lay

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Trial Judge, New York, 1952, p. 104, who quotes the telling remark on the troubles of a judge taking over the questioning of a witness when confronted with an inexperienced lawyer: "Judge, I don't mind your trying the case for me, but for God's sake, don't lose it."

[68] The rules were laid down in Querica v. United States, 286 U.S. 466 (1933).

[69] For an incisive comment on the potential consequences of inequality in representation, see Joseph B. Warner, "The Responsibilities of the Lawyer" (*op.cit.*, Ch. VI, n. 31), p. 326. For an example of the dominating influence of an insufficient defense, see G. Louis Joughin and Edmund M. Morgan, *The Legacy of Sacco and Vanzetti*, New York, 1948, Ch. III.

[70] See the discussion in Ursula Westhoff, *Über die Grundlagen des Strafprozesses*

assessors, does not have to face the problem of keeping a jury both instructed and protected against possible prejudicial knowledge. Consequently, it will be both willing and able to admit almost any evidence liable to throw light on the incident under discussion. But it is the court which will direct the taking of the evidence toward as coherent a picture as possible. Proceedings will first concentrate on interrogation of the defendant who, as he does not testify as a witness, may answer as he sees fit. The witnesses, too, will be questioned by the judge, with the parties as a rule expected to ask them questions through him. It goes without saying that in proceedings dominated by the judge, he can call supplementary witnesses and appoint experts of his own in pursuance of his search for the objective truth.

But this concentration of power in the hands of the judge, somehow uniting in his person the functions of prosecutor, defense lawyer, and truthfinder, has a built-in shortcoming. To be able to direct the proceedings with authority and efficiency and to concentrate the hearings from the outset on the relevant points, rather than to listen to whatever the parties see fit to submit, the judge will have to be fully informed about all that has transpired at the pretrial stage. Unless a pretrial motion has by chance come his way, the Anglo-American judge enters the courtroom with his mind a *tabula rasa*. The continental judge, though, will have made a painstaking study of the whole file of the case transmitted to him by the prosecutor. It will contain everything which has transpired so far, including police reports, pretrial depositions of defendants and witnesses, and defense motions to the criminal record of the defendant. As he has perforce formed some opinion on the case, his is the temptation to make reality conform to the file.[71] Unlike his Anglo-American colleague, he might well go on questioning and calling witnesses until he arrives at what seems to him the most meaningful reconstruction of reality. But he may in point of fact be satisfied with much less: with the facile confirmation of what his blue and red pencils have previously underlined in the file as his understanding of the

mit besonderer Berücksichtigung des Beweisrechts, Berlin, 1955, esp. pp. 62 and 173; see also Binding, *Strafrechtliche und Strafprozessuale Abhandlungen*, pp. 190-201. Art. 166, II, of the new French Code of Criminal Procedure, establishes the rule that if, in the opinion of the court, an expert opinion becomes necessary, two experts should be immediately appointed by the bench. They would be asked to furnish a joint report or, if necessary, to discuss explicitly the reasons why they have arrived at different conclusions from one another.

[71] See F. Hartung (former judge of the Leipzig Supreme Court), "Einführung des Amerikanischen Strafverfahrensrechts in Deutschland?" in *Festschrift fur Rosenfeld*, Berlin, 1949; and Maurice Garcon, *op.cit.*, Vol. III, p. 26.

trine, applied in two minor cases without much political background,[35] holds that an exile handed over to his country of origin without due observance of extradition agreements and thereupon prosecuted in a national court may contest court jurisdiction on the ground of the irregularity of his seizure.

The latter interpretation is undoubtedly more in harmony with the dictates of human decency. It may well be argued that an extradition treaty is made the law of the land through the process of incorporation, and that therefore an exile sheltered by a country signatory to such a treaty should be within his rights in expecting not to be deprived of asylum in a manner other than that prescribed by the treaty. Still, the argument lacks in realism. In the absence of a viable international jurisdiction to turn to, the exile in danger of being deported to the home country will hardly find a national tribunal willing to let him go free in the face of the government's contention that this would cause grave injury to national interest.

If there is a remedy at all against informal "rendition" to the home state by way of deportation, it is in the wide acceptance of the principle set forth in Article 33 of the Geneva Convention. Under this rule, no refugee shall be deported to, or returned to the frontier of, a territory

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correct. The alleged consent of Eichmann to his forcible transfer to Israel could not extinguish Argentina's claim to "appropriate reparation" for the violation of its sovereignty through Eichmann's abduction. However, since Argentina did not care to insist on repatriation, the Israeli court acted in conformity with prevailing practice: it rejected Eichmann's jurisdictional complaint based on the illegality of Israel's establishing custody over his person.

For Swiss protests in the Berthold Jacob abduction case, see *American Journal of International Law*, Vol. 24 (1935), pp. 502-07. Legal evaluation of surrender effected through overzealousness or corruption of the asylum country's lower-level officials is controversial. Dealing with the abduction from Mexican territory of a fugitive United States national sought for narcotics offenses, the Federal district court in ex parte Lopez, 6 F Supp. 342 (1934), denied the abducted man's habeas corpus petition on the ground that whatever had occurred under the sovereignty of the Mexican government was outside the court's jurisdiction and should be taken up with the United States Department of State.

[35] See discussion in Manuel R. Garcia-Mora, "Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud. A Comparative Study," *Indiana Law Journal*, Vol. 32 (1957), pp. 427-49. Of the two cases, one (tribunal correctionnel d'Avesnes in *Recueil Sirey*, Vol. II [1934], pp. 105ff.) referred to a Belgian suspect of larceny who had been abducted from Belgian territory by French officials. The French court ordered the prisoner released as seizure on Belgian territory constituted grounds of absolute nullity of the proceedings. In the other case (part of a damage suit before the US-Panama Claims Commission, related in *Annual Digest of Public International Law Cases*, 1933-1934, Case No. 96, pp. 250-51), a similar act of abduction on foreign territory was likewise held illegal.

CHAPTER XI
SUMMING UP

La justice est sujette à disputes: la force est très reconnaissable, et sans dispute. Ainsi on n'a pu donner la force à la justice, parce que la force a contredit la justice et a dit qu'elle était injuste, et a dit que c'etait elle qui était juste. Et ainsi, ne pouvant faire ce qui est juste fût fort, on a fait ce qui est fort fût juste.

—BLAISE PASCAL, *Pensèes*, Brunschwicg, no. 298*

1. *The Strategy of Political Justice: Necessity, Choice, and Convenience*

THE aim of political justice is to enlarge the area of political action by enlisting the services of courts in behalf of political goals. It is characterized by the submission to court scrutiny of group and individual action. Those instrumental in such submission seek to strengthen their own position and weaken that of their political foes.

In each case resort to the courts may be a matter of necessity, choice, or mere convenience. 1) If, for instance, an important political dignitary has been assassinated, but the government structure as a whole remains intact and continues to function within a legal framework, the authorities will usually find it *necessary* to try the assassin. 2) If the regime is confronted with an "opposition of principle," it has a number of choices, running the gamut from genuine toleration to total suppression. The decision against toleration and the legal implementation of a variety of repressive measures are a matter of *choice*. 3) A regime may want to gain, stabilize, or destroy political positions by manipulating opinion through the medium of a political trial. Resorting to political justice for that purpose is a matter of *convenience*, one of many channels in interpersonal and intergroup political warfare.

* "Justice is subject to dispute; might is easily recognized and is not disputable. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus unable to make what is just strong, we have made what is strong just."